DR. P.B. DESAI

v.

STATE OF MAHARASHTRA & ANR.

(Criminal Appeal No. 1432 of 2013)

SEPTEMBER 13, 2013

[A.K.PATNAIK AND A.K. SIKRI, JJ.]

Penal Code, 1860 – s. 338 r/w. s. 109 – Prosecution under – Of medical practitioner (surgeon) – Conviction by courts below – Held: The omission on the part of the accused to take care of the patient, in the facts of the case, can come within the realm of professional misconduct and civil liability (actionable wrong in tort) but not criminal liability – The omission on the part of the accused was not the cause for patient's death – Hence he cannot be held liable u/s. 338 as the ingredients of s. 338 have not been satisfied – Tort – Actionable wrong – Professional Misconduct – Medical Negligence.

s. 338 – Offence under – Scope of – Held: An offence u/s. 338 is capable of being committed by omission – Medical profession is included in it.

Liability – Omission liability – 'Omission to act' whether amounts to 'act' – Held: Liability for an omission, requires a legal duty to act arising from either civil or criminal law – A moral duty to act is not sufficient for invoking omission liability – Penal Code and in particular s. 338 IPC does explicitly include the liability due to omissions.

Medical Negligence:

Medical negligence – Liability of the offending doctor – Negligent act/omission by a doctor gives rise to civil as well as criminal liability – Distinction is required to be drawn between the two.

Medical negligence – Civil liability – If the patient suffers because of negligent act/omission of doctor, the doctor is liable to pay damages – Torts.

Medical negligence – Criminal liability – Of the offending doctor – Held: Criminal liability is to be answered in terms of mens rea – The only state of mind which deserves punishment is that which demonstrates an intention to cause harm or where there is deliberate willingness to subject others to the risk of harm.

Medical negligence – Ascertainment of – Doctor-patient relationship – Establishment of – Held: Formation of a doctor-patient relationship is integral to formation of a legal relationship and consequent rights and duties, forming the basis of liability of a medical practitioner – A contract between doctor and patient is always implied, except when written informed consent is obtained – When contractual relationship is established, it gives foundation to legal obligation between the doctor and patient – Once it is found that there is 'duty to treat' there would be corresponding 'duty to take care' – Whenever the principle of 'duty to take care' is founded on a contractual relationship it acquires a Legal character.

Negligence:

'Negligence' – Connotation of.

'Negligence' and 'Recklessness' – Difference between.

The appellant, a renowned surgeon was prosecuted u/s. 338 r/w. s. 109 of IPC. The prosecution case was that the wife of the complainant was a patient of cancer since 1977. She had also undergone treatment in U.S.A. for the same, where the hospital declared her beyond surgical treatment and was sent back to India. Thereafter, she was on medication under medical supervision of Dr. 'M'. She was admitted in the hospital with a [illegible]al

bleeding', where the appellant-accused examined her and advised 'Exploratory Laporotomy' (surgery), in order to ascertain whether patient's uterus could or could not be removed to stop the bleeding. Dr. 'M' began the surgery. On seeing the condition after opening the abdomen, Dr. 'M' called the appellant-doctor who was performing other surgery. Appellant after seeing the condition of the patient from a distance, advise Dr. 'M' to close the abdomen as it was not possible to proceed with the operation. Thereafter, the condition of the patient deteriorated and she developed other problems and never recovered and after about one year died.

The complainant filed a complaint against the appellant with Maharashtra Medical Council, who took disciplinary action against the appellant and found him guilty of professional misconduct and issued warning u/s. 22(1) of Maharashtra Medical Council Act, 1965.

The complainant also lodged a criminal case against the appellant u/s. 338 r/w. s. 109 IPC. The trial court convicted him and sentenced him to simple imprisonment till the rising of the Court and fine of Rs. 50,000/- by way of compensation with default clause. High Court confirmed the order of trial court. Hence the present appeal.

Allowing the appeal, the Court

HELD: 1.1. The defence put by the appellant was that the complainant's wife was not his patient, but the same has rightly been rejected by the Courts below in view of plethora of evidence, establishing otherwise. Thus, it can be concluded that she was the patient of the appellant and it was his responsibility to take care of his patient. Usually before the operation, consent form is required to be signed by the patient for agreeing to the risks involved. The documentary medical records of surgical

operation pointed to the appellant as the operating surgeon, the oral and documentary proof both impliedly and explicitly leads to the creation of contractual agreement between the patient and the appellant. [Paras 24 and 25] [889-B, C-D]

Lambert v. California **(355 U.S. 225 (1957) – referred to.**

1.2. When a physician agrees to attend a patient, there is an unwritten contract between the two. The patient entrusts himself to the doctor and that doctor agrees to do his best, at all times, for the patient. Such doctor-patient contract is almost always an implied contract, except when written informed consent is obtained. While a doctor cannot be forced to treat any person, he/she has certain responsibilities for those whom he/she accepts as patients. [Para 39] [894-H; 895-A-B]

1.3. The formation of a doctor-patient relationship is integral to the formation of a legal relationship and consequent rights and duties, forming the basis of liability of a medical practitioner. Due to the very nature of the medical profession, the degree of responsibility on the practitioner is higher than that of any other service provider. The concept of a doctor –patient relationship forms the foundation of legal obligations between the doctor and the patient. In the present case, as already held above, doctor-patient relationship stood established, contractually, between the patient and the appellant. [Para 39] [895-H; 896-A-C]

1.4. Once, it is found that there is 'duty to treat' there would be a corresponding 'duty to take care' upon the doctor qua/his patient. In certain context, the duty acquires ethical character and in certain other situations, a legal character. Whenever the principle of 'duty to take care' is founded on a contractual rel s

a legal character. Contextually speaking, legal 'duty to treat' may arise in a contractual relationship or governmental hospital or hospital located in a public sector undertaking. Ethical 'duty to treat' on the part of doctors is clearly covered by Code of Medical Ethics, 1972. Clause 10 of this Code deals with 'Obligation to the Sick' and Clause 13 cast obligation on the part of the doctors with the captioned "Patient must not be neglected". Whenever there is a breach of the aforesaid Code, the aggrieved patient or the party can file a petition before relevant Disciplinary Committee constituted by the concerned State Medical Council. [Para 40] [896-D-G]

1.5. When reasonable care, expected of the medical professional, is not rendered and the action on the part of the medical practitioner comes within the mischief of negligence, it can be safely concluded that the said doctor -did not perform his duty properly which was expected of him under the law and breached his duty to take care of the patient. [Para 41] [896-H; 897-A]

2.1. There may be various circumstances where 'act' would include 'omission to act' as well. This is recognized even in ss. 32, 33 and 36 IPC. An omission is sometimes called a negative act, but this seems dangerous practice, for it too easily permits an omission to be substituted for an act without requiring the special requirement for omission liability such as legal duty and the physical capacity to perform the act. Criminal liability for an omission is also well accepted where the actor has a legal duty and the capacity to act. It is said that this rather fundamental exception to the act requirement is permitted because an actor's failure to perform a legal duty of which he is capable, satisfies the purposes of the act requirement or at least satisfies them as well as an act does. Specifically these two special requirements for omission liability help to exclude from liability cases of -fantasizing

and irresolute intentions, important purposes of the act requirement. [Paras 29 and 30] [890-E; 891-C-E]

2.2. However, a failure to act, by itself does nothing to screen out mere fantasies. It is the actor's failure to act in the light of his capacity to do so that suggests the actor's willingness to go beyond mere fantasizing and to have the harm or evil of the offence occur. Even then, however, the screening effect seems weak; "letting something happen" simply does not carry the same implication of resolute intention that is shown in "causing something to happen" by affirmative action. While an actor's failure to perform a legal duty provides some evidentiary support for the existence of an intention to have the harm or evil occur, the force of the implication is similarly weak. Inaction often carries no implication of intention unless it is shown that the actor knows of his or her duty to act and the opportunity to do so. [Para 31] [891-F-H; 892-A]

2.3. Liability for an omission requires a legal duty to act; a moral duty to act is not sufficient. The duty may arise either from the offence definition itself or from some other provision of criminal or civil law. A duty arises from the former when an offence is defined in terms of omission. This is the -situation where the legislature has made it an offence. A legal duty to act may also be created by a provision of either criminal or civil, separate from the offence charged. [Para 32] [892-B-C]

2.4. Since there is no moral difference between (i) a positive act and (ii) an omission, when a duty is established, it is to be borne in mind that cases of omissions, the liability should be exceptional and needs to be adequately justified in each instance. Secondly, when it is imposed, this should be done by clear statutory language. Verbs primarily denoting (and forbidding) active conduct should not be co[illegible]e

omissions except when the statute contains a genuine implication to this effect. Thirdly, maximum penalties applied to active wrongdoing should not automatically be transferred to corresponding omissions; penalties for omissions should be re-thought in each case. Indeed, IPC does include explicitly the liability due to omissions. And even Indian courts have affirmed so. Section 338 of I.P.C does recognize unambiguously that the particular offence can be committed by omission. More so, the medical profession is included in it. [Para 33] [892-D-F; 893-C]

Latifkhan **(1895) 20 Bom 394 – referred to.**

Kusum Sharma and others v. Batra Hospital and Medical Research Centre and Others **(2010) 3 SCC 480: 2010 (2) SCR 685 – relied on.**

3.1. If the patient has suffered because of negligent act/ omission of the doctor, it undoubtedly gives right to the patient to sue the doctor for damages. This would be a civil liability of the doctor under the law tort and/ or contract. Such a negligent act, normally a tort, may also give rise to criminal liability as well, though jurisprudentially the distinction has to be drawn between negligence under Civil Law and negligence under Criminal Law. [Paras 42 and 43] [899-B, H; 900-A]

Jacob Mathews v. State of Punjab and Another **2005 (6) SCC 1: 2005 (2) Suppl. SCR 307 – relied on.**

3.2. Thus, in the civil context, the moral implications of negligent conduct, a clear view of the state of mind of the negligent doctor might not require strictly. This is for the reason that the law of tort is ultimately not concerned with the moral culpability of the defendant, even if the language of fault is used in determining the standard of care. From the point of view of civil law, it may be

appropriate to impose liability irrespective of moral blameworthiness. This is because in civil law two questions are at issue: Was the defendant negligent? If so, should the defendant bear the loss in this particular set of circumstances? In most cases where negligence has been established, the answer to the second question will be in the affirmative, unless the doctrine of remoteness or lack of foresee ability militates against a finding of liability, or where there is some policy reason precluding compensation. The question in the civil context is, therefore, not about moral blame, even though there will be many cases where the civilly liable defendant is also morally culpable. [Para 44] [903-B-E]

3.3. So far as the sphere of criminal liability is concerned, as *mens rea* is not abandoned, the subjective state of mind of the accused lingers a critical consideration. In the context of criminal law, the basic question is quite different. Here the question is: Does the accused deserve to be punished for the outcome caused by his negligence? This is a very different question from the civil context and must be answered in terms of *mens rea.* Only if a person has acted in a morally culpable fashion can this question be answered positively, at least as far as non strict liability offences are concerned. [Para 45] [903-F-H; 904-A]

3.4. The only state of mind which is deserving of punishment is that which demonstrates an intention to cause harm to others, or where there is a deliberate willingness to subject others to the risk of harm. Negligent conduct does not entail an intention to cause harm, but only involves a deliberate act subjecting another to the risk of harm where the actor is aware -of the existence of the risk and, nonetheless, proceeds in the face of the risk. This, however, is the classic definition of recklessness, which is concep

negligence and which is widely accepted as being a basis for criminal liability. [Para 46] [904-B-C]

3.5. The solution to the issue of punishing what is described loosely, and possibly inaccurately, as negligence is to make a clear distinction between negligence and recklessness and to reserve criminal punishment for the latter. If the conduct in question involves elements of recklessness, then it is punishable and should not be described as merely negligent. If, however, there is nothing to suggest that the actor was aware of the risk deliberately taken, then he is morally blameless and should face, at the most, a civil action for damages. [Para 47] [904-D-E]

4.1. A perusal of s. 338 IPC would clearly demonstrate that before a person is held guilty of the offence, following ingredients need to be established: a) Causing grievous hurt to a person. b) Grievous hurt should be the result of an act. c) Such act ought to have been rash and negligent. d) The intensity of commission of such an act ought to endanger human life or the personal safety of others. [Para 23] [887-E-G]

4.2. In the present case, the concern revolves around the acts of omission and commission which amounted to an 'act' so rashly or negligently as to have had endangered the life of the patient constituting an offence punishable u/s. 338 IPC. Since there was no overt act on the part of the appellant, as the surgical procedure was performed by another doctor, charge of abetment under Section 109 of I.P.C. was also leveled. The other doctor was also made accused in the said complaint. However, at a later stage, he was dropped from the proceedings at the instance of the complainant. [Para 51] [905-D-E]

4.3. The appellant was leveled a specific charge which was framed against him. The prosecution was

required to prove that particular charge and not to go beyond that and attribute "rash and negligent" acts which are not the part of the charge. Culpability is specifically related to the act of performing surgical procedure. It is, thus, this act alone, and nothing more, for which the appellant and the other doctors were charged and the appellant is supposed to meet this charge alone. [Para 52] [905-F-H]

4.4. Just because the advise of the appellant that 'Exploratory Laparotomy' be conducted on the patient, was given in the teeth of the advise of the doctors in the U.S.A, it would not automatically follow that the view expressed by the appellant was blemished. The two experts in medical field may differ on decision to undertake the surgical operation. The critical condition of the patient at that time has to be kept in mind. She was sent home by the American doctors as inoperable. She was advised to take certain medicines. These medicines were being administered by Dr. 'M'. However, further complications arose in the meantime as vagina started bleeding which was not coming to a halt. Obviously, it was terminal stage for the patient. It is in this situation, opinion of the appellant was sought. The dilemma of a doctor in such a scenario can be clearly visualized viz., whether to leave the patient as it is or to take a chance, may be a very slim chance, to save or at least to try to prolong the life of the patient. It was not an easy choice. Overcoming this difficult situation, the appellant took the bold decision viz. that surgical operation was worth taking a risk, as even otherwise, the condition of the patient was deplorable. The appellant has even given his justification and rationale for adopting this course of action. [Paras 53 and 54] [906-A, C-G]

4.5. During trial, a doctor (DW.2) has endorsed the

opinion of the appellant and has gone to the extent of saying that it was the best possible option for the treatment of the patient. Moreover, Dr. 'M' has also accepted/ agreed that the advise tendered by the appellant on the basis of CT Scan Report, and, that the call to operate was "unanimous". In this scenario, it cannot be said that advise of the appellant for taking the surgical procedure was an act of wanton negligence. [Para 55] [907-E-F]

4.6. No doubt, in the present case the appellant not only possesses requisite skills but is also an expert in this line. However, having advised the operation, he failed to take care of the patient. Thereafter, at various stages, he was held to be negligent by the Maharashtra Medical Council and thus found to be guilty of committing professional misconduct. Thus, it was the appellant's "duty" to act contractually, professionally as well as morally and such an omission can be treated as an "act". Within the realm of civil liability, the appellant has breached the well essence of "duty" to the patient. [Paras 60 and 61] [911-A-C]

4.7. Opening of the abdomen and performing the surgery cannot be treated as causing grievous hurt. It could have been only if the doctors would have faltered and acted in rash and gross negligent manner in performing that procedure. It is not so. At the same time, his act of omission, afterwards, in not doing the surgery himself and remaining absent from the scene and neglecting the patient, even thereafter, when she was suffering the consequences of fistula, is an act of negligence and is definitely blame worthy (though that is not the part of criminal charge). However, the omission is not of a kind which has given rise to criminal liability under the given circumstances. [Para 62] [911-F-H]

4.8. However, the appellant's omission in not rendering complete and undivided legally owed duty to patient and not performing the procedure himself, has not made any difference. It was not the cause of the patient's death which was undoubtedly because of the acute chronic cancer condition. In such a scenario, it is enough to keep off the clutches of criminal law. The negligent conduct in the nature of omission of the appellant is not so gross as to entail criminal liability on the appellant u/ s. 338 IPC. The crimes as mentioned in s. 338 IPC require proof that the appellant caused the patient's condition to the acute stage. [Paras 66 and 67] [913-C-E]

R. v. Adomako **(1994) 3 WLR 288 – referred to.**

4.9. The conduct of the appellant constituted not only professional misconduct for which adequate penalty has been meted out to him by the Medical Council, the negligence on his part also amounts to actionable wrong in tort, it does not transcend into the criminal liability, and in no case makes him liable for offence under Section 338 IPC, as the ingredients of that provision have not been satisfied. [Para 69] [914-C-D]

Faguna Kant Nath v. The State of Assam **(1959) 2 Suppl. SCR 1;** *Madan Raj Bhandari v. State of Rajasthan* **(1969) 2 SCC 385: 1970 (1) SCR 688 - referred to.**

Case Law Reference:

(1959) 2 Suppl. SCR 1	referred to	Para 17
1970 (1) SCR 688	referred to	Para 17
355 U.S. 225 (1957)	referred to	Para 26
2010 (2) SCR 685	referred to	Para 55
2005 (2) Suppl. SCR 307	relied on	Para 43, 59

(1994) 3 WLR 288 referred to Para 68

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1432 of 2013.

From the Judgment & Order dated 15.10.2012 of the High Court of Bombay in CRLRP No. 166 of 2012.

Harish Salve, K.V. Vishwanatha, R.N. Karanjawala, Sandeep Kapur, Shivek Trehan, Shridhar Y. Chitale, Mehul Gupta, Gayatri Goswami, Manik Karanjawala (for Karanjawala & Co.) for the Appellant.

B.H. Marlapalle, Colin Gonsalves, Asha Gopalan Nair, Abhishek Kr. Pandey, Jubli Momalia, Jyoti Mendiratta for the Respondents.

The Judgment of the Court was delivered by

A.K. SIKRI, J. 1. Leave granted.

2. The appellant herein, a renowned surgeon, stands convicted of the offence punishable under Section 338 r/w Section 109 of the Indian Penal Code, 1860 (hereinafter to be referred as the 'I.P.C'). This conviction was delivered by the Additional Chief Metropolitan Magistrate, 47th Court, Esplanade, Mumbai, vide judgment and order dated 05.07.2011. The -appellant was sentenced to suffer simple imprisonment (SI) till the rising of the Court and to pay Rs. 50,000/- as and by way of compensation, in default to suffer simple imprisonment for 3 months. This conviction and sentence had been upheld by the ld. Additional Sessions Judge vide judgment dated 22.03.2012 and is also confirmed by the High Court of Judicature at Bombay by way of impugned judgment dated 15.10.2012. Still not satisfied, the appellant has challenged the judgment of the High Court, by way of present appeal.

3. To give a glimpse of the episode at the outset, we may mention that one Smt. Leela Singhi (hereinafter to be referred as the 'patient'), wife of Shri Padamchandra Singhi, the complainant, was suffering from Cancer for which she was under medical treatment since the year 1977. As her condition did not improve and rather deteriorated over a period of time, in 1987 she was taken to America and was treated in Sloan Kettering Memorial Hospital in New York. However, it did not yield any positive results. The doctors in that hospital declared her beyond surgical treatment and she was sent back to India on 29.11.1987. In India, she had been under the medical supervision of Dr. A.K. Mukherjee, for a long time, who started -administering the medication prescribed by the doctors in U.S.A. Within few days, the patient started suffering from vaginal bleeding because of which Dr. A.K. Mukherjee advised her for hospitalization. She was admitted to Bombay Hospital on 9.12.1987. After a few days of hospitalization, she was examined by the appellant who advised 'Exploratory Laparotomy (surgery)', in order to ascertain whether the patient's uterus can or cannot be removed in order to stop the vaginal bleeding.

4. Nod of a patient for Exploratory Laparotomy was duly taken who signed the consent form. Dr. Mukherjee, assisted by two other doctors, began the Exploratory Laparotomy procedure on 22.12.1987. On opening the abdomen, Dr. Mukherjee found plastering of intestines as well as profuse oozing of ascetic fluids. He immediately called the appellant who was performing other surgical procedure in another operation theatre. The appellant after seeing the condition of the patient from a distance, found that it was not possible to proceed with the operation. He advised Dr. A.K. Mukherjee to close the abdomen. Dr. Mukherjee, thus, closed the abdomen. The condition of the patient, thereafter, deteriorated due to the formation of fistula. The patient remained in the hospital for

treatment of the fistula. After remaining in the hospital for about 3 months she was discharged and taken home by the complainant. But she never recovered and ultimately passed away on 26.2.1989 at Jaipur.

5. The complainant filed a complaint with the Maharashtra Medical Council against the appellant and also lodged criminal complaint against the appellant with the Director General of Police, Maharashtra. Main allegation against the appellant was that he did not take personal care and attention by preferring the operation himself. On the contrary he did not ever bother to even remain present there when Dr. A.K. Mukherjee started surgical procedure and opened the abdomen. Moreover, when Dr. Mukherjee, on opening of the abdomen, found that Cancer was at a very advanced stage and it would not be possible to proceed because there was fluid and intestines were plastered and he called the appellant for advice, even then the appellant did not examine the patient minutely. Instead, after seeing her from the entrance of the operating room, he advised Dr. Mukherjee to close the abdomen. So much so, even after the formation of the fistula and the pathetic condition of the patient, the appellant never bothered to examine or looked after her. It was alleged that the very advise of the appellant for -surgical operation, even when doctors at U.S.A. had opined to the contrary, was inappropriate. It was, thus alleged that the aforesaid acts of omission and commission amounted to professional misconduct as well as offence punishable under Section 338 of the I.P.C. Since, there was no overt act on the part of the appellant, as the surgical procedure was performed by Dr. A.K. Mukherjee, charge of abetment under Section 109 of I.P.C. was also leveled against the appellant. Dr. A.K. Mukherjee was also made accused in the said complaint. However, at a later stage, Dr. A.K. Mukherjee was dropped from the proceedings at the instance of the complainant.

6. It is on the aforesaid allegations, purportedly proved through oral and documentary evidence, that the conviction of

the appellant is returned by the courts below.

7. On the complaint of the complainant, Maharashtra Medical Council initiated disciplinary action against the appellant and found him guilty of professional mis-conduct under Para 15 of the Warning Notice of the Maharashtra Medical Council's Code of Ethics and Para 3 of the disciplinary action of the Medical Council of India's Code of Ethics. It resulted in issuance of warning under Section 22(1) of the Maharashtra Medical -Council Act, 1965 vide orders dated 11.2.1991 passed by the Maharashtra Medical Council. The appellant did not challenge the findings of the disciplinary committee of the Maharashtra Medical Council and accepted the order of warning.

8. As we are, in this appeal, concerned with the validity of the conviction of the appellant under Section 338, IPC, we would like to reproduce that provision at this stage:

> **"338.** Causing grievous hurt by act endangering life or personal safety of others: Whoever causes grievous hurt to any person by doing any act so rashly or negligently as to endanger human life, or the personal safety of others, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine which may extend to one thousand rupees, or with both."

9. Questions that falls for determination is as to whether the alleged role of the appellant amounts to "doing any act" and whether it was so rash or negligent as to endanger the life of the patient.-

10. Mr. Harish Salve, learned Senior Counsel appearing for the appellant, at the outset, invited the attention of this Court to the exact charge framed by the Trial Court which reads as under:-

> "Does the prosecution prove that o ut 9.00 a.m., at Bombay Hospital, Mu .

1, Accused No. 2 - Dr. A.K. Mukherjee, caused grievous hurt to the wife of complainant namely, Leela Singhi by doing an operation of abdomen taking out uterus, so rash or negligently as to endanger human life or the personal safety of wife of the complainant namely, Leela Singhi and thereby committed an offence punishable under Section 338 read with Section 109 of the I.P.C?"

11. His submission was that the specific allegations in the charge framed against the appellant as well as Accused No. 2 – Dr.. A.K. Mukherjee were that:-

(a) The charge is for a specific act committed at 9.00 a.m. on 22.12.1987.

(b) It is a charge against the Appellant (Accused No. 1) and Dr. A.K. Mukherjee (Acquitted Accused No. 2).

(c) The charge is against the two accused under Section 338 r/w Section 109 of I.PC.

12. Proceeding therefrom, Mr. Harish Salve, argued that the primary offender, as per the charge under Section 338 of the I.P.C, was Dr. A.K. Mukherjee, the doctor who actually performed the procedure and the appellant was charged as an abettor, using Section 109 of the I.P.C. However, Dr. A.K. Mukherjee was dropped from the prosecution at the instance of the complainant himself, on the ground that there was no evidence against him. On the contrary, the complainant in his testimony (P.W.1) gave glowing compliments to Dr. A.K. Mukherjee, praising his skills both as a doctor and a surgeon. In such circumstances, argued Mr. Harish Salve the question of abetment did not survive and, therefore, the case warranted closure even against the appellant as well, after dropping Dr. Mukherjee from the prosecution.

13. Without prejudice to the aforesaid submissions, further

arguments of Mr. Harish Salve were that, in any case, the ingredients of Section 338 of I.P.C had not been established. It was merely a case of "negligence" projected by the prosecution. It could not be held, *ipso facto*, that the essential ingredients of the offence contained under Section 338 of I.P.C. were fulfilled.

14. Mr. Harish Salve endeavored to demonstrate that the decision of the appellant to advise the operation, in question, namely "Exploratory Laparotomy" could not even be treated as unreasonable or an act of negligent advice. Once it was accepted that the appellant was a renowned Oncologist with great experience, his opinion to conduct the aforesaid procedure/ surgery, after examining the patient, was an expert opinion and merely because he differed from the doctors in U.S.A. on this account, negligence could not be attributed to him because of the same, much less criminal negligence.

15. That apart, merely on the basis of negligence, it could not be held that ingredients of Section 338 of I.P.C. stood proved as it could not amount to an "act" of causing "grievous hurt", that too "rationally and negligently" thereby endangering the life of the patient. He submitted that, in the first instance, a medical professional who is called upon to treat a patient cannot possibly be charged for causing hurt, where the patient has come to the hospital for receiving treatment *inter alia* by virtue of Section 81, 87 and 88 of the I.P.C. and where consent for such treatment has been freely given.-

Secondly, in the context of a doctor - patient relationship, even assuming, without accepting that there could be a situation in which a doctor can be held to have committed an offence of causing hurt (either for want of consent or acting with wanton negligence in performing a procedure), it is inconceivable that a doctor can be charged of causing a hurt by not doing something. An omission by a surgeon to perform a surgery, in certain extreme circumst[illegible]e

acting in a manner that no medical professional would, and thereby be a case of criminal negligence. It cannot possibly be an omission by which hurt, by way of a positive act, is inflicted.

16. Mr. Harish Salve argued that once rendering an opinion to perform such surgical procedure cannot be treated as criminal offence, in so far as actual procedure is concerned, that was not performed by the appellant. Without accepting, that it was the appellant who was to do the surgery himself, he submitted that the Courts below fell in legal error by attributing the so called omission to perform the said surgery by the appellant as an "act" within the meaning of Section 338 of the I.P.C. He pointed out that the charge as framed did not even remotely mention about the purported "illegal omission". He thus, argued that the Respondents could not base their case on plea of "omission" as an "act". Even otherwise, in the instant case, the so called omission could not be treated as an "act" of causing grievous hurt in as much as, such an omission has to be in relation to the operation that caused the hurt. Dilating this aspect, the learned senior counsel projected the theory that illegal omissions could result in causing hurt cannot have any application to a doctor who has not performed a surgery – where the primary allegation is that the performance of the surgery constituted the infliction of hurt. Whatever may be the legal consequences of reneging on an assurance to perform a surgery, if the surgery is performed by a duly qualified professional, the surgeon who did not perform the surgery could not possibly be guilty of causing hurt. A fortiori, where the surgeon who did perform the surgery is duly qualified, and is blame free, there is no question of charging, under Section 338 of I.P.C., some other surgeon who may have been engaged to perform the surgery, but did not do so.

17. Mr. Harish Salve also sought to distract the charge of abetment under Section 109 of the I.P.C. by attempting to highlight that as per the charge framed by the Trial Court, the "act" was attributed to Dr. A.K. Mukherjee and the primary

charge against the appellant was only that of abetment. With the dropping of Dr. A.K. Mukherjee from the prosecution, the charge of abetment no more survived, more so when no overt act is attributed to the appellant and there is no medical or other aspect examined to show grievous hurt resulted because of the surgery. The appellant placed reliance upon the decisions of this Court in *Faguna Kant Nath v. The State of Assam* (1959) 2 Suppl. SCR 1; *Madan Raj Bhandari v. State of Rajasthan* (1969) 2 SCC 385.

18. Mr. B.H. Marlapalle, learned Senior Counsel appearing for the State invited the attention of this Court to the reasons recorded by the Maharashtra Medical Council in its orders dated 11.2.1991 holding the appellant guilty of misconduct. He pointed out that under the Maharashtra Medical Council Act, 1965, the proceedings against the appellant were in the nature of judicial proceedings under Sections 22 of the said Act and since these findings of the Medical Council had attained finality, there was no basis in the submission of the appellant that he had not acted negligently. He also referred to the findings recorded by the trial court and the High Court and submitted as under:

(a) The patient Smt. Leela Singhi was admitted at the Bombay Hospital as the patient of the present accused in Room No. 1005 (MRC I Class).

(b) She had given consent for being operated by the present accused.

(c) It was the accused mainly who took the decision to operate the patient for exploratory surgery despite a written opinion from the doctors of USA that she was inoperable.

(d) As per the evidence of DW.2, Dr. Gajanand Hegade, Dr. A.K. Mukherjee was the Assistant Surgeon under the present a[illegible]t

permissible for him to perform any procedure independently.

(e) The accused had accepted two different surgeries in two different operation theatres (OT 1 and OT 2) at the same time on 20.12.1987 at the Bombay Hospital and Mrs. Leela Singhi was taken in OT 2. He instructed Dr. A.K. Mukherjee to open the abdomen of Mrs. Leela Singhi and went to OT1 to attend another surgery. After Dr. A.K. Mukherjee, as per the instructions of the present accused, Dr. P.B. Desai took a cut he immediately noticed that the process was unmanageable for him and the said process was started in the absence of Dr. Desai. Dr. Mukherjee, therefore, in deperation sent for Dr. Desai to come to OT 2 and attend to Mrs. Singhi for further procedure. Dr. Desai did not turn up and, therefore, after waiting for some time -and leaving the patient, Dr. Mukherjee went to OT1 to request Dr. Desai to come and attend to Mrs. Singhi. Dr. Desai came to OT 2 and by standing at a distance of 6 feet, instructed Dr. Mukherjee to stitch the abdomen as the case was inoperable. He did not touch the patient, leave alone stitching the abdomen by himself. The patient remained in the Hospital for over three months and for about initial one month she required dressing every one hour because of the bleeding from the stitches. This pain and suffering of the patient could have been avoided/ reduced if Dr. Desai himself had stitched the abdomen. After the wound was stitched and till the patient was discharged on 5.4.1998, Dr. Desai did not, even once, attend to Mrs. Singhi and the patient missed the healing touch of the surgeon who was authorized to operate her.

(f) After the patient's husband (PW.1) started writing

complaints, Dr. Desai flatly denied that Mrs. Singhi was his patient. And Dr. Desai continued the denial even till the end of the trial despite the fact that the Maharashtra Medical Council had held him guilty after a full fledged enquiry under Section 22 of the Maharashtra Medical Council Act, 1965 and warned him, so also three witnesses from the hospital i.e. PW.2, PW.3 and PW.5 were examined by the prosecution to prove that Mrs. Leela Singhi was the patient of Dr. Desai. This entire behavior of Dr. Desai during the operation stage and post operation and -post complaint/ during trial was not commensurate with his professional eminence.

19. Submissions of Mr. B.H. Marlapalle were that the aforesaid admitted facts were sufficient to establish commission of offence under Section 338 of the I.P.C., in as much as, it has been proved beyond reasonable doubts that because of the procedure with which the patient was subjected to, under the instructions of the appellant, the patient suffered grievous hurt which also endangered her life and it was he alone who was negligent and acted rashly from 20.12.1987 till the patient was discharged on 5.4.1988. He argued that it is not necessary to evaluate as to whether his decision to operate Mrs. Singhi could be said to be rash or negligent, (though it was hazardous) but surely having taken the decision to operate her, the appellant did not operate her and instead instructed Dr. Mukherjee to proceed with the first cut and Dr. Desai even abandoned the patient and went to the other operation theatre. When he came back to OT 2, he did not attend to Mrs. Singhi and stitched the cut. This was second act of rash and negligent behavior of the appellant. Thirdly, even after the operation, he never attended to Mrs. Leela Singhi till she was discharged and thus again this was another act of rash and negligent behavior. Though this could be said to be omissions of Dr. Desai, the word "doing any act" as appearing in Section 338 is required to be read with Section 32, 33 and 36 of I.P.C.

pointed out that in every part of this Code, except where a contrary intention appears from the context, words which refer to acts done extend also to illegal omissions. Section 33 of I.P.C. states that the word "act" denotes as well a series of acts as a single act and the word "omission" denotes as well as series of omissions as a single omission. Whereas, as per Section 36 of the I.P.C. - wherever the causing of a certain effect, or an attempt to cause that effect, by an act or by an omission, is an offence, it is to be understood that the causing of that effect partly by an act and partly by an omission is the same offence. It was thus, argued that all the acts proved against the appellant and the omissions attributable to him, form the part of the same offence viz., an offence under Section 338 of causing grievous hurt by rash and negligent acts/ omissions. The said offence is not attributable to a single act or omission but it denotes a series of omissions/ acts as a single omission/ act. -

20. According to the learned State Counsel even the offence under Section 109 of I.P.C. was proved, notwithstanding the fact that Dr. Mukherjee was dropped from the proceedings. He referred to Section 107 of I.P.C. which defines Abetment of a thing - by stating that a person abets a doing of a thing who, inter alia, intentionally aids, by any act or illegal omission the doing of that thing. As per Section 109 of I.P.C. whoever abets any offence shall, if the act abetted is committed in consequence of the abetment, and no express provision is made by the I.P.C. for the punishment of such abetment, be punished with punishment provided for the offence. Thus, the offence under Section 109 is an independent offence but the punishment is related with other offence. In the instant case, with the offence punishable under Section 338, as the appellant instructed Dr. Mukherjee to open the abdomen of Mrs. Singhi who was not authorized to do so and left the operation theatre leaving the patient in the charge of Dr. Mukherjee, the appellant abetted through Dr. Mukherjee. The

words "intentionally acts" used in Section 107 (thirdly) of I.P.C. are required, to be read, in the instant case as "knowingly instructs". The prosecution case has not in any way effected because of the discharge of Dr. Mukherjee by allowing an -- application under Section 321 of Cr. PC. as Dr. Mukherjee was not competent to undertake the procedure independently and he undertook the procedure solely as per the instructions of the appellant. Hence, the prosecution urged that the accused has been rightly convicted under Section 338 r/w Section 109 of I.P.C.

21. Mr. Gonsalves, ld. Senior Counsel, argued for the complainant/ Respondent No. 2, and pleaded that the conviction recorded by the Court below were perfectly justified which required no interference. He referred to the following facts which according to him, were established by sufficient and cogent evidence.

(a) The appellant alone was the doctor of the patient to whom the patient was specifically referred to by Dr. Mukherjee from the stage of examining the patient and advising surgical operation. The entire responsibility was that of the appellant even to do the surgery in as much as the patient as well as the complainant recognized only one doctor namely the appellant.

(b) The appellant took a particular decision viz., to perform Exploratory Laparotomy and this itself was "rash and negligent" act on the part of the appellant, when examined the same in juxtaposition with the advise rendered by the doctors in U.S.A.-

(c) The instruction of the appellant to Dr. Mukherjee to operate, when Dr. Mukherjee was not authorized by the Complainant/ Respondent No. 2 was another act of rash and negligent na

(d) The appellant had consciously and deliberately abandoned his patient twice – one at the time of operation and thereafter, not attending and treating her to ameliorate her pain and suffering, which was another rash and negligent act.

These acts, according to Mr. Gonsalve, were sufficient to specify the ingredients of Section 338 of I.P.C.

22. Mr. Gonsalves, also pointed out that the only defence of the appellant was that Smt. Leela Singhi was not her patient which has been proved to be false. Therefore, the appellant could not be allowed to argue to the contrary. Mr. Gonsalves also referred to the findings of the Maharashtra Medical Council, as argued by the State Counsel, to buttress his submission that the guilt of the appellant stood proved.

23. We have given our deep thoughts to the aforesaid submissions made by the learned Senior Counsel appearing for different parties. The provisions of Section 338 IPC have already been reproduced in the earlier part of this -judgment. A perusal thereof would clearly demonstrate that before a person is held guilty of the offence, following ingredients need to be established:

(a) Causing grievous hurt to a person.

(b) Grievous hurt should be the result of an act.

(c) Such act ought to have been rash and negligent.

(d) The intensity of commission of such an act ought to endanger human life or the personal safety of others.

24. Before we find out as to whether these essential ingredients have been satisfied in the present case or not, another aspects needs discussion, viz., whether Smt. Leela was the patient of the appellant or not.

The Established Facts

To find an answer to this question, let us revert to those facts which have been established by evidence. Respondent No.2 on the advice of Dr. A.K. Mukherjee admitted her in the unit of the appellant at Bombay Hospital on the basis of a note for admission given by Dr. A. Mukherjee. The operation namely "Exploratory Laprotomy Panhyxtroctomy" was advised by the appellant. At Bombay Hospital, a number of medical tests referred by the appellant including CT Scan, Blood Analysis, Blood transfusion report, -examination of urine, microscopic examination of centrifugalised deposits were done on the patient. As per the Bombay Hospital records, the patient - Smt. Leela Singhi was admitted as the indoor patient from 09.12.1987 to 4.5.1988 in Room No. 1005 under the appellant. Room No. 1005 was earmarked for the appellant and never allotted to any other patient without instructions of the appellant. The date of operation was fixed as per the convenience and on instructions of the appellant five days after his advice. The patient was examined by the appellant after preliminary investigations by Dr. A. K Mukherjee. A bill of Rs. 5000/- as the operation fee rendered by the operating surgeon Accused No 1 - the appellant, was raised by Bombay Hospital which was sent to Government of Rajasthan for payment. The documents also showed the appellant as operating surgeon. The constant reminders for the clearance of the bill were made to the Government of Rajasthan for releasing of the payment. The Respondent No. 2 had objected for charging of Rs. 5000/ - in the name of the appellant for the operation which admittedly the appellant had never carried on his wife, the operation which according to the Bombay Hospital records was to be conducted by the appellant. Thereafter, Respondent No.2 made a complaint to the Board of -Management of the Bombay Hospital regarding the behaviour of the appellant and even met the chairman of the hospital. Resultantly, the charges of Rs. 5,000/- against the appellant w[illegible]e

correspondence, Bombay Hospital sent a duplicate bill deleting Rs. 5,000/- which was the operation fee charges for the appellant.

We may record that the defence put by the appellant in the Trial Court was that Smt. Leela Singhi was not her patient but the same has rightly been rejected by the Courts below in view of plethora of evidence, establishing otherwise. Thus, it can be concluded that Smt. Leela was the patient of the appellant and it was his responsibility to take care of his patient.

25. The answer can also be founded on the nature of professional duty which appellant owed to the patient. Usually before the operation, consent form is required to be signed by the patient for agreeing to the risks involved. The documentary medical records of surgical operation pointed to the appellant as the operating surgeon, the oral and documentary proof both impliedly and explicitly leads to the creation of contractual agreement between the patient and the appellant. -

26. In *Lambert v. California* (355 U.S 225 (1957), the Supreme Court of United States seems to recognize the unfairness of imposing liability where an actor is unaware of a duty to act. Similarly the Indian Constitution mandates under Articles 20(1) & 21 of the Constitution of India that the due process of law requires that everyone who is tried under any law before court must have some awareness of, or at least a reasonable opportunity to become aware of their legal owed duty towards its recipient. In this case, at hand, the appellant was aware of his duty towards the patient - Smt. Leela as the appellant was the patient's operating surgeon. To the utter disregard of the patient, the appellant vehemently denied her to be his patient. Since the documentary evidences are conclusive in nature also all the facts which had been perused below in the courts undoubtedly point to the undeniable fact that the patient - Smt. Leela was indeed the appellant's patient.

27. Thus, brushing aside the objection of the appellant that Smt. Leela Singhi was not his patient, on the facts of this case we proceed to find out whether conviction u/s 338 is sustainable or not.

28. For time being we keep aside the first element, viz. whether the surgical procedure of opening the abdomen of the patient resulted in -grievous hurt. That is dealt with at appropriate stage. Before that we discuss the preliminary submission as to whether this act can be attributed to the appellant. Vehemence in the submission was that there is no "overt" act on the part of the appellant. Therefore, question arises, in the context of second ingredient, as to whether "omission to act", would also be covered by the expression "act" occurring therein.

29. Whether "act" includes "omission"? Though this aspects needs elaboration alongwith discussion with regard to other ingredients as these are inextricably mixed up and can't be discussed in isolation and, therefore, we have proceeded in that manner at appropriate stage. Here, we are narrating the legal position only. In this behalf, we may point out that there may be various circumstances where "act" would include "omission to act" as well. This is so recognized even in Sections 32, 33 & 36 of I.P.C.

These provisions are reproduced below:

> **"32. Words referring to acts include illegal omissions**. - In every part of the said code, except where a contrary intention appears from the context, words which refer to acts done extend also to illegal omissions. **-**
>
> **33. "Act", "Omission".** - The word "act" denotes as well a series of acts as a single act: the word "omission" denotes as well a series of omissions as a single omission.

36. Effect caused partly by act and partly by omission. - Wherever the causing of certain effect, or an attempt to cause that effect, by an act or by an omission, is an offence, it is to be understood that the causing of that effect partly by an act and partly by an omission is the same offence."

30. The legal understanding of omission is indispensable at the juncture. An omission is sometimes called a negative act, but this seems dangerous practice, for it too easily permits an omission to be substituted for an act without requiring the special requirement for omission liability such as legal duty and the physical capacity to perform the act. Criminal liability for an omission is also well accepted where the actor has a legal duty and the capacity to act. It is said that this rather fundamental exception to the act requirement is permitted because an actor's failure to perform a legal duty of which he is capable, satisfies the purposes of the act requirement or at least satisfies them as well as an act does. Specifically these two special requirements for omission liability help to exclude from liability cases of -fantasizing and irresolute intentions, important purposes of the act requirement.

31. However, a failure to act, by itself does nothing to screen out mere fantasies. It is the actor's failure to act in the light of his capacity to do so that suggests the actor's willingness to go beyond mere fantasizing and to have the harm or evil of the offence occur. Even then, however, the screening effect seems weak; "letting something happen" simply does not carry the same implication of resolute intention that is shown in causing something to happen by affirmative action. While an actor's failure to perform a legal duty provides some evidentiary support for the existence of an intention to have the harm or evil occur, the force of the implication is similarly weak. Inaction often carries no implication of intention unless it is shown that the actor knows of his or her duty to act and the opportunity to do so.

32. Liability for an omission requires a legal duty to act; a moral duty to act is not sufficient. The duty may arise either from the offence definition itself or from some other provision of criminal or civil law. A duty arises from the former when an offence is defined in terms of omission. This is the -situation where the legislature has made it an offence. A legal duty to act may also be created by a provision of either criminal or civil separate from the offence charged. For example, a duty under the Maharashtra Medical Council's Code of Ethics and Maharashtra Medical Council Act, 1965.

33. Since there is no moral difference between (i) a positive act and (ii) an omission when a duty is established, it is to be borne in mind that cases of omissions, the liability should be exceptional and needs to be adequately justified in each instance. Secondly, when it is imposed this should be done by clear statutory language. Verbs primarily denoting (and forbidding) active conduct should not be construed to include omissions except when the statute contains a genuine implication to this effect. Thirdly, maximum penalties applied to active wrongdoing should not automatically be transferred to corresponding omissions; penalties for omissions should be re-thought in each case. Indeed, the Indian Penal Code, 1860 does include explicitly the liability due to omissions. And even Indian courts have affirmed so. In the case *of Latifkhan (1895) 20 Bom 394,* wherein the law imposes a duty to act on a person, his illegal omission to act renders him liable to punishment. While dealing with the imposition of liability for -- omission, certain considerations are required to be kept in mind. Does section 338 of the I.P.C recognize that the particular offence may be committed by omission? Some category of offences may, some may not; Does it include medical profession? If the offence is capable of being committed by omission, who all were under a duty to act? Who

owed the primary duty? What are the criteria for selecting the culprit? Where the definition of the crime requires proof that the actor caused a certain result, and can he be said to have caused that result by doing nothing? These questions cannot be completely separated and sometimes few or all three of them would arise in the same material which follows. Each of them, perhaps, also gives rise to yet another question: Is actor's conduct properly categorized as an omission, or an act? Indeed section 338 of the I.P.C does recognize unambiguously that the particular offence can be committed by omission. More so, the medical profession is included in it. The offence under section 338 of the I.P.C is capable of being committed by omission.

34. We reiterate that we have stated, explained and clarified the meaning of expression "act" occurring in Section 338 IPC, to include acts of omission as well. Its applicability in the instant case has been discussed elaborately at the relevant portion of this judgment so as not to lose the continuum.

35. As we find that "omission" on the part of the appellant would also be treated as "act" in the given circumstances, the issue is as to whether this act of omission was rash & negligent. This is a pivotal & central issue which needs elaborate and all pervasive attention of the court. To create the edifice, brick by brick, we intend to proceed in the following order:

1. The Doctor-Patient Relationship.
2. Duty of care which a doctor owes towards his patient.
3. When this breach of duty would amount to negligence.
4. Consequences of negligence: Civil and Criminal.
5. When criminal liability is attracted.

6. Whether appellant criminally liable u/s 338 IPC, in the present case?

(1) <u>The Doctor- Patient relationship</u>

36. Since ancient times, certain duties and responsibilities have been cast on persons who adopt the sacred profession as exemplified by Charak's Oath (1000 BC) and the Hippocracic Oath (460 BC).

37. It is the responsibilities that emerge from the doctor-patient relationship that forms the cornerstone of the legal implications emerging from medical practice. The existence of a doctor-patient relationship presupposes any obligations and consequent liability of the doctor to the patient.

38. It was Talcott Parsons, a social scientist, who first theorized the doctor-patient relationship. He worked on the hypothesis that illness was a form of dysfunctional deviance that required re-integration with social organism. Maintaining the social order required the development of a legitimized sick role to control this deviance, and make illness a transitional state back to normal role performance. In this process, the physician, who has mastered a body of technical knowledge, on a functional role to control the deviance of sick persons who was to be guided by an egalitarian universalism rather than a personalized particularism. While this basic notion has remained robust, over a period of time there have been numerous qualifications to the theory of Parsons. For instance, physicians and the public consider some illnesses to be the responsibility of the ill, such as lung cancer, AIDA and obesity.

39. It is not necessary for us to divulge this theoretical approach to the doctor-patient relationship, as that may be based on model foundation. Fact remains that when a physician agrees to attend a patient, there is an unwritten contract between the two. The patient [illegible] e

doctor and that doctor agrees to do his best, at all times, for the patient. Such doctor-patient contract is almost always an implied contract, except when written informed consent is obtained. While a doctor cannot be forced to treat any person, he/she has certain responsibilities for those whom he/she accepts as patients. Some of these responsibilities may be recapitulated, in brief:

(a) to continue to treat, except under certain circumstances when doctor can abandon his patient;

(b) to take reasonable care of his patient;

(c) to exhibit reasonable skill: The degree of skill a doctor undertakes is the average degree of skill possessed by his professional brethren of the same standing as himself. The best form of treatment may differ when different choices are available. There is an implied contract between the doctor and patient where the patient is told, in effect, "Medicine is not an exact science. I shall use my experience and best judgment and you take the risk that I may be wrong. I guarantee nothing."-

(d) Not to undertake any procedure beyond his control: This depends on his qualifications, special training and experience. The doctor must always ensure that he is reasonably skilled before undertaking any special procedure/treating a complicated case.

(e) Professional secrets:A doctor is under a moral and legal obligation not to divulge the information/ knowledge which he comes to learn in confidence from his patient and such a communication is privileged communication.

Conclusion: The formation of a doctor-patient

relationship is integral to the formation of a legal relationship and consequent rights and duties, forming the basis of liability of a medical practitioner. Due to the very nature of the medical profession, the degree of responsibility on the practitioner is higher than that of any other service provider. The concept of a doctor –patient relationship forms the foundation of legal obligations between the doctor and the patient.

In the present case, as already held above, doctor-patient relationship stood established, contractually, between the patient and the appellant.

(2) Duty of Care which a doctor owes towards his patient.-

40. Once, it is found that there is 'duty to treat' there would be a corresponding 'duty to take care' upon the doctor qua/his patient. In certain context, the duty acquires ethical character and in certain other situations, a legal character. Whenever the principle of 'duty to take care' is founded on a contractual relationship, it acquires a legal character. Contextually speaking, legal 'duty to treat' may arise in a contractual relationship or governmental hospital or hospital located in a public sector undertaking. Ethical 'duty to treat' on the part of doctors is clearly covered by Code of Medical Ethics, 1972. Clause 10 of this Code deals with 'Obligation to the Sick' and Clause 13 cast obligation on the part of the doctors with the captioned "Patient must not be neglected". Whenever there is a breach of the aforesaid Code, the aggrieved patient or the party can file a petition before relevant Disciplinary Committee constituted by the concerned State Medical Council.

(3) When this breach of duty would amount to negligence?

41. When reasonable care, expected of the medical professional, is not rendered and the action on the part of the medical practitioner comes within the n[illegible],

it can be safely concluded that the said doctor -did not perform his duty properly which was expected of him under the law and breached his duty to take care of the patient. Such a duty which a doctor owes to the patient and if not rendered appropriately and when it would amount to negligence is lucidly narrated by this Court in *Kusum Sharma and others v. Batra Hospital and Medical Research Centre and Others*; (2010) 3 SCC 480. The relevant discussions therefrom are reproduced hereinbelow:

> **"**45. According to *Halsbury's Laws of England*, 4th Edn., Vol. 26 pp. 17-18, the definition of negligence is as under:
>
> > **22.** *Negligence*.—Duties owed to patient. A person who holds himself out as ready to give medical advice or treatment impliedly undertakes that he is possessed of skill and knowledge for the purpose. Such a person, whether he is a registered medical practitioner or not, who is consulted by a patient, owes him certain duties, namely, a duty of care in deciding whether to undertake the case; a duty of care in deciding what treatment to give; and a duty of care in his administration of that treatment. A breach of any of these duties will support an action for negligence by the patient."
>
> 46. In a celebrated and oft cited judgment in *Bolam* v. *Friern Hospital Management Committee* (Queen's Bench Division)
>
> McNair, L.J. observed:
>
> > (*i*) A doctor is not negligent, if he is acting in accordance with a practice accepted as proper by a reasonable body of medical men skilled in that particular -art, merely because there is a body of such opinion that takes a contrary view.
> >
> > "The direction that, where there are two different

> schools of medical practice, both having recognition among practitioners, it is not negligent for a practitioner to follow one in preference to the other accords also with American law; see 70 *Corpus Juris Secundum* (1951) 952, 953, Para 44. Moreover, it seems that by American law a failure to warn the patient of dangers of treatment is not, of itself, negligence McNair, L.J. also observed:
>
> Before I turn to that, I must explain what in law we mean by 'negligence'. In the ordinary case which does not involve any special skill, negligence in law means this: some failure to do some act which a reasonable man in the circumstances would do, or the doing of some act which a reasonable man in the circumstances would not do; and if that failure or the doing of that act results in injury, then there is a cause of action. How do you test whether this act or failure is negligent? In an ordinary case it is generally said, that you judge that by the action of the man in the street. He is the ordinary man. In one case it has been said that you judge it by the conduct of the man on the top of a Clapham omnibus. He is the ordinary man. But where you get a situation which involves the use of some special skill or competence, then the test as to whether there has been negligence or not is not the test of the man on the top of a Clapham omnibus, because he has not got this man exercising and professing to have that special skill. … A man need not possess the highest expert skill at the risk of being found negligent. It is well-established law that it is sufficient if he exercises the ordinary skill of an ordinary competent man exercising that particular art."

(4) Breach of Duty to Take Care: Consequences

42. If the patient has suffered because of negligent act/ omission of the doctor, it undoubtedly gives right to the patient to sue the doctor for damages. This would be a civil liability of the doctor under the law tort and/ or contract. This concept of negligence as a tort is explained in *Jacob Mathews v. State of Punjab and Another* 2005(6) SCC1, in the following manner:

> "10. The jurisprudential concept of negligence defines any precise definition. Eminent jurists and leading judgments have assigned various meanings to negligence. The concept as has been acceptable to Indian jurisprudential thought is well stated in the Law of Torts, Ratanlal & Dhirajlal (24th Edn., 2002, edited by Justice G.P. Singh).
>
> Negligence is the breach of a duty caused by the omission to do something which a reasonable man, guided by those considerations which ordinarily regulate the conduct of human affairs would do, or doing something which a prudent and reasonable man would not do. Actionable negligence consists in the neglect of the use of ordinary care or skill towards a person to whom the defendant owes the duty of observing ordinary care and skill, by which neglect the plaintiff has suffered injury to his person or property…. The definition involves three constituents of negligence: (1) A legal duty to exercise due care on the part of the party complained of towards the party complaining the former's conduct within the scope of the duty; (2) breach of the said; and (3) consequential damage. Cause of -action for negligence arises only when damage occurs; for, damage is a necessary ingredient of this tort."

43. Such a negligent act, normally a tort, may also give rise to criminal liability as well, though it was made clear by this Court in *Jacob's* Case (supra) that jurisprudentially the distinction has to be drawn between negligence under Civil Law

and negligence under Criminal Law. This distinction is lucidly explained in *Jacob's Case*, as can be seen from the following paragraphs:

> "**12.** The term "negligence" is used for the purpose of fastening the defendant with liability under the civil law and, at times, under the criminal law. It is contended on behalf of the respondents that in both the jurisdictions, negligence is negligence, and jurisprudentially no distinction can be drawn between negligence under civil law and negligence under criminal law. The submission so made cannot be countenanced inasmuch as it is based upon a total departure from the established terrain of thought running ever since the beginning of the emergence of the concept of negligence up to the modern times. Generally speaking, it is the amount of damages incurred which is determinative of the extent of liability in tort; but **in criminal law it is not the amount of damages but the amount and degree of negligence that is determinative of liability.** To fasten liability in criminal law, the degree of negligence has to be higher than that of negligence enough to fasten liability for damages in civil law. **The essential ingredient of *mens -rea* cannot be excluded from consideration when the charge in a criminal court consists of criminal negligence.** In *R.* v. *Lawrence* Lord Diplock spoke in a Bench of five and the other Law Lords agreed with him. He reiterated his opinion in *R.* v. *Caldwell*[3] and dealt with the concept of **recklessness as constituting *mens rea* in criminal law.** His Lordship warned against adopting the simplistic approach of treating all problems of criminal liability as soluble by classifying the test of liability as being "subjective" or "objective", and said: (All

"Recklessness on the part of the doer of an act does presuppose that there is something in the circumstances that would have drawn the attention of an ordinary prudent individual to the possibility that his act was capable of causing the kind of serious harmful consequences that the section which creates the offence was intended to prevent, and that the risk of those harmful consequences occurring was not so slight that an ordinary prudent individual would feel justified in treating them as negligible. It is only when this is so that the doer of the act is acting 'recklessly' if, before doing the act, he either fails to give any thought to the possibility of there being any such risk or, having recognised that there was such risk, he nevertheless goes on to do it."

13. The moral culpability of recklessness is not located in a desire to cause harm. It resides in the proximity of the reckless state of mind to the state of mind present when there is an intention to cause harm. **There is, in other words, a disregard for the possible consequences.** The consequences entailed in the risk may not be wanted, and indeed the actor may hope that they do not occur, but this hope nevertheless fails to inhibit the taking of the risk. Certain types of violation, called optimising violations, -may be motivated by thrill-seeking. These are clearly reckless.

14. In order to hold the existence of criminal rashness or criminal negligence it shall have to be found out that the **rashness was of such a degree as to amount to taking a hazard knowing that the hazard was of such a degree that injury was most likely imminent.** The element of criminality

is introduced by the accused having run the risk of doing such an act with recklessness and indifference to the consequences. Lord Atkin in his speech in *Andrews* v. *Director of Public Prosecutions*[4] stated: (All ER p. 556 C)

"Simple lack of care such as will constitute civil liability is not enough. For purposes of the criminal law there are degrees of negligence, and a very high degree of negligence is required to be proved before the felony is established."

Thus, a clear distinction exists between "simple lack of care" incurring civil liability and "very high degree of negligence" which is required in criminal cases. In *Riddell* v. *Reid*[4a] (AC at p. 31) Lord Porter said in his speech —

"A higher degree of negligence has always been demanded in order to establish a criminal offence than is sufficient to create civil liability."

15. The fore-quoted statement of law in *Andrews* has been noted with approval by this Court in *Syad Akbar* v. *State of Karnataka*[5]. The Supreme Court has dealt with and pointed out with reasons the distinction between negligence in civil law and in criminal law. Their Lordships have opined that there is a marked difference as to the effect of evidence viz. the proof, in civil and criminal proceedings. In civil proceedings, a mere preponderance of probability is sufficient, and the -defendant is not necessarily entitled to the benefit of every reasonable doubt; but in criminal proceedings, the **persuasion of guilt must amount to such a moral certainty as convinces the mind of the Court, as a reasonabl**

reasonable doubt. Where negligence is an essential ingredient of the offence, the negligence to be established by the prosecution must be culpable or gross and not the negligence merely based upon an error of judgment."

44. Thus, in the civil context while we consider the moral implications of negligent conduct, a clear view of the state of mind of the negligent doctor might not require strictly. This is for the reason the law of tort is ultimately not concerned with the moral culpability of the defendant, even if the language of fault is used in determining the standard of care. From the point of view of civil law it may be appropriate to impose liability irrespective of moral blameworthiness. This is because in civil law two questions are at issue: Was the defendant negligent? If so, should the defendant bear the loss in this particular set of circumstances? In most cases where negligence has been established, the answer to the second question will be in the affirmative, unless the doctrine of remoteness or lack of foresee ability militates against a finding of liability, or where there is some policy reason precluding compensation. The question in the civil context is, therefore, not about moral blame, even though there will be many cases where the civilly liable defendant is also morally culpable.

(5) Criminal Liability : When attracted

45. It follows from the above that as far as the sphere of criminal liability is concerned, as *mens rea* is not abandoned, the subjective state of mind of the accused lingers a critical consideration. In the context of criminal law, the basic question is quite different. Here the question is: Does the accused deserve to be punished for the outcome caused by his negligence? This is a very different question from the civil context and must be answered in terms of *mens rea.* Only if a person has acted in a morally culpable fashion can this question be answered positively, at least as far as non strict liability

offenses are concerned.

46. The only state of mind which is deserving of punishment is that which demonstrates an intention to cause harm to others, or where there is a deliberate willingness to subject others to the risk of harm. Negligent conduct does not entail an intention to cause harm, but only involves a deliberate act subjecting another to the risk of harm where the actor is aware -of the existence of the risk and, nonetheless, proceeds in the face of the risk. This, however, is the classic definition of recklessness, which is conceptually different from negligence and which is widely accepted as being a basis for criminal liability.

47. The solution to the issue of punishing what is described loosely, and possibly inaccurately, as negligence is to make a clear distinction between negligence and recklessness and to reserve criminal punishment for the latter. If the conduct in question involves elements of recklessness, then it is punishable and should not be described as merely negligent. If, however, there is nothing to suggest that the actor was aware of the risk deliberately taken, then he is morally blameless and should face, at the most, a civil action for damages.

(6) Whether the appellant criminally liable under Section 338 IPC, in the present case?

48. We have to keep in mind that by the impugned judgment, the appellant is convicted of an offence under Section 338 read with Section 109 of I.P.C. Therefore, the relevant question to be decided is as to whether, the -acts of omission and commission, imputed to the appellant, are sufficient to hold that all the ingredients of Section 338 of the I.P.C. stand satisfied.

49. The section explicitly lays down [illegible]

is "*so rashly or negligently as to endanger human life, or the personal safety of others, shall be punished....". Thus t*he section itself carves out the standard of criminal negligence intended to distinguish between those whose failure is culpable and those whose conduct, although not up to standard, is not deserving of punishment.

50. One of the several questions which arise in the factual situation at hand is this: Whether the appellant-doctor, who acted negligently, manifested such a state of mind which justifies moral censure? This is conceivably best answered by identifying what was nature of act owed by the appellant towards the patient.

51. In the case at hand, the concern revolves around the acts of omission and commission which amounted to an "act" so *rashly* or *negligently* as to have had endangered the life of Smt. Leela constituting an offence punishable under Section 338 of the I.P.C. Since, there was no overt act on the part of the appellant - as the surgical procedure was performed by Dr. -A.K. Mukherjee, charge of abetment under Section 109 of I.P.C. was also leveled. . Dr. A.K. Mukherjee was also made accused in the said complaint. However, at a later stage, Dr. A.K. Mukherjee was dropped from the proceedings at the instance of the complainant.

52. We would also like to make another aspect very explicit. The appellant was leveled a specific charge which was framed against him. The prosecution was required to prove that particular charge and not to go beyond that and attribute "rash and negligent" acts which are not the part of the charge. Culpability is specifically related to the "act" committed on 22.12.1987 at about 9 a.m. in the hospital viz., the act of performing surgical procedure. It is, thus, this act alone, and nothing more, for which the appellant and Dr. Mukherjee were charged and the appellant is supposed to meet this charge alone.

53. In this scenario, the first and foremost question that needs to be determined is as to whether the advise of the appellant that 'Exploratory Laparotomy' be conducted on the patient was inappropriate, and if so, amounted to wanton negligence, giving rise to criminal liability, in as much -as the opening of the abdomen of the patient, even by Dr. Mukherjee, was the consequence of that advise.

54. No doubt, such an opinion was given in the teeth of the advise of the doctors in the U.S.A where the patient was examined earlier. However, only because of this reason, it would not automatically follow that the view expressed by the appellant was blemished. The two experts in medical field may differ on decision to undertake the surgical operation. But for the sake of life which, any way was struggling to live is the respect to doctors in their position to operate the patient or not. We have to keep in mind the critical condition of the patient at that time. She was sent home by the American doctors as inoperable. She was advised to take certain medicines. These medicines were being administered by Dr. Mukherjee. However, further complications arose in the meantime as vagina started bleeding which was not coming to a halt. Obviously, it was terminal stage for the patient. It is in this situation, opinion of the appellant was sought. The dilemma of a doctor in such a scenario can be clearly visualized viz., whether to leave the patient as it is or to take a chance, may be a very slim chance, to save or at least to try to prolong the life of the patient. It was not -an easy choice. Overcoming this difficult situation, the appellant took the bold decision viz. that surgical operation was worth taking a risk, as even otherwise, the condition of the patient was deplorable. The appellant has even given his justification and rationale for adopting this course of action. The appellant states that the decision to operate was taken having regard to the following circumstances:

(a) The patient was suffering from metastatic breast cancer for ten long years and the said cancer was spreading to other parts of the body. As such the patient was unable to follow her ordinary pursuits irrespective of the surgical procedure advised by the appellant herein.

(b) The patient was repeatedly suffering from vaginal bleeding and bodily pain and as such the patient was unable to follow her ordinary pursuits irrespective of the surgical procedure advised by the appellant herein.

(c) The formation of a fistula is a complication which may or may not arise out of surgical procedures and the advice for surgical procedure was tendered with a view to alleviate her suffering rather than endanger her life. -

55. During trial, Dr. Gajanand Hegade (DW.2) has endorsed the opinion of the appellant and has gone to the extent of saying that it was the best possible option for the treatment of the patient. Moreover, Dr. Mukherjee has also accepted/ agreed that the advise tendered by the appellant on the basis of CT Scan Report, and, that the call to operate was "unanimous". Thus, even Dr. Mukherjee endorsed the opinion which appears to be his opinion as well. In this scenario, it cannot be said that advise of the appellant for taking the surgical procedure was an act of wanton negligence. Dilemma of a doctor, in such circumstances, is beautifully explained by this Court in *Kusum Sharma (Supra)*, in the following words:

"89(V) In the realm of diagnosis and treatment there is scope for genuine difference of opinion and one professional doctor is clearly not negligent merely because his conclusion differs from that of other professional doctor.

(VI) The medical professional is often called upon to adopt a procedure which involves higher element of risk, but which he honestly believes as providing greater chances of success for the patient rather than a procedure involving lesser risk but higher chances of failure. Just because a professional looking to the gravity of illness has taken higher element of risk to redeem the patient out of his/ her suffering which did not yield the desired result may not amount to negligence.-

(VII) Negligence cannot be attributed to a doctor so long as he performs his duties with reasonable skill and competence. Merely because the doctor chooses one course of action in preference to the other one available, he would not be liable if the course of action chosen by him was acceptable to the medical profession.

56. It also needs to be emphasized, as contended by Mr. Harish Salve, that the experts from New York are not oncological surgeons. Dr. Ernest Greenberg is a physician while Dr. Brokunier is a Gynecologist. On the other hand, even as per the complainants own version, the appellant is a renowned oncologist and surgeon.

57. At this juncture, an important observation is needed. When such a decisional shift is taken against the line of other doctors who had earlier treated the patient, the appellant was required to give personal attention to the patient during the operation. He was, even otherwise, contractually bound to do so.

58. While the two experts might differ on the level of risks involved in the critical surgical operation but for the sake of life which in anyway was struggling to live, is a mild respite to doctors in their decision to operate the patient or not. A long catena of medical cases on this theme

doctors. One of the many indispensable duties which is of utmost importance is that when such a decisional shift is taken by a doctor against the line of renowned doctor who had earlier treated the patient, that doctor must exercise required personal attention to the patient during the operation. On this aspect, *the Medical council of Maharashtra, while reprimanding, reasoned that Dr. P.B Desai, instead of merely advising surgery which was inspite of the opinion of cancer specialists from U.S.A, ought to have voluntarily taken more interest and personally seen the situation faced by Dr. A.K Mukherjee which he did not do so.* Since the appellant has not challenged the findings of the Medical Council who had found him guilty of misconduct, those findings does provide the legal fortification and along with the oral and documentary evidences adduced before court below speaks much on the professional duty which the appellant owed to the patient.

59. Thus, one thing is crystal clear. Failure to act on the part of the appellant, in conducting surgical procedure, and not taking care thereafter as well, established his negligence in tort law i.e. in civil domain. We refer to and rely on the judgment of this Court in *Jacob's Case* once again, where -the Court explained as to under what circumstances professional can be liable for negligence. It is necessary for this purpose that one of the two findings, as set out therein, should be established.

> **"18.** In the law of negligence, professionals such as lawyers, doctors, architects and others are included in the category of persons professing some special skill or skilled persons generally. Any task which is required to be performed with a special skill would generally be admitted or undertaken to be performed only if the person possesses the requisite skill for performing that task. Any reasonable man entering into a profession which requires a particular level of learning to be called a professional of that branch, impliedly assures the

> person dealing with him that the skill which he professes to possess shall be exercised with reasonable degree of care and caution. He does not assure his client of the result. A lawyer does not tell his client that the client shall win the case in all circumstances. A physician would not assure the patient of full recovery in every case. A surgeon cannot and does not guarantee that the result of surgery would invariably be beneficial, much less to the extent of 100% for the person operated on. The only assurance which such a professional can give or can be understood to have given by implication is that he is possessed of the requisite skill in that branch of profession which he is practising and while undertaking the performance of the task entrusted to him he would be exercising his skill with reasonable competence. This is all what the person approaching the professional can expect. Judged by this standard, a professional may be held liable for negligence on one of two findings: either he was not possessed of the requisite skill which he professed to have possessed, or, -he did not exercise, with reasonable competence in the given case, the skill which he did possess. The standard to be applied for judging, whether the person charged has been negligent or not, would be that of an ordinary competent person exercising ordinary skill in that profession. It is not necessary for every professional to possess the highest level of expertise in that branch which he practises. In *Michael Hyde and Associates v. J.D. Williams & Co. Ltd.* Sedley, L.J. said that where a profession embraces a range of views as to what is an acceptable standard of conduct, the competence of the defendant is to be judged by the lowest standard that would be regarded as acceptable."

60. No doubt, in the present case the appellant not only possesses requisite skills but also an expert in this line. However, having advised the operation, he failed to take care of the patient. Thereafter, at various stages, as observed by the courts below, he was held to be negligent by the Maharashtra Medical Council and thus found to be guilty of committing professional misconduct.

61. Thus, it was the appellant's "duty" to act contractually, professionally as well as morally and such an omission can be treated as an "act". We again clarify that undoubtedly, within the realm of civil liability, the appellant has breached the well essence of "duty" to the patient. -

62. Having reached this conclusion, we proceed to the next stage viz., the criminal liability of the appellant. However, we once again emphasize that the question of criminal liability has also to be examined in the context of Section 338 of I.P.C. which is the real issue. To recapitulate some important aspects, we have concluded that decision of the appellant advising Exploratory Laparatomy was not an act of negligence, much less wanton negligence, and under the circumstances it was a plausible view which an expert like the appellant could take keeping in view the deteriorating and worsening health of the patient. As a consequence, opening of the abdomen and performing the surgery cannot be treated as causing grievous hurt. It could have been only if the doctors would have faltered and acted in rash and gross negligent manner in performing that procedure. It is not so. At the same time, his act of omission, afterwards, in not doing the surgery himself and remaining absent from the scene and neglecting the patient, even thereafter, when she was suffering the consequences of fistula, is an act of negligence and is definitely blame worthy. (though that is not the part of criminal charge) However, we are of the opinion that the omission is not of a kind which has given rise to criminal liability under the given circumstances.

63. As already noted above, we are conscious of the fact that when the appellant decided to operate on the patient against the U.S doctor's advice, the level of attention expected from the appellant towards the patient was immense and undivided kind. The operating surgeon along with the fellow junior doctors was supposed to conduct operation. The junior doctor rendered his complete and undivided assistance to the patient but the appellant abstained.

64. However, the important and relevant point is: Had the appellant undertaken the surgical procedure by himself, the result would have been different? Or, to put it otherwise, whether opening of abdomen by Dr. Mukherjee and not by the appellant who was supposed to do it, made any difference? In the given case, we do not find it to be so.

65. To appreciate, we need to reiterate certain facts. On opening the abdomen, Dr. A.K. Mukherjee found plastering of intestines as well as profuse oozing of ascetic fluids. He immediately called the appellant who -was performing other surgical procedures in another operation theatre. The appellant after seeing the condition of the patient, albeit, from the distance found that it was not possible to proceed with the operation. He advised Dr. A.K. Mukherjee to close the abdomen. Dr. Mukherjee, thus, closed the abdomen. Significantly, Section 109 IPC was also pressed into service at the time of framing of the charge on the premise that Dr. Mukherjee caused grievous hurt and omission on the part of the appellant to not to personally intervene in the operation of the patient amounted to abetment. However, the position which emerges is that the junior doctor rendered complete care. He did not falter in his act of cutting open the abdomen. It is only at that stage, it was found, that there was a lot of discharge from fistula and surgery was not possible. The appellant advised Dr. Mukherjee to close the abdomen. No doubt, he did not do it himself but it is not the case of the prosecution that Dr.

Mukherjee did not do it deftly either. It is because of the deplorable condition of the patient, the surgery could not be completed as on the opening of the abdomen other complications were revealed. This would have happened in any case, irrespective whether abdomen was opened by Dr. Mukherjee or by the appellant himself. On the contrary, the -- complainant's own case is that Dr. Mukherjee's performance was not lacking; nay, it was of superlative quality.

66. The appellant's omission in not rendering complete and undivided legally owed duty to patient and not performing the procedure himself has not made any difference. It was not the cause of the patient's death which was undoubtedly because of the acute chronic cancer condition. In such a scenario, it is enough to keep off the clutches of criminal law.

67. The negligent conduct in the nature of omission of the appellant is not so gross as to entail criminal liability on the appellant under section 338 of the I.P.C. It is to be kept in mind that the crime as mentioned in section 338 I.P.C requires proof that the appellant caused the patient's condition to the acute stage. Can he be said to have caused such a result, by his omission to act? We do not find it to be so.

68. *In the common law case R v Adomako* [1994] 3 WLR 288 wherein, Lord Mackay LC set the test for gross negligence in manslaughter:

> "On this basis in my opinion the ordinary principles of the law of negligence apply to ascertain whether or not the defendant has been in breach of a duty of care towards the victim who has died. If such breach of duty is established the next question is whether that breach of duty caused the death of the victim. If so, the jury must go on to consider whether that breach of duty should be characterised as gross negligence and therefore as a crime. This will depend on the seriousness of the breach

> of duty committed by the defendant in all the circumstances in which the defendant was placed when it occurred. The jury will have to consider whether the extent to which the defendant's conduct departed from the proper standard of care incumbent upon him, involving as it must have done a risk of death to the patient, was such that it should be judged criminal."

69. For the aforesaid reasons, we have no option but to conclude that though the conduct of the appellant constituted not only professional misconduct for which adequate penalty has been meted out to him by the Medical Council, and the negligence on his part also amounts to actionable wrong in tort, it does not transcend into the criminal liability, and in no case makes him liable for offence under Section 338, IPC as the ingredients of that provision have not been satisfied. We, therefore, allow this appeal and set aside the impugned judgments of the courts below. No costs.

K.K.T. Appeal allowed.

HIMACHAL PRADESH STATE ELECTRICITY REGULATORY COMMISSION AND ANOTHER
v.
HIMACHAL PRADESH STATE ELECTRICITY BOARD
(Civil Appeal No. 6128 of 2009)

OCTOBER 03, 2013

[ANIL R. DAVE AND DIPAK MISRA, JJ.]

Electricity Regulatory Commission Act, 1998:

s. 27 – Appeal under – Maintainability of – After repeal of the 1998 Act and enactment of Electricity Act, 2003 – Held: Maintainable, since the legislature never intended to take away the vested right of appeal in the forum under the 1998 Act, as the 2003 Act did not provide for transfer of pending cases – Electricity Act, 2003 – s. 111.

s. 22 – Determination of Tariff under – By regulatory Commission – Also issued certain directions as part of the tariff order – The Commission imposed fine on Electricity Board for non-compliance of the directions – Propriety of – Held: The Commission was competent to issue the directions as all the directions were connected with the tariff fixation – However, it was not correct for the Commission to impose penalty on the Board, as the Board had substantially complied with the directions.

Prospective Operation – Enactments dealing with vested rights are primarily prospective, unless expressly or by necessary intention or implication given effect retrospectively – A right to appeal as well as forum is a vested right.

Himachal Pradesh State Electricity Regulatory Commission constituted under Electricity Regulatory Commission Act, 1998, in exercise of its powers u/ss. 22

and 29 of the 1998 Act, determined the tariff applicable for electricity in the State and also issued certain directions as a part of the tariff order.

In view of the complaints, the Commission issued notice to the respondent-Board for non-compliance of the directions issued by the Commission. Respondent-Board, in its reply, questioned the jurisdiction and competence of the Commission to issue those directions. The Commission held the respondent-Board guilty of non-compliance of the directions and imposed penalty of Rs. 5000/- on the Board.

The respondent-Board, challenging the order of the Commission, filed appeal before High Court u/s. 27 of the 1998 Act. In the meantime 1998 Act was repealed and Electricity Act, 2003 was enacted. Pursuant thereto, the Commission took preliminary objection as to maintainability of the appeal by the High Court and contended that in view of s. 111 of the 2003 Act the appeal would lie to the Appellate Tribunal established under 2003 Act. High Court held that the appeal was maintainable because the 2003 Act would have prospective operation. While deciding the appeal on merit, set aside the order passed by the Commission. Hence the present appeals.

Disposing of the appeals, the Court

HELD: 1.1. It is a well settled proposition of law that enactments dealing with substantive rights are primarily prospective unless it is expressly or by necessary intention or implication given effect retrospectively. The aforesaid principle has full play when vested rights are affected. In the absence of any unequivocal expose, the piece of Legislation must exposit adequate intendment of Legislature to make the provision retrospective. A right of appeal as well as forum is a ves

said right is taken away by the Legislature by an express provision in the Statute by necessary intention. [Para 25] [937-H; 938-A-B]

1.2. It is the admitted position that Legislature by expressed stipulation in the new legislation has not provided for transfer of the pending cases as was done by the Parliament in respect of service matters and suits by financial institutions/banks by enactment of Administrative Tribunal Act, 1985 and Recovery of Debts due to Banks and Financial Institution Act, 1993. No doubt right to appeal can be divested but this requires either a direct legislative mandate or sufficient proof or reason to show and hold that the said right to appeal stands withdrawn and the pending proceedings stand transferred to different or new appellate forum. Creation of a different or a new appellate forum by itself is not sufficient to accept the argument/contention of an implied transfer. Something more substantial or affirmative is required which is not perceptible from the scheme of the 2003 Act. [Para 26] [938-C-F]

1.3. On reading of Section 185 of the 2003 Act in entirety, it is difficult to say that even if Section 6 of the General Clauses Act would apply, then also the same does not save the forum of appeal. There is no contrary intention that Section 6 of the General Clauses Act would not be applicable. It is also to be kept in mind that the distinction between what is and what is not a right by the provisions of the Section 6 of the General Clauses Act is often one of great fitness. What is unaffected by the repeal of a statute is a right acquired or accrued under it and not a mere hope, or expectation of, or liberty to apply for, acquiring right. [Para 28] [939-F-H]

Ambalal Sarabhai Enterprises Ltd. vs. Amrit Lal and Co. and Anr. **(2001) 8 SCC 397: 2001 (2) Suppl. SCR 195;** *Kolhapur Canesugar Works Ltd. vs. Union of India* **(2000) 2 SCC 536: 2000 (1) SCR 518;** *M.S. Shivananda vs. Karnataka State Road Transport Corporation and Ors.* **(1980) 1 SCC 149: 1980 (1) SCR 684;** *Vijay vs. State of Maharashtra and Ors.* **(2006) 6 SCC 289: 2006 (4) Suppl. SCR 81 – relied on.**

1.4. Tested on the touchstone of doctrine of fairness, the legislature never intended to take away the vested right of appeal in the forum under the 1998 Act. Thus the conclusion of the High Court that it had jurisdiction to hear the appeal is absolutely flawless. [Paras 30 and 31] [940-C-D]

Garikapati Veeraya vs. N. Subbiah Choudhry and Ors. **AIR 1957 SC 540: 1957 SCR 488 – followed.**

State of Punjab vs. Mohar Singh **(1955) 1 SCR 893;** *Brihan Maharashtra Sugarsyndicate Ltd. vs. Janardan Ramchandra Kulkarni and Ors.* **AIR 1960 SC 794: 1960 SCR 85;** *Manphul Singh Sharma vs. Ahmedi Begum (Smt) (since deceased) through her alleged legal representative/ successors (A) M.A. Khan (B) Delhi Wakf Board* **(1994) 5 SCC 465: 1994 (2) Suppl. SCR 495;** *Commissioner of Income Tax, Bangalore vs. R. Sharadamma* **(1996) 8 SCC 388: 1996 (3) SCR 1200;** *Commissioner of Income Tax, Orissa vs. Dhadi Sahu* **1994 Supp (1) SCC 257: 1992 (3) Suppl. SCR 168;** *Messrs. Hoosein Kasam Dada (India) Ltd. vs. The State of Madhya Pradesh and Ors.* **AIR 1953 SC 221: 1953 SCR 987 – relied on.**

Colonial Sugar Refining Company Ltd. vs. Irving **1905 AC 369 – referred to.**

2.1. The finding recorded by the High Court that the Commission has no authority to issue directions or to impose penalty as it had become *functus officio* is not correct. [Para 32] [940-E]

2.2. The language employed in Section 22(1)(d) has to be understood in its proper con lt

enables the State Commission to carry out the function for promoting competition, efficiency and economy in the activities of the electricity industry to achieve the objects and purposes of the Act. The State Commission under Section 22(1)(d) was conferred power to address various facets and there is no reason that the terms, namely, "efficiency, economy in the activity of the electricity industry" should be narrowly construed. That apart, it would not be seemly to say that under Section 22(1) of the 1998 Act, the Commission had only the power to fix the tariff and no other power. Had that been so, the legislature would not have employed such wide language in Section 22(1)(d). The powers enumerated under sub-section (2) of Section 22 are more enumerative in nature and the jurisdiction conferred comparatively covers more fields. In the present case, if the directions issued by the Commission are read in proper perspective, the same really do not travel beyond the power conferred under Section 22(1)(d) of the 1998 Act. All of them can be connected with the tariff fixation and with the associated concepts, namely, purpose to promote competition, efficiency and economy in the activities of the electricity industry regard being had to achieve the objects and purposes of the Act. [Para 33] [941-E-H; 942-A-B]

2.3. It is not inapposite to take note of the fact that the Board had agreed to comply and submit the report. Though the Commission later on has found some fault with the Board, yet it is factually found on a close perusal of the explanation by the Board that there has been real substantial compliance with the directions. In this factual backdrop, it was not correct on the part of the Commission to impose penalty on the Board. However, under the 2003 Act, constitution of the State Commission is governed by Section 82. Section 86 deals with the function of the State Commission. On a reading of Section 86 it is found that at present no notification is required

to be issued to confer any power on the State Commission. It is conferred and controlled by the statute. If anything else is required to be done in praesenti, the Commission is at liberty to proceed under the provisions of the 2003 Act. It is clarified, that grant of liberty may not be understood to have said that the Commission can take any action arising out of its earlier order dated 29.10.2001 or any subsequent orders passed thereon. [Para 34] [942-C-F]

Case Law Reference:

(1955) 1 SCR 893	**relied on**	**Para 18**
1960 SCR 85	**relied on**	**Para 18**
1994 (2) Suppl. SCR 495	**relied on**	**Para 18**
1996 (3) SCR 1200	**relied on**	**Para 18**
1992 (3) Suppl. SCR 168	**relied on**	**Para 18**
1953 SCR 987	**relied on**	**Para 20**
1957 SCR 488	**followed**	**Para 21**
1905 AC 369	**referred to**	**Para 21**
2001 (2) Suppl. SCR 195	**relied on**	**Para 27**
2000 (1) SCR 518	**relied on**	**Para 27**
1980 (1) SCR 684	**relied on**	**Para 28**
2006 (4) Suppl. SCR 81	**relied on**	**Para 29**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6128 of 2009.

From the Judgment & Order dated 21.11.2007 of the High Court at Shimla in FAO No. 493 of 2002.

WITH

C.A. Nos. 6129, 6130, 6131, 6132 & 6133 of 2009.

Rana S. Biswas, Sunil Kumar Sharma, Matrugupta Mishra (for Sharmila Upadhyay for the Appellants.

Anand K. Ganeshan, K.V. Mohan for the Respondent.

The Judgment of the Court was delivered by

DIPAK MISRA, J. 1. These appeals, by special leave, are directed against the common Judgment and order dated 21.11.2007 passed by the High Court of Himachal Pradesh in FAOs (Ord.) Nos. 489, 490, 491, 492, 493 & 494 of 2002 whereby the learned Single Judge overturned the decision dated 17.08.2002 rendered by the Himachal Pradesh State Electricity Regulatory Commission (for short, "the Commission") constituted under the provisions of Chapter IV of Electricity Regulatory Commission Act, 1998 (hereinafter referred to as "the 1998 Act").

2. The controversy that has emerged for consideration being common to all the appeals, we shall adumbrate the facts from Civil Appeal No. 6128 of 2009 for the sake of convenience.

3. The facts requisite to be stated are that the Commission was established for rationalization of electricity tariff, transparent policies regarding subsidies, promotions of efficient and environmentally benign policies and for matters connected therewith or incidental thereto. In exercise of the power conferred on it under Sections 22 and 29 of the 1998 Act the Commission vide order dated 29.10.2001 determined the tariff applicable for electricity in the State of Himachal Pradesh. While determining the tariff it also issued certain directions which are as follows:-

(a) "Furnishing of information and also periodical reports with respect to the value of the assets and

capital projects of the Board.

(b) Replacement of all dead and defective meters by electronic meters from 31st March, 2002 onwards and reporting the status, as on 31st December, 2001 by 31st March, 2002.

(c) To develop and implement a comprehensive public interaction programme through Consultative Committees, preparation, publication and advertisement of material helpful to various consumer interest groups and general public on various activities of the utility, dispute settlement mechanism, accidents, rights and obligations of the consumers etc. Accordingly, the Board was directed on September 22, 2001, to submit its plan for approval of the commission and implement the same by 31st March, 2002.

(d) Submission of plans, short term and long term, by 31st March, 2002, for rationalization of existing manpower for improvements in efficiency through scientific engineering resources management, improving and updating the organization strategies and systems and skills of human resources for increased productivity. The Board in its affidavit of 3rd October, 2001 has agreed to comply and submit the above study by the above-mentioned date.

(e) Submission of a plan by 31st March, 2002, for reducing loss, both technical and non-technical, together with relevant load flow studies and details of investment requirement to achieve the planned reductions. The Commission also observed in its interim order of 20th September, 2001 passed in the course of public hearing that investments must aim at reducing the T & D lo y

of supply and service to the consumers as it happened in the case of Palampur area which has mixed domestic and commercial loading. The strategy can be considered for adoption elsewhere also to produce similar results. The Board has confirmed and undertaken to complete this study by 31st March, 2002

(f) To do a comparison of the capital costs of Malana Plant with the capital costs of HPSEB Plants and submit a report on this by 31st March, 2002."

4. Be it noted, the commission issued the directions as a part of the tariff order and the said directions were contained in paragraphs 7.1, 7.4, 7.5, 7.6, 7.8, 7.9 and 7.13. The Commission in paragraphs 7.31 and 7.32 had further stated as follows:-

"7.31 The Commission would monitor the progress in complying with these directions. The Commission accordingly directs the Board to furnish the information on milestones required in column 3 of the Annex (7.1) by December 31, 2001. Subsequent reports should be sent every quarter, providing the information required in columns 4, 5, 6 and 7. The first report should be submitted by January 15, 2002.

7.32 In the directions where the Board is to comply by the next tariff petition and the same is not filed within next six months, the directions should be complied within the next six months."

5. Thereafter, the Commission while discharging its regulatory functions proceeded to review the directions issued by it and found that part of the tariff had not been complied with. In view of the complaints, the Commission issued notice on 23.7.2002 under Section 45 of the 1998 Act. Pursuant to the aforesaid notice the Board filed its reply raising the question

of jurisdiction and competence of the Commission to issue the aforesaid directions. The Commission while dealing with the same framed number of issues and thereafter came to hold that the Board had not fully complied with the directions of the Commission, and accordingly imposed penalty of Rs.5000/- on the Board with a further stipulation that the same shall be deposited within a period of 30 days. The Board was directed to submit further steps taken by it before the Commission.

6. Being aggrieved by the aforesaid order, the Board preferred an appeal under Section 27 of the 1998 Act forming the subject matter of FAO No. 489 of 2002.

7. During the pendency of the appeal, the 1998 Act was repealed and the Electricity Act, 2003 (for short, "the 2003 Act") came into force. The 2003 Act was brought in to consolidate the laws relating to generation, transmission, distribution, trading and use of electricity and generally for taking measures conducive to development of electricity industry, promoting competition therein, protecting interest of consumers and supply of electricity to all areas, rationalisation of electricity tariff, ensuring transparent policies regarding subsidies, promotion of efficient and environmentally benign policies, constitution of Central Electricity Authority, Regulatory Commissions and establishment of Appellate Tribunal and for matters connected therewith or incidental thereto.

8. At this juncture, it is apt to state that the batch of appeals was taken up for hearing by the learned Single Judge, learned counsel for the respondent-Commission raised a preliminary objection about the maintainability of the appeals. It was contended that as under Section 110 of the 2003 Act the appellate tribunal has already been established and an appeal would lie to the appellate tribunal as contemplated under Section 111 of the said Act, the High Court had lost its jurisdiction to hear the appeals. The learned Single Judge took note of the fact that the appeals were p n

27 of the 1998 Act and at that stage an appeal was maintainable before the High Court. The High Court referred to the repealed Act and the language employed under Section 185 of the Act of 2003 and Section 6 of the General Clauses Act, 1897 and analyzing the gamut of the provisions came to hold that the appeal preferred under the 1998 Act could be heard by the High Court even after coming into force of the 2003 Act.

9. After dwelling upon the maintainability of the appeal the learned Single Judge delved into the merits of the appeal and for the aforesaid purpose, he studiedly scrutinized the language employed in Section 22 of the 1999 Act and came to hold that when the Commission was approached by the Board to determine the tariff for electricity, the Commission was called upon to discharge the functions mentioned in sub-Section 1 (a) of Section 22 of the 1998 Act and under the said provision it had the jurisdiction to issue further directions. Thereafter, the learned Single Judge proceeded with regard to the monitoring facet by the Commission, appreciated the directions and, eventually, opined thus:-

> "Commission's observation that the directions were issued in the larger interest of the Board and the consumers is also out of the context. As already noticed, the Commission was approached by the Board to fix the tariff of electricity. Once the tariff had been fixed the job of the Commission was over. It became *functus officio* once the function of determination of tariff had been performed. The interests of the Board and the consumers were required to be borne in mind and protected while fixing the tariff. The Commission could not have arrogated to itself and superintendence and control of the Board on the pretension of watching and protecting the larger interests of the Board and the consumers."

As stated earlier, the aforesaid judgment and order are the

subject matter of assail before us in these appeals.

10. Mr. Jaideep Gupta, learned senior counsel, questioning the sustainability of the judgment of the High Court has raised the following submissions:-

(a) The High Court has absolutely flawed by coming to hold that appeal was maintainable before it despite a separate forum having been created and provision for appeal being engrafted under Section 111 of the 2003 Act. It is urged by him that the High Court has totally misguided itself in interpreting the Repeal and Saving provision contained in Section 185 of the 2003 Act.

(b) The High Court has erred in holding that despite the repeal of the 1998 Act and coming into force of the 2003 Act the right to prefer an appeal under the old Act would still survive. It is urged by him that from the schematic content of the 2003 Act it is graphically clear that a contrary intention of the legislature is clear from the 2003 Act that the appeal has to lie to the appellate tribunal and the High Court has been divested of its appellate jurisdiction to deal with the pending appeals.

(c) The view expressed by the High Court that the Board had approached the Commission to fix the electricity tariff and once the said tariff had been fixed by the Commission it became *functus officio* and it could not have arrogated to itself the power of superintendence and control of the Board on the pretext of monitoring of larger public interest, is sensitively susceptible. Learned counsel would submit that the Commission had been conferred power under Section 22 (1) of the 1998 Act by virtue of issuance of notifi[illegible] of

Himachal Pradesh but the High Court failed to appreciate and scrutinize the effect of conferment of power under the said provision as a consequence of which an indefensible order came to be passed.

11. Mr. Anand K. Ganesan, learned counsel appearing for the respondent-Board, resisting the aforesaid submissions contended as follows:-

(i) The conclusion arrived at by the High Court that the appeal can be heard despite repeal of the 1998 Act and introduction of the 2003 Act on the basis of Section 6 of the General Clauses Act 1897 and the provision contained in Section 185(5) of the 2003 Act cannot be found fault with, for there is no express provision to take away the vested right of appeal and no contrary intention can be gathered from any of the provisions of the new enactment.

(ii) The right of appeal before the High Court was a vested right and the same has not been taken away by the 2003 Act and, therefore, the opinion expressed by the High Court being impregnable deserves to be concurred with by this Court. Right of forum as regards an appeal is also a vested right unless abolished or altered by subsequent law and in the case at hand the 2003 Act does not extinguish the said vested right and hence, the judgment and order passed by the High Court are impeccable.

(iii) The Commission under the 1998 Act could not have issued directions inasmuch as the notification issued by the State had only conferred powers under Section 22 (1) of the 1998 Act and not under any other provisions, and hence, the directions issued travel beyond the power conferred which have been appositely nullified. It is further argued

that though the finding of the High Court that the Commission had become *functus officio* may not be a correct expression in law but directions issued being without jurisdiction, the Commission could not have been proceeded and imposed penalty. Alternatively, it is submitted that even if the issue of jurisdiction is determined in favour of the Commission. The directions issued by it having been substantially complied with by the respondent and there being no willful and deliberate non-compliance, on the facts and circumstances imposition of penalty was not justified.

12. First, we shall proceed to deal with the jurisdiction of the High Court to hear the appeal after coming into force the 2003 Act. The Board, as is manifest, was grieved by order imposing penalty. The relevant part of the order of the Commission reads as follows:-

"The instant matter is one of the first incidents of the contravention of the Commission orders/ directions attributable to the conduct of Respondents / objectors. The commission has determined the quantum of fine to be imposed after considering the nature and extent of non-compliance and other relevant factor as per Regulation 51 (iii) of HPERC's Conduct of Business Regulations, 2001 under the overall provision of Section 45 of the ERC Act, 1998. Penalty of Rs. 5,000/- only is hereby imposed upon Respondent No. 7-HPSEB. The penalty be deposited with the Secretary of the Commission within a period of 30 days from today. Additional penalty for continuing failure @ Rs. 300/- only per day is further imposed on HPSEB and shall be ipso facto recoverable immediately after January 15, 2002 until the date of compliance to the Commission's satisfaction to be so notified by the Commission. The Board shall submit the Status / Action taken reports on the fifteenth day of every month until c

13. By the time the order was passed by the Commission it was subject to challenge in appeal before the High Court under Section 27 of the 1998 Act, which reads as follows:-

"27. **Appeal to High Court in certain cases**. – (1) Any person aggrieved by any decision or order of the State Commission may file an appeal to the High Court.

(2) Except as aforesaid, no appeal or revision shall lie to any court from any decision or order of the State Commission.

(3) Every appeal under this section shall be preferred within sixty days from the date of communication of the decision or order of the State Commission to the person aggrieved by the said decision or order.

Provided that the High Court may entertain an appeal after the expiry of the said period of sixty days if it is satisfied that the aggrieved person had sufficient cause for not preferring the appeal within the said period of sixty days."

14. It is not in dispute that when the appeals were preferred under Section 27 of the 1998 Act pending before the High Court awaiting adjudication the 2003 Act was enacted. Chapter XI of the 2003 Act deals with "Appellate Tribunal for Electricity". Section 110 deals with establishment of appellate tribunal. The said provision reads as under:-

"110. **Establishment of Appellate Tribunal**. – The Central Government shall, by notification, establish an Appellate Tribunal to be known as the Appellate Tribunal for Electricity to hear appeals against the orders of the adjudicating officer or the Appropriate Commission [under this Act or any other law for the time being in force]."

15. Section 111 provides for an appeal to the appellate tribunal. Sub-Sections (1) and (2) being relevant for the present

purpose are reproduced below:-

"111. **Appeal to Appellate Tribunal -** (1) Any person aggrieved by an order made by an adjudicating officer under this Act (except under section 127) or an order made by the Appropriate Commission under this Act may prefer an appeal to the Appellate

Tribunal for Electricity: Provided that any person appealing against the order of the adjudicating officer levying and penalty shall, while filling the appeal , deposit the amount of such penalty: Provided further that where in any particular case, the Appellate Tribunal is of the opinion that the deposit of such penalty would cause undue hardship to such person, it may dispense with such deposit subject to such conditions as it may deem fit to impose so as to safeguard the realisation of penalty.

(2) Every appeal under sub-section (1) shall be filed within a period of forty-five days from the date on which a copy of the order made by the adjudicating officer or the Appropriate Commission is received by the aggrieved person and it shall be in such form, verified in such manner and be accompanied by such fee as may be prescribed:

Provided that the Appellate Tribunal may entertain an appeal after the expiry of the said period of forty-five days if it is satisfied that there was sufficient cause for not filing it within that period."

16. From the aforesaid provision it is clear as crystal that a different forum of appeal has been created under the new legislation with certain conditions.

17. At this stage, we may usefully refer to Section 185 which deals with Repeal and Saving. It reads as follows:-

"185. **Repeal and saving**. -(1) Save as otherwise provided in this Act, the Indian Ele of

1910, the Electricity (Supply) Act, 1948 (54 of 1948) and the Electricity Regulatory Commissions Act, 1998 (14 of 1998) are hereby repealed.

(2) Notwithstanding such repeal, -

(a) anything done or any action taken or purported to have been done or taken including any rule, notification, inspection, order or notice made or issued or any appointment, confirmation or declaration made or any licence, permission, authorisation or exemption granted or any document or instrument executed or any direction given under the repealed laws shall, in so far as it is not inconsistent with the provisions of this Act, be deemed to have been done or taken under the corresponding provisions of this Act.

(b) the provisions contained in sections 12 to 18 of the Indian Electricity Act, 1910 (9 of 1910) and rules made thereunder shall have effect until the rules under section 67 to 69 of this Act are made;

(c) The Indian Electricity Rules, 1956 made under section 37 of the Indian Electricity Act, 1910 (9 of 1910) as it stood before such repeal shall continue to be in force till the regulations under section 53 of this Act are made;

(d) all rules made under sub-section (1) of section 69 of the Electricity (Supply) Act, 1948 (54 of 1948) shall continue to have effect until such rules are rescinded or modified, as the case may be;

(e) all directives issued, before the commencement of this Act, by a State Government under the enactments specified in the Schedule shall continue to apply for the period for which such directions were issued by the State Government.

(3) The provisions of the enactments specified in the Schedule, not inconsistent with the provisions of this Act, shall apply to the States in which such enactments are applicable.

(4) The Central Government may, as and when considered necessary, by notification, amend the Schedule.

(5) Save as otherwise provided in sub-section (2), the mention of particular matters in that section, shall not be held to prejudice or affect the general application of section 6 of the General Clauses Act, 1897 (10 of 1897), with regard to the effect of repeals."

18. It is submitted by Mr. Jaideep Gupta, learned senior Counsel that when the 1998 Act has been repealed and a new legislation has come into force the intention of the legislature is clear to the effect that the appeals are to be heard by the newly constituted appellate tribunal. Learned senior counsel would also contend that if the interpretation placed by the High Court is accepted then there would be two appellate authorities after the enactment of the 2003 Act which would lead to an anomalous situation. In this context Mr. Gupta has commended us to the authorities in *State of Punjab v. Mohar Singh*[1], *Brihan Maharashtra Sugarsyndicate Ltd. v. Janardan Ramchandra Kulkarni and Others*[2], *Manphul Singh Sharma v. Ahmedi Begum (Smt) (since deceased) through her alleged legal representative/successors (A) M.A. Khan (B) Delhi Wakf Board*[3], *Commissioner of Income Tax, Bangalore v. R. Sharadamma*[4] and *Commissioner of Income Tax, Orissa v. Dhadi Sahu*[5].

1. (1955) 1 SCR 893.
2. AIR 1960 SC 794.
3. (1994) 5 SCC 465.
4. (1996) 8 SCC 388.
5. 1994 Supp (1) SCC 257.

19. In *Mohar Singh* (supra), the Court has ruled thus:-

"Whenever there is a repeal of an enactment, the consequences laid down in section 6 of the General Clauses Act will follow unless, as the section itself says, a different intention appears. In the case of a simple repeal there is scarcely any room for expression of a contrary opinion. But when the repeal is followed by fresh legislation on the same subject we would undoubtedly have to look to the provisions of the new Act, but only for the purpose of determining whether they indicate a different intention. The line of enquiry would be, not whether the new Act expressly keeps alive old rights and liabilities but whether it manifests an intention to destroy them. We cannot therefore subscribe to the broad proposition that section 6 of the General Clauses Act is ruled out when there is repeal of an enactment followed by a fresh legislation. Section 6 would be applicable in such cases also unless the new legislation manifests an intention incompatible with or contrary to the provisions of the section. Such incompatibility would have to be ascertained from a consideration of all the relevant provisions of the new law and the mere absence of a saving clause is by itself not material. It is in the light of these principles that we now proceed to examine the facts of the present case."

[Underlining is ours]

20. In *Messrs. Hoosein Kasam Dada (India) Ltd. v. The State of Madhya Pradesh and others,*[6] this Court was considering the effect of amendment of provisions of Central Provinces and Berar Sales Tax Act. Section 22(2) prior to the amendment of the Act stipulated that no appeal against an order of assessment with or without penalty could be entertained by the appellate authority unless it was satisfied that such amount of tax or penalty, or both, as the appellant had

6. AIR 1953 SC 221.

admitted due to him had been paid. The amended provision laid a postulate that appeal had to be admitted subject to the satisfaction of proof of payment of tax in appeal to which the appeal had been preferred. It was contended that the appellant was covered under the unamended provision and that he had not admitted any tax and hence, he was not liable to deposit any sum along with the appeal. It was urged before this Court that the restriction imposed by the amending Act could not affect his right to appeal as the same was a vested right prior to the amendment at the time of commencement of the proceeding under the Act. Dealing with the said contention, the Court opined that a right of appeal is not merely a matter of procedure but a matter of substantive right. It was also held that the right of appeal from the decision of an inferior tribunal to a superior tribunal becomes vested in a party when proceedings are first initiated and before a decision is given by the inferior Court. It has been further observed that such a vested right cannot be taken away except by express enactment or necessary intendment and an intention to interfere with or to impair or imperil such a vested right cannot be presumed unless such intention is clearly manifested by express words or necessary implication. Eventually, the Court ruled that as the old law continues to exist for the purpose of supporting the pre-existing right of appeal and that old law must govern the exercise and enforcement of that right of appeal and there is no question of applying the amended provision preventing the exercise of that right.

21. In this context, we may refer with profit to the Constitution Bench judgment in *Garikapati Veeraya v. N. Subbiah Choudhry and others.*[7] In the said decision, the Constitution Bench referred to the leading authority of the privy council in *Colonial Sugar Refining Company Ltd. v. Irving*[8]. The Constitution Bench observed that the doctrine laid down

7. AIR 1957 SC 540.

8. 1905 AC 369.

in the decision of the privy council in *Colonial Sugar Refining Company Ltd.* (supra) has been followed and applied by the Courts in India. The passage that was quoted from the Privy Council's judgment is as follows:-

> "As regards the general principles applicable to the case there was no controversy. On the one hand, it was not disputed that if the matter in question be a matter of procedure only, the petition is well founded. On the other hand, if it be more than a matter of procedure, if it touches a right in existence at the passing of the Act, it was conceded that, in accordance with a long line of authorities extending from the time of Lord Coke to the present day, the appellants would be entitled to succeed. The Judiciary Act is not retrospective by express enactment or by necessary intendment. And therefore the only question is, was the appeal to His Majesty in Council a right vested in the appellants at the date of the passing of the Act, or was it a mere matter of procedure? It seems to their Lordships that the question does not admit of doubt. To deprive a suitor in a pending action of an appeal to a superior tribunal which belonged to him as of right is a very different thing from regulating procedure. In principle, Their Lordships see no difference between abolishing an appeal altogether and transferring the appeal to a new tribunal. In either case there is an interference with existing rights contrary to the well-known general principle that statutes are not to be held to act retrospectively unless a clear intention to that effect is manifested."

22. Thereafter, the larger Bench referred to number of authorities and proceeded to cull out the principles as follows:-

> **"23.** From the decisions cited above the following principles clearly emerge:
>
> (*i*) That the legal pursuit of a remedy, suit, appeal and second appeal are really but steps in a series of proceedings all connected by an intrinsic unity and are to be regarded as one legal proceeding.
>
> (*ii*) The right of appeal is not a mere matter of procedure but is a substantive right.
>
> (*iii*) The institution of the suit carries with it the implication that all rights of appeal then in force are preserved to the parties thereto till the rest of the career of the suit.
>
> (*iv*) The right of appeal is a vested right and such a right to enter the superior court accrues to the litigant and exists as on and from the date the lis commences and although it may be actually exercised when the adverse judgment is pronounced such right is to be governed by the law prevailing at the date of the institution of the suit or proceeding and not by the law that prevails at the date of its decision or at *the* date of the filing of the appeal.
>
> (*v*) This vested right of appeal can be taken away only by a subsequent enactment, if it so provides expressly or by necessary intendment and not otherwise."

23. On a proper understanding of the authority in *Garikapati Veeraya* (supra), which relied upon the Privy Council decision, three basic principles, namely, (i) the forum of appeal available to a suitor in a pending action of an appeal to a superior tribunal which belongs to him as of right is a very different thing from regulating procedure; (ii) that it is an integral part of the right when the action was initiated at the time of the institution of action; and (iii) that if the Court to which an appeal lies is altogether abolished without any forum constituted in its place for the disposal of pending matters or for lodgment of the appeals, vested right perishes, are established. It is worth noting that in *Garikapati Veeraya* (supra), the Constitution Bench ruled that as the Federal Court had been abolished, the Supreme

Court was entitled to hear the appeal under Article 135 of the Constitution, and no appeal lay under Article 133. The other principle that has been culled out is that the transfer of an appeal to another forum amounts to interference with existing rights which is contrary to well known general principles that statutes are not to be held retrospective unless a clear intention to that effect is manifested.

24. In *Dhadi Sahu (supra)*, it has been held thus:-

> **"18.** It may be stated at the outset that the general principle is that a law which brings about a change in the forum does not affect pending actions unless intention to the contrary is clearly shown. One of the modes by which such an intention is shown is by making a provision for change-over of proceedings, from the court or the tribunal where they are pending to the court or the tribunal which under the new law gets jurisdiction to try them.
>
> xxx xxx xxx
>
> **21.** It is also true that no litigant has any vested right in the matter of procedural law but where the question is of change of forum it ceases to be a question of procedure only. The forum of appeal or proceedings is a vested right as opposed to pure procedure to be followed before a particular forum. The right becomes vested when the proceedings are initiated in the tribunal or the court of first instance and unless the legislature has by express words or by necessary implication clearly so indicated, that vested right will continue in spite of the change of jurisdiction of the different tribunals or forums."

25. At this stage, we may state with profit that it is a well settled proposition of law that enactments dealing with substantive rights are primarily prospective unless it is expressly or by necessary intention or implication given

retrospectivity. The aforesaid principle has full play when vested rights are affected. In the absence of any unequivocal expose, the piece of Legislation must exposit adequate intendment of Legislature to make the provision retrospective. As has been stated in various authorities referred to hereinabove, a right of appeal as well as forum is a vested right unless the said right is taken away by the Legislature by an express provision in the Statute by necessary intention.

26. Mr. Gupta has endeavoured hard to highlight on Section 111 of the 2003 Act to sustain the stand that there is an intention for change of forum. It is the admitted position that Legislature by expressed stipulation in the new legislation has not provided for transfer of the pending cases as was done by the Parliament in respect of service matters and suits by financial institutions/banks by enactment of Administrative Tribunal Act, 1985 and Recovery of Debts due to Banks and Financial Institution Act, 1993. No doubt right to appeal can be divested but this requires either a direct legislative mandate or sufficient proof or reason to show and hold that the said right to appeal stands withdrawn and the pending proceedings stand transferred to different or new appellate forum. Creation of a different or a new appellate forum by itself is not sufficient to accept the argument/contention of an implied transfer. Something more substantial or affirmative is required which is not perceptible from the scheme of the 2003 Act.

27. It is urged by Mr. Gupta that Section 6 of the General Clauses Act would not save the vested right of forum in view of the language employed in Section 185(2) of the 2003 Act. In this context, we may usefully refer to *Ambalal Sarabhai Enterprises Ltd. v. Amrit Lal & Co. and Another*[9] wherein the learned Judges referred to the opinion expressed in *Kolhapur Canesugar Works Ltd. v. Union of India*[10] and distinguishing

9. (2001) 8 SCC 397.

10. (2000) 2 SCC 536.

the same observed as follows:-

> **"18.** In *Kolhapur Canesugar Works Ltd. v. Union of India,* this Court held: (SCC p. 551, para 37)
>
> "*37*. The position is well known that at common law, the normal effect of repealing a statute or deleting a provision is to obliterate it from the statute-book as completely as if it had never been passed, and the statute must be considered as a law that never existed."
>
> **19.** Relying on this the submission for the tenant is, if the repealing statute deletes the provisions, it would mean they never existed hence pending proceedings under the Rent Act cannot continue. This submission has no merit. This is not a case under the Rent Act, also not a case where Section 6 of the General Clauses Act is applicable. This is a case where repeal of rules under the Central Excise Rules was under consideration. This would have no bearing on the question we are considering, whether a tenant has any vested right or not under a Rent Act."

28. We have referred to the aforesaid paragraphs as Mr. Gupta has contended that when there is repeal of an enactment and substitution of new law, ordinarily the vested right of a forum has to perish. On reading of Section 185 of the 2003 Act in entirety, it is difficult to accept the submission that even if Section 6 of the General Clauses Act would apply, then also the same does not save the forum of appeal. We do not perceive any contrary intention that Section 6 of the General Clauses Act would not be applicable. It is also to be kept in mind that the distinction between what is and what is not a right by the provisions of the Section 6 of the General Clauses Act is often one of great fitness. What is unaffected by the repeal of a statute is a right acquired or accrued under it and not a mere hope, or expectation of, or liberty to apply for, acquiring right (See *M.S. Shivananda v. Karnataka State Road Transport Corporation and Others*[11]*).*

29. In this context, a passage from *Vijay v. State of Maharashtra and Others*[12] is worth noting:-

> "....It is now well settled that when a literal reading of the provision giving retrospective effect does not produce absurdity or anomaly, the same would not be construed to be only prospective. The negation is not a rigid rule and varies with the intention and purport of the legislature, but to apply it in such a case is a doctrine of fairness."

30. We have referred to the aforesaid passage to hold that tested on the touchstone of doctrine of fairness, we are also of the opinion that the legislature never intended to take away the vested right of appeal in the forum under the 1998 Act.

31. On the basis of the aforesaid analysis it can safely be concluded that the conclusion of the High Court that it had jurisdiction to hear the appeal is absolutely flawless.

32. The next aspect that emanates for consideration is that whether the finding recorded by the High Court that the Commission has no authority to issue directions or to impose penalty as it had become *functus officio* is correct or not. We may state here that the learned counsel appearing for the parties very fairly stated that the High Court was not correct in using the expression that the Commission had become *functus officio*. Learned counsel for the parties, however, urged that the High Court, by stating that the Commission had become *functus officio*, it meant after the Commission had fixed the tariff it had no power to give directions or proceed with monitoring for the purpose of compliance of the directions. It is submitted by Mr. Ganesan, learned counsel for the respondent, that Section 22 occurring in Chapter V of the 1998 Act deals with

11. (1980) 1 SCC 149.

12. (2006) 6 SCC 289.

powers and functions of the State Commission and for exercise of power of Board under Section 22(2) a notification in the official Gazette by the State Government is required to be issued, but the same was not issued when the Commission passed the order and hence, it is bereft of jurisdiction. In oppugnation of the said submission, Mr. Gupta, learned senior counsel appearing for the Commission, has submitted that though no notification under Section 22(2) of the 1998 Act has been issued, yet the directions which had been issued can fall within the ambit of Section 22(1)(d) of the 1998 Act.

33. To appreciate the said submission we may refer to Section 22(1)(d) of the 1998 Act. It reads as follows: -

> "**22. Functions of State Commission**. – (1) Subject to the provisions of Chapter III, the State Commission shall discharge the following functions, namely: -
>
> xxx xxx xxx
>
> (d) to promote competition, efficiency and economy in the activities of the electricity industry to achieve the objects and purposes of this Act."

The language employed in Section 22(1)(d) has to be understood in its proper connotative expanse. It enables the State Commission to carry out the function for promoting competition, efficiency and economy in the activities of the electricity industry to achieve the objects and purposes of the Act. We find that the State Commission under Section 22(1)(d) was conferred power to address to various facets and we see no reason that the terms, namely, "efficiency, economy in the activity of the electricity industry" should be narrowly construed. That apart, it would not be seemly to say that under Section 22(1) of the 1998 Act the Commission had only the power to fix the tariff and no other power. Had that been so, the legislature would not have employed such wide language in Section 22(1)(d). At this stage, we may also note that the powers enumerated under sub-section (2) of Section 22 are more

enumerative in nature and the jurisdiction conferred comparatively covers more fields. In the present case, if we read the directions issued by the Commission in proper perspective, the same really do not travel beyond the power conferred under Section 22(1)(d) of the 1998 Act. We are inclined to think so as all of them can be connected with the tariff fixation and with the associated concepts, namely, purpose to promote competition, efficiency and economy in the activities of the electricity industry regard being had to achieve the objects and purposes of the Act.

34. It is not inapposite to take note of the fact that the Board had agreed to comply and submit the report. Though the Commission later on has found some fault with the Board, yet we factually find on a close perusal of the explanation by the Board that there has been real substantial compliance with the directions. In this factual backdrop, it was not correct on the part of the Commission to impose penalty on the Board. However, we may hasten to add that under the 2003 Act constitution of the State Commission is governed by Section 82. Section 86 deals with the function of the State Commission. On a reading of Section 86 we find that at present no notification is required to be issued to confer any power on the State Commission. It is conferred and controlled by the statute. If anything else is required to be done in praesenti, the Commission is at liberty to proceed under the provisions of the 2003 Act. Be it clarified, our grant of liberty may not be understood to have said that the Commission can take any action arising out of its earlier order dated 29.10.2001 or any subsequent orders passed thereon. We have said so, for the Commission and a statutory Board can really work to achieve the objects and purposes of the 2003 Act.

35. The appeals stand disposed of in the above terms leaving the parties to bear their respective costs.

K.K.T. Appeals disposed of.

STATE OF U.P. AND ORS.
v.
JAIPRAKASH ASSOCIATES LTD.
(Civil Appeal No.3026 of 2004)

OCTOBER 18, 2013

[H.L. DATTU AND SUDHANSU JYOTI MUKHOPADHAYA, JJ.]

Constitution of India, 1950:

Articles 301 and 304(a) – Inter-State Trade and Commerce – Tax rebate – Granted by State Government (State of U.P.) by Notification – To cement manufacturing units – The first condition for getting benefit of the rebate was that the units were established in the districts of that State and the second condition was that the units were manufacturing cement by using fly-ash purchased from that State – The Notification whether in violation of Arts. 301 and 304(a) – Held: The Notification is violative of Arts. 301 and 304(a) – It discriminated between imported goods and similar locally manufactured goods (i.e. cement manufactured by using fly-ash procured from the State of U.P.) – Object of the Government was to grant rebate to provide incentive to the manufacturing units using fly-ash – Thus the first condition was discriminatory – If the first condition is severed from the Notification, it would not frustrate the object of the notification – Therefore, using doctrine of severability, condition No. 1 is severed from the Notification – Uttar Pradesh Trade Tax Act, 1948 – s. 5.

Art. 304(a) – Nature and scope of – Held: Article 304(a) is an exemption to Art. 301 – It does not prevent levy of tax on goods – But such levy of tax is prohibited, which would result in goods imported from other States and similar goods produced or manufactured within the State.

Art. 304 – Powers under – Extent and Scope of – Held: The powers given to State Legislatures are not unrestricted, and are bound to function within limitations stipulated u/Art. 304(a) – The power u/Art. 304(a), though an exception to Art. 301, but is not a blanket power intended to be conferred to the State Legislature – Powers u/Art. 304(b) also are to be exercised sparingly.

Arts. 302 and 304(a) – Powers under – Distinction between.

Taxation – 'Rebate of tax' – Held: It is such a device or weapon of taxation used by the Government, validity where of is tested on the touchstone of Article 304(a), in the circumstances under which they are used – Exemption or rebate of tax is within the purview of taxation.

Constitutionalism – Test of constitutional validity of a statute – Held: Machinery provisions cannot be used to test the constitutional validity of a statute – Issue of territoriality should also not be a factor to determine the constitutional validity of a notification.

Doctrine – Doctrine of severability – Applicability of – Discussed.

Words and Phrases:

'Discrimination' – Meaning of, in the context of taxation and in the context of Art. 304(a) of the Constitution of India, 1950.

'Rebate' – Meaning of – Explained in the context of Taxation.

'Rebate of tax' and 'incentive' – Distinction between:

'Tax' and 'Taxation' – Meaning of, in the context of Article 304(a) of the Constitution of India, 195

The State of Uttar Pradesh, to encourage manufacturers of cement using fly-ash in manufacturing of their products, in exercise of its power u/s. 5 of Uttar Pradesh Trade Tax Act, 1948, issued Notification dated 27.2.1998. The State imposed certain conditions on the manufacturers in order to take benefit of the rebate provided in the Notification. The first condition was that the goods should be manufactured in a unit established in the State of Uttar Pradesh. The second condition was that such goods shall be manufactured using fly-ash purchased from the thermal power stations situated in the districts of the State of Uttar Pradesh. The respondent-cement industries situated in neighbouring States who were manufacturing cement in the State of Madhya Pradesh after procuring fly-ash from the State of Uttar Pradesh, filed writ petition, seeking quashing of the Notification in so far as first condition of the Notification was concerned.

High Court held that grant of rebate of tax by the State Government discriminated between the imported goods and the goods manufactured in Uttar Pradesh restricting the free movement of goods from one State to the other and therefore impinges articles 301 and 304(a) of the Constitution. The Court further applying doctrine severability declared the first condition of the Notification as illegal, arbitrary and discriminatory and accordingly quashed the same and granted rebate to the respondent-manufacturers. Hence the present appeal by the State.

The questions for consideration before this Court were; whether the grant of rebate of tax is hit by constitutional limitation on the State legislature under article 304(a) read with article 301 of the Constitution of India, as and when it discriminates between the imported goods and the goods manufactured and produced outside the State; whether the grant of rebate, directly or

indirectly restrict the free flow of trade, commerce and intercourse among States by assuming the effects of an exemption/ concession which is nothing but a concept within the scope of taxation; and whether the first condition of the notification be severed, if it is found to be violative of article 304(a) of the Constitution without striking down the whole of the notification.

Disposing of the appeals, the Court

HELD:1.1. Article 304(a) of the Constitution is an exception to article 301 of the Constitution. Article 304(a) does not prevent levy of tax on goods; what is prohibited is such levy of tax on goods as would result in discrimination between goods imported from other States and similar goods manufactured or produced within the State. The object is to prevent imported goods being discriminated against, by imposing a higher tax thereon than on local goods. What Article 304(a) demands is that the rate of taxation on local as well as imported goods must be the same. This is designed to discourage States from creating State barriers or fiscal barriers at the boundaries. Article 304(a) of the Constitution empowers the State to levy tax, with an intent that Part XIII of the Constitution does not affect the power of taxation given under Part XII of the Constitution. It is to preserve and protect the broad object of Article 301 of the Constitution. Article 304(a) only limits the power of the State legislature from imposing such taxes that would discriminate between imported goods and domestic goods and restrict free movement of goods between States. [Para 27] [975-B-F]

Atiabari Tea Co. Ltd. vs. The State of Assam and Ors **AIR (1961) SC 232: 1961 SCR 809 – relied on.**

1.2. Article 304(a) of the Constitution admits two exception in favour of the State legis t

trade, commerce, and intercourse throughout the territory of India shall be free. Clause(b) to article 304(a) is an exception which enables a State legislature to impose such "reasonable restrictions" on the freedom of trade, commerce and intercourse as may be required in the "public interest". But no bill or amendment for the purpose of clause(b) shall be introduced or moved in the legislature of a State without the previous sanction of the President. [Para 29] [976-F-H]

1.3. The Principle of 'non- Discriminatory tax' as provided in Article 304(a) of the Constitution of India is a sine-qua–non to free movement of goods between nations/States in several jurisdictions and also in international trade and policy. Discrimination as explained under World Trade Organization ("WTO") jurisprudence is spoken of in terms of effect and intention behind such discrimination. Intent is referred to as 'aim' or 'motive' or 'purpose' of such discrimination and the other factor commonly associated with discrimination is 'effect' that is whether a measure has a discriminatory effect (also known as the disparate impact) against imports. WTO members are free to choose any system of taxation they deem appropriate, provided that they do not impose on foreign products taxes in excess of those imposed on like products. The effect of tax should not be such that two like goods are given discriminatory treatment. [Para 30] [977-A-D]

1.4. At the same time, it cannot be doubted that rising of protective walls may be justified in international trade. The Government can and has been providing such protectionist measures to encourage the growth and establishment of industries in the country and to protect them from competition from foreign manufacturers. But unlike the international trade policies and the commerce clause in United States Constitution, the Constitution of India provides for regulating inter-State trade and

commerce. The Parliament can take all protective measures under Article 302 of the Constitution of India as may be required in public interest. But there are certain obvious differences between the powers conferred to the Parliament under Article 302 and State legislature under Article 304(a) of the Constitution. The powers given to the State legislature are not unrestricted and are bound to function within limitations stipulated under Article 304(a) of the Constitution of India. The powers even under Article 304(b) are to be exercised sparingly and after fulfilling all the conditions of Article 304 of the Constitution of India. The power conferred under Article 304(a) although an exception to Article 301 of the Constitution, but is not a blanket power intended to be conferred to the State legislature. [Para 31] [977-E-H; 978-A]

1.5. Article 304(a) ensures only equal rate of tax for incoming goods. So if such goods are taxed at a higher rate or where they are taxed at any rate when indigenous goods enjoy concessional rate of tax, Article 304(a) is attracted. [Para 33] [979-C]

1.6. Article 304(a) is a provision that deals with taxation. It places goods imported from sister States on a par with similar goods manufactured or produced within the State in regard to State taxation in the allocated field. The object of Article 304(a) was to limit the power of taxation by States so as to prevent discrimination against imported goods by imposing taxes on such goods at a higher rate than is borne by indigenous goods. The tax referred to in Article 304(a) is a 'tax on goods'. The word "tax" and "taxation" is all sorts of exaction which swell the public funds. Taxation in its broadest and most general sense, includes every charge or burden imposed by the sovereign power upon persons, property or property right, for the use and support of the Government and to e

its appropriate functions, and in that broad definition there is included a proportionate levy upon persons or property and various other methods or devices by which revenue is extracted from persons and property. The term 'tax' is to be read in all-embracing and sweeping sense. Such methods or device used by the Government from time to time are not ordinarily open to serious questions but their scope and application vary according to the nature of the subject under discussion and the circumstances under which they are used. [Para 38] [981-D-H; 982-A]

State v. Chicago & N. W. R. Co., **128 Wis 449, 108 N. W. – referred to**

2.1. The legislature has the power to exempt from taxation according to its views of public policy provided no constitutional provisions are violated. The United States Constitution under the Equality and Uniformity clause mandates that where the Constitution requires taxation to be equal and uniform, it is held in most States that the legislature must tax all such persons or property and cannot grant any exemptions unless the power to exempt is expressly conferred by the Constitution. In some states, however, the contrary is held but even in such states it is held that exemptions are not valid unless including all property and persons of the same class whether such person as subject to such exemption is inside the State or situated outside the State. [Para 39] [983-A-C]

Jefferson Branch Bank v. Skelly; **66 U.S. 436 – referred to.**

Congressional Budget and Fiscal Operations, **2 U.S.C.A.§ 622 – referred to.**

2.2. Exemption has two-fold impact. First,

exemptions/ concessional rate of tax affect consumer choice by impacting relative pricing and, thus, materially altering the economic balance. It is because consumption will tend to shift towards untaxed items, the prices of those items and the items used to produce them will increase while the prices of taxed items will decrease relatively. Second, such exemptions unfairly burden some businesses either within the same industry or in other competing industries. [Para 40] [983-D-E]

2.3. Rebate is another such device used by the Government which when given on the rate of tax to the full amount of tax levied, it gives favourable treatment to one class of dealers situated within the state barring the dealers similarly placed outside the State manufacturing goods using the same raw material. The grant of such rebate has the colour of exemption/ concessional rate of tax along with the same deleterious effects of an exemption. [Para 41] [983-F-G]

2.4. Rebate means abatement, discount, credit, refund, or any other kind of repayment. Rebates have been normally used as justifiable incentives given by the Government to stimulate small industries or newly established industries. But to understand Rebate of tax as rebate per se would be a misnomer. Rebate of tax is the rebate on rate of tax and is essentially the arithmetic of rate. The term 'rate' is often used in the sense of standard or measure. It is the tax imposed at a certain measure or standard on the total turnover of the goods. Rate, in other words is the relation between the taxable turnover and the tax charged. Rebate of tax or exemption is distinguished from non-imposition or non-liability. [Para 46] [986-D-G]

Estate of Bernard H. Stauffer, Bonnie H. Stauffer, Executrix, v. Commissioner of Internal Revenue **48 U.S. T.C. 277 – referred to.**

2.5. In rebate of tax, the sales or purchases would have to be included in the gross turnover of the dealer because they are prima facie liable to tax and the only thing which dealer is entitled to in respect thereof is the deduction from the gross turnover in order to arrive at the net turnover on which the tax can be imposed. On the other hand, in the case of non-imposition or non-liablity, the sales or purchases are exempted from taxation altogether. The Legislature cannot enact a law imposing or authorizing the imposition of a tax thereupon as they are not liable to any such imposition of tax. If they are thus not liable to tax, no tax can be levied or imposed on them and they do not come within the purview of the Act at all. The very fact of their non-liability to tax is sufficient to exclude them from the calculation of the gross turnover as well as the net turnover on which sales tax can be levied or imposed. [Para 46] [986-G-H; 987-A-C]

A.V. Fernandez v. The State of Kerala; **AIR 1957 SC 657 – referred to.**

Firm A.T.B Mehta Masjid & Co v. State of Madras and Anr. **AIR 1963 SC 928;** *W.B. Hosiery Association and others v. State of Bihar* **(1988) 4 SCC 134;** *H. Anraj v Government of Tamil Nadu* **(1986) 1 SCC 414;** *Western Electronics and Another v. State of Gujarat and others* **1988 2 SCC 568;** *Loharn Steel Industries v. State of Andhra Pradesh* **(1997) 2 SCC 37;** *State of U.P. and another v. Laxmi Paper Mart and others* **AIR 1997 SC 950;** *Lakshman v. State of Madhya Pradesh* **1983 SCR 3124 – relied on.**

2.6. The concept of rebate of tax in the instant case is akin to concessional/ reduced rate of tax. Rebate is though ex-hypothesi in the nature of subsidy and other incentives given by the Government but conceptually rebate of tax and incentives are different and it needs to be explained in reference to the purpose and nature of such rebate of tax introduced by the legislature. The

legislation in respect of a rebate has taken different forms, one of them is a partial rebate in the tax, where the deduction is given partially on the gross amount and the other is the power reserved for the Government to permit rebate in respect of any goods to the full amount of the tax levied at any point in the series of sales of such goods. A dealer who is entitled to a rebate under any notification will collect the tax from the consumers at the point of purchase and then have to pay the full amount of sales tax due on his turnover in that quarter; and claim rebate in terms of the notification in accordance with the provision in the rules. However, the claim for rebate need not necessarily be handed back to the payer after he has paid the stipulated sum, it can also be paid in advance of payment. It is nothing but a remission or a payment back or it is sometimes spoken of as a discount or a drawback. It cannot be disputed that it is the discretion of the State Government, through its legislature, to grant rebate to the full amount of sales tax, unless its power of taxation is limited by Constitutional provisions. [Para 36] [979-B-G]

2.7. In the facts of the present case, the legislature authorizes the State Government under Section 5 of the Act to issue notification in the public interest to grant rebate up to the full amount of the tax levied on any specific point in the series of sales/ purchase of such goods. Such rebate is only extended to the districts in State of Uttar Pradesh. The Government of Uttar Pradesh has the power to refund or discount to the full amount of rate of sales tax levied on a dealer, provided the power to discount does not overall has effects of a weapon of taxation that would discriminate between the goods imported and manufactured in Uttar Pradesh as laid down in Article 304(a) of the Constitution. [Para 36] [979-G-H; 980-A-B]

Shree Mahavir Oils and Anr. vs. *d*

Kashmir **(1996) 11 SCC 39: 1996 (9) Suppl. SCR 356;** *Video Electronics Ltd. v. State of Punjab* **1990 (3) SCC 87:1989 SCR Supp.(2) 731 – relied on.**

2.8. 'Rebate of tax' in the instant case is such a device or weapon of taxation used by the Government from time to time which is though not in question in all situations but their validity is tested in the touchstone of Article 304(a) of the Constitution in the circumstance under which they are used. If the rebate of tax by way of repayment to the full amount of tax levied qualifies within the same meaning as that of exemption, then such discount would a fortori mean discrimination on the rate of tax by repaying by way of a rebate to one class of local dealers the whole amount of sales tax paid and on the other hand the outside dealers are taxed higher in absence of the benefit of rebate. This situation squarely falls within the meaning of 'discrimination' as contemplated under Article 304(a) of the Constitution of India. [Para 38] [982-A-C]

2.9. The exemption or rebate of tax is therefore within the purview of taxation. In the instant case, if the grant of rebate of tax by the State Government under Section 5 of the Act is to the full amount of tax levied, then for the dealers manufacturing cement using fly-ash outside the State of Uttar Pradesh but selling it in Uttar Pradesh, though the State Government contends that the rate of tax is same for the dealers inside Uttar Pradesh and outside Uttar Pradesh, but the overall effect is that there is no tax levied on the net turnover after deductions being made from the gross turnover but, on the other hand, the dealers manufacturing or producing cement using fly-ash outside Uttar Pradesh are taxed at the rate of 12.5%. Therefore, it can be said that the rebate of tax is in the nature of exemption and the blanket exemption without reasons are discriminatory and violating article 304(a) of the Constitution of India. [Para 47] [987-D-F]

2.10. Therefore, the test to be applied to determine whether rebate is within the realm of tax defined in Article 304(a) of the Constitution of India so as to say that it discriminates between the two class of goods: locally manufactured goods and the imported goods when both the class of dealers meet the conditions required to qualify for the grant of rebate i.e. the use of fly-ash, is the overall effect or impact of such rebate on the manufacturer. [Para 42] [983-H; 984-A]

3.1. Doctrine of severability provides that if an enactment cannot be saved by construing it consistent with its constitutionality, it may be seen whether it can be partly saved. "When a statute is in part void, it will be enforced as against the rest, if that is severable from what is invalid". Seven propositions of severability, out of which, one of them provided that if the valid and the invalid portions are distinct and separate that after striking out what is in-valid, what remains is in itself a complete code independent of the rest, then it will be upheld notwithstanding that the rest has become unenforceable. What the Court has to see is, whether the omission of the impugned portions of the Act will "change the nature or the structure or the object of the legislation". In the facts of the present case, striking down Clause (1) of the notification alone does not change the object of the legislation. It is a notification passed in public interest and therefore even if Clause (1) of the notification is expunged, leaving behind the rest of the notification intact, the purpose of the Government to grant rebate to provide incentive to the manufacturing units using fly-ash is not lost. [Para 48] [987-H; 988-A-E]

D.S. Nakara vs. Union of India **1983 2 SCR 165;** *RMD Chamarbaugwala vs. Union Of India* **AIR 1957 SC 628: 1957 SCR 930;** *A. K. Gopalan vs. State of Madras* **AIR 1950 SC 27: 1950 SCR 88 – relied on**

3.2. Thus the condition No. 1 is discriminatory and violates article 304(a) of the Constitution of India and therefore needs to be severed from the rest of the notification which can operate independently without altering the purpose and the object of the notification. [Para 50] [989-C]

3.3. It is not correct to say that since the assessing authorities would not be in a position to verify the claim for grant of rebate of tax by manufacturers of cement using fly-ash outside the State of Uttar Pradesh, the benefit under the notification cannot be extended to them. The explanation appended to the notification authorises the assessing authorities to verify the claim that may be made by the manufacturers including the fact whether an assessee(s) satisfy the conditions prescribed in the notification. If they do not fall within the parameters of the notification the assessing authority can always reject the claim of the manufacturers. The machinery provisions cannot be used to test the constitutional validity of a statute because the liability is always created through substantive provisions. Issue of territoriality should not be a factor to determine the constitutional validity of the notification. [Paras 51 and 52] [989-D-F; 990-A-B]

G.B. Prabharkar Rao v. State of Andhra Pradesh, **1985 Supp. SCC 432 – relied on.**

3.4. Therefore, 'rebate of tax' granted by the State Government to cement manufacturing units using fly-ash as raw material in a unit established in the districts of State of Uttar Pradesh alone, is violative of the provisions contained in articles 301 and 304(a) of the Constitution of India. It is further declared that the notification would also apply to respondent(s)- cement manufacturing units. [Para 53] [990-C]

Case Law Reference:

1961 SCR 809	**relied on**	**Para 27**
1996 (9) Suppl. SCR 356	**relied on**	**Para 37**
1989 SCR Supp.(2) 731	**relied on**	**Para 37**
128 Wis 449	**referred to**	**Para 38**
66 U.S. 436	**referred to**	**Para 39**
1963 Suppl. SCR 435	**relied on**	**Para 42**
1988 (2) Suppl. SCR 378	**relied on**	**Para 43**
1985 (3) Suppl. SCR 342	**relied on**	**Para 43**
1988 (3) SCR 768	**relied on**	**Para 44**
1996 (10) Suppl. SCR 898	**relied on**	**Para 44**
1997 (1) SCR 914	**relied on**	**Para 45**
1983 SCR 3124	**relied on**	**Para 45**
48 U.S. T.C. 277	**referred to**	**Para 46**
AIR 1957 SC 657	**referred to**	**Para 46**
1957 SCR 837	**relied on**	**Para 46**
1957 SCR 930	**relied on**	**Para 48**
1950 SCR 88	**relied on**	**Para 48**
1983 2 SCR 165	**relied on**	**Para 49**
1985 Suppl. SCR 573	**relied on**	**Para 52**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3026 of 2004.

From the Judgment & Order dated 29.01.2004 of the High Court of Judicature at Allahabad in Civil Misc. Writ Petition No. 957 of 1999.

WITH

C.A. Nos. 3025, 5567, 7190 of 2004, 333 of 2006, 9187 of 2013 & 9185-9186 of 2013.

Sunil Gupta, Ashok Desai, R.S. Suri, S.B. Upadhyay, Dhruv Agarwal, Vivek Vishnoi, Ravi P. Mehrotra, Abhniav Kumar Malik, Vinay Garg, Pawan Upadhyay, Sharmila Upadhyay, Pawan Kishore Singh, Praveen Kumar, Sunaina Kumar, Swetank Sailakwal, Vanita Bhargava, Nitin Mishra, Gauri Rishi (for Khaitan & Co.), Amar Dave, Nikhil Goel for the appearing parties.

The Judgment of the Court was delivered by

H.L. DATTU, J. 1. Leave granted.

2. The substantial question of law that requires to be considered and decided in these appeals is, whether grant of rebate of tax by the State Government by issuing a notification in exercise of its powers under Section 5 of Uttar Pradesh Trade Tax Act, 1948 ("the Act", for short) discriminates between the goods imported from neighbouring States and goods manufactured and produced in the State of Uttar Pradesh and therefore contravenes the Constitutional Provisions *viz.*; articles 301 and 304(a) of the Constitution of India.

3. The lead case is Civil Appeal No. 3026 of 2004. The appellants are public limited companies, manufacturing cement in their manufacturing units in Rewa district situate in the State of Madhya Pradesh after procuring fly-ash from the thermal power stations in the State of Uttar Pradesh and thereafter selling the manufactured product *viz.* Cement in the districts of State of Uttar Pradesh.

4. The fly-ash is produced from coal combustion and normally dispersed into the atmosphere which contains toxic chemicals that can cause environmental pollution and hazards.

Therefore for utilization of fly-ash and to control pollution, cement projects were set up to make use of the fly-ash generated from the power plants.

5. To encourage manufacturers using fly-ash in manufacturing of their products, the Government of Uttar Pradesh in exercise of its powers under Section 5 of the Act, had issued notification dated 18.06.1997, granting "rebate of tax" to the dealers in the State of Uttar Pradesh excluding all other dealers manufacturing cement outside the State of Uttar Pradesh using fly-ash purchased in the State of Uttar Pradesh. Annexure appended to the notification provided for name of the districts and the period for which the rebate will be allowed. The notification prior to its rescinding only specified the percentage of rebate of tax to be granted depending on the content of fly-ash used by the dealers in the manufacturing of cement.

6. On a finding by the Government of Uttar Pradesh on a later date that the notification is vaguely worded, has rescinded the earlier notification dated 18.06.1997, and has issued fresh notification dated 27.02.1998, in exercise of its powers under Section 5 of the Act. Apart from others the notification provides certain conditions which requires to be fulfilled if the manufacturing units intend to take benefit of the notification. The condition No. 1 of the notification specifies that to avail the benefit of rebate, the goods should be manufactured in a unit established in the State of Uttar Pradesh and secondly, such goods shall be manufactured using fly-ash purchased from the thermal power stations situated in the State of Uttar Pradesh. The notification specifically enlists the areas in Uttar Pradesh districts alone for the purpose of the grant of rebate of tax by the Government and therefore restricted the benefit of rebate only to the units manufacturing and producing cement using fly-ash in Uttar Pradesh. The notifications require to be extracted. They are as follows:

"[S. No. 1263]

Notification No. T.T.-2-1885/XI-9(226)94-U.P. Act-15-48-Order-97, dated 18-6-1997

[Published in U.P. Gazette, dated 18.06.1997]

In exercise of the power under section 5 of the Uttar Pradesh Trade Tax Act, 1948 (U.P. Act No. XV of 1948) the Governor is pleased:-

(a) to declare the goods having fly-ash contents of 10 per cent of more by weight to be notified goods for the purposes of this section;

(b) to grant a rebate of tax of twenty five percent on goods having fly-ash contents between ten to thirty per cent by weight and a rebate of tax of fifty per cent on the goods having fly-ash contents exceeding thirty percent by weight on the tax levied under the Act in the district mentioned in column-2 Annexure given below for the period mentioned in column-3 of the said Annexure:-

ANNEXURE

Serial Number	Name of District	Period for which the rebate of tax will be allowed
1	2	3
1.	Banda, Hamipur, Jalaun, Mahoba, Jhansi, Lalitpur and Shahuji Nagar	Twelve Years
2.	Almora, Chamoli, Dehradun, Fatehpur, Jaunpur, Kanpur	Twelve Years

	(Dehat), Nanital, Fauri Garhwal, Pithoragarh, Sultanpur, Champawat, Tehri Garhwal, Udham Singh Nagar, Uttar Kashi and Growth Centre.	
3.	(i) The Districts of Azamgarh, Ambedkar-Nagar, Bahraich, Ballia, Barabanki, Deoria, Etah, Etawah, Faizabad, Farrukhabad, Ghazipur, Gonda, Hardoi, Mainpuri, Mathura, Mau, Moradabad, Padrauna, Pillibhit, Pratapgarh, Raibareili, Rampur, Shahjahanpur, Sidharth Nagar, Sitapur, Unnao, Kaushambi, Jyotibaphule Nagar, Mahamaya Nagar and Shravasti	Ten Years
	(ii) The area of Allahabad District in South of the river Jamuna and confluent Ganga (Excluding the area included under Municipal Corporation Allahabad)	Ten Years
	(iii) The Taj Trapezium Area	Ten Years
	(IV) Greater Noida Industrial Development area	Ten Years
	The Districts of Agra (excluding Taj Trapezium area), Aligarh (excluding Tax Trapezium Area), Allahabad (excluding the area in south of rivers Jamuna and confluent Ganga but including the area included under Mur	

Corporation Allahabad), Bareilly, Bhadohl, Bijnor, Firozabad (excluding Taj Trapezium area), Ghaziabad (excluding Greater NOIDA Industrial Development Area), Gorakhpur, Haridwar, Kanpur (Nagar), Lakhimpur Kheri, Lucknow, Maharajganj, Meerut, Muzaffarnagar, Saharanpur, Varanasi, Gautam Budh Nagar, Chandauli, Mirzapur and Sonbhadra.

7. The second notification, dated 27.02.1998 issued by the Government of Uttar Pradesh is extracted and reads as under:-

"[S. No. 1289]

Notification No. T.T.-2-592/XI-9(226)94-U.P. Act-15-48

Order-98, dated 27-2-1998

Whereas, the State Government is satisfied that it is expedient in the public interest so to do:

Now, therefore, in exercise of the powers under section 5 of the Uttar Pradesh Trade Tax Act, 1948 (U.P. Act No. XV of 1948), read with Section 21 of the Uttar Pradesh General Clauses Act, 1904 (U.P. Act No. 1 of 1904), the Governor, with effect from March 1, 1998 is pleased:-

(a) to rescind the Notification No. T.T.-2-1885/XI-9(226)94-U.P. Act-15-48 Order-97, dated June 18, 1997;

(b) to grant a rebate of tax of twenty five percent on goods having fly-ash contents between ten to thirty per cent by weight and a rebate of tax of fifty per

cent on the goods having fly-ash contents exceeding thirty percent by weight on the tax levied under the Act in the districts mentioned in column-2 Annexure given below for the period mentioned in column-3 of the said Annexure subject to the following condition:-

CONDITIONS

(i) Such goods shall be manufactured in a unit established in the area mentioned in column-2 of the Annexure;

(ii) Such goods shall be manufactured using fly-ash, purchase or received from the thermal power stations situated in Uttar Pradesh;

(iii) the dealer claiming rebate of tax under this notification shall keep records in which following information will be shown:

(a) date;

(b) name of thermal power stations from which fly-ash is purchased or received;

(c) weight of fly-ash;

(d) name of manufactured goods;

(e) weight of manufactured goods

(f) weight of fly-ash used in manufacturing of such goods

(g) weight of other goods used in manufacture of such goods;

(iv) the total weight of manufactured goods and percentage of fly-ash used, and

on goods of packing of such goods as far as possible.

ANNEXURE *(Supra)*

Explanation:- The verification of percentage of fly-ash used by fly-ash based industries shall be made on the basis of Government orders issued in this behalf from time to time."

8. To complete the narration, it is apropos to state that the aforesaid notification is rescinded by the State Government with effect from 14.10.2004 by issuing notification dated 14.10.2004.

9. The cement industries situated in the neighbouring States aggrieved by the notification of the Government of Uttar Pradesh, dated 27.02.1998 had approached the High Court by filing Writ Petitions. In that they had sought for quashing of the notification, dated 27.02.1998 insofar as Condition No. 1 (as extracted above) of the notification and other consequential reliefs.

10. The High Court has come to a finding on two broad issues; firstly, whether Condition No. 1 of the notification *i.e.* the grant of rebate of tax on the sale of cement in the Districts of Uttar Pradesh alone contravenes articles 301 and 304(a) of the Constitution of India. On the aforesaid issue, the Court has concluded that the grant of rebate of tax by the State Government discriminated between the imported goods and the goods manufactured in Uttar Pradesh restricting the free movement of goods from one State to the other and therefore impinges articles 301 and 304(a) of the Constitution of India.

11. The Second question that is considered and decided by the High Court, is, whether doctrine of severability will apply and therefore if Condition No. 1 in the notification violates articles 301 and 304(a) of the Constitution of India; should the

notification be struck down in its entirety or merely the impinging condition in the notification. The High Court has relied on the decision of this Court in *Loharn Steel Industries v. State of Andhra Pradesh*, (1997) 2 SCC 37, and has come to the conclusion that if certain conditions in the notification violate freedom of trade and commerce, then that portion of the notification restricting rebate of tax to the districts in State of Uttar Pradesh alone is severable. Therefore, the High Court for the reasons stated above has declared the Condition No.1 of the notification as illegal, arbitrary and discriminatory, accordingly has quashed the Condition No.1 of the notification and also granted consequential relief in the form of rebate to the respondents-herein and further has directed that deposits made by the respondents in excess of what was payable was to be refunded with an interest of 10% per annum.

12. Being aggrieved, the Revenue calls in question the correctness or otherwise of the common judgment and order passed by the High Court in a batch of Writ Petitions dated 29.01.2004.

13. Shri Sunil Gupta, learned senior counsel appearing for the appellants contended that the notification issued by the Government provides for grant of rebate to an industry which manufactures cement by using fly-ash as a raw material. The rebate is granted by the Government to encourage industries in removing and re-using fly-ash. Since the notification only provides for rebate, it would not fall within the meaning ascribed to 'any tax' under article 304(a) of the Constitution and would therefore does not contravene the Constitutional Provisions. In aid of his submission, the counsel would heavily rely on the decision of this Court in the case of *Video Electronics Pvt. Ltd. v. State of Punjab*, (1990) 3 SCC 87. The learned counsel would further argue that rebate and imposition/ exemption are two different concepts. Exemption is an antithesis of 'imposition' and it belongs to the realm of imposition of tax and therefore exemption simpliciter without reason is [illegible]

of the Constitution of India. Rebate, on the other hand, is repayment or refund of an amount and therefore it may not be a subsidy but it is in the form of an incentive or a grant. He further would point out that imposition of tax is different from collection or repayment of tax. In other words, he would submit that there are two different stages:- one would be the imposition and levy of taxes and the other is collection and repayment of taxes. Rebate of tax as such is a repayment of taxes and is certainly not a part of levy or imposition of taxes. He would further submit that for rebate of tax as against non-imposition or exemption at point of tax being common, Part XIII of the Constitution will not apply.

14. In the second limb of the argument, the learned counsel would submit that there are two crutches in the notification, if one of them is taken away the other cannot function independently. Therefore, he would submit that because the respondents have not challenged Clause(2) and have only challenged Clause(1) of the notification, then while granting relief if one of the condition is declared invalid then both the clauses of the notification are to be struck down.

15. Thirdly, the learned counsel would contend that the State of Uttar Pradesh has no territorial jurisdiction over the industrial units situate outside the State of Uttar Pradesh and therefore, the notification also inherently does not and cannot give the Uttar Pradesh Authorities any extra territorial jurisdiction. Therefore, it is nigh impossible for the accessing authorities to effectively enforce machinery and procedural provisions. This aspect of the matter is not taken note of is the submission of the learned counsel. Finally concludes, that, rebate is outside the scope of Part XIII and article 304(a) of the Constitution of India, and Section 5 of the Act is a beneficial legislation passed in public interest by the State Government and therefore a liberal approach requires to be adopted by this Court.

16. *Per Contra*, Shri Dhruv Agarwal, learned senior counsel would contend, that, by reason of the notification all the sales of the Cement in Uttar Pradesh manufactured by cement industries using fly ash for such manufacture outside the State of Uttar Pradesh are subjected to levy of sales tax at the rate of 12.5 per cent, whereas the sales of the cement manufactured by cement industries in Uttar Pradesh are granted rebate of tax from such levy and thus the cement industries outside the State of Uttar Pradesh are clearly discriminated against. It is submitted that this discrimination violates the provisions of articles 301 and 304(a) of the Constitution of India. It is further contended that article 304(a) of the Constitution speaks of imposition of tax and rebate of tax is nothing but a facet of imposition of tax and therefore the provision of article 304(a) of the Constitution is attracted. He would further contend that article 304(a) of the Constitution is not meant to be blanket legislation and that grant of incentives and subsidies for backward areas given under the provisions of the Act are different from rebate of tax given under the notification. He would rely on *Shree Mahavir Oils and another v. State of Jammu and Kashmir*, (1996) 11 SCC 39, and would submit that the aforesaid case clarified the observations made in the Video Electronics case (*Supra*), wherein it is observed that exemption without reasons is discriminatory and would directly hit by article 304(a) of the Constitution of India. He would further point out that rebate of tax would have the same effects of an exemption because it would mean refunding the full amount of tax collected. Therefore, rebate is nothing but a concessional rate of tax.

17. The learned counsel, would further argue on the point of severability that while severing, the scope of the provision is enlarged and therefore if the invalid portion of the notification *viz.* Condition No.1 of the notification can be severed from the valid portion of the notification without changing the object of the notification, then relying on the prin*a*

v. Union of India, 1983 2 SCR 165, the doctrine of severability should be made applicable. Lastly it is submitted that the constitutional validity of a taxing provision cannot be tested on the touch stone of inability in enforcing machinery provision.

18. Shri Ashok H. Desai, learned senior counsel would argue that the primary question for consideration is whether the rebate of tax introduced by the Government of Uttar Pradesh creates a trade barrier/ fiscal barrier or in other words the Government has further insulated itself by creating tariff walls, therefore, impinging article 301 and article 304(a) of the Constitution of India. He would therefore make an effort to show the legislative history and scope of article 304(a) read with article 301 of the Constitution of India. To date back to the historical genesis of the aforesaid articles, he would submit that they were introduced to remove the trade blocks/ barrier that existed between princely States prior to independence but subsequently to foster economic development in the whole of India and to preserve its unity, such economic barriers were restricted which were discriminatory in nature. He would further submit that to understand whether any such tax introduced by the Government is discriminatory or not, the effect and the result of such tax imposed is to be seen. If the overall result or such effect restricts the free movement of goods between the States then it would violate articles 301 and 304(a) of the Constitution of India.

19. He further submits that it is undoubtedly true that it is the prerogative of the State Government to encourage the backward areas in its State by way of incentives but in the instant case the State of Uttar Pradesh does not segregate between backward and developed districts in the State but have rather extended the rebate of tax to even the industrially advanced districts in the State of Uttar Pradesh and further the rebate of tax is in the nature of exemption/ concessional rate of tax and the overall effect of such rebate is that it altogether

exempts the dealer manufacturing and producing cement by using fly-ash in Uttar Pradesh from the payment of tax and therefore rebate qualifies as any such 'tax' imposed under article 304(a) of the Constitution that would give a discriminatory treatment to two different goods, one originating within the State and the other as the out-of–State goods.

20. The learned counsel would further contend that the concept of rebate of tax is within the realm of taxation and whether it is exemption or repayment by way of a rebate of tax, the only test is, one has to be mindful of its impact as to whether it is a trade barrier thereby impinging article 304(a) of the Constitution of India. He would further point his finger to Section 5 of the Act and submit that Section 5 of the Act is couched in a manner so as to reflect that it is a rebate of tax. Therefore, the intention of the framers of article 304(a) of the Constitution cannot be overlooked which was only to restrict trade barrier irrespective of their nomenclature used to shield such levy or imposition of tax. It is therefore, he would submit that it is not the words used but the impact on the manufacturer(s). Article 304(a) of the Constitution is therefore a constitutional limitation in itself that prevents a State from discriminating between the goods so imported and the goods so manufactured or produced by the dealers within the State unless the State in public interest impose reasonable restriction under article 304(b) of the Constitution after obtaining Presidential assent. Shri Desai, would therefore submits that the amendment in the notification brought by the Government further does not satisfy the requirements of the aforesaid articles by not obtaining Presidential assent if the legislation is made in public interest.

21. There are three broad issues for our consideration:

. firstly, whether the grant of rebate of tax is hit by constitutional limitation on the State legislature under article 304(a) read with article 301 of the Constitution of India, as and[illegible]s

between the imported goods and the goods manufactured and produced outside the State.

. the second issue that arises is, whether the grant of rebate, directly or indirectly restrict the free flow of trade, commerce and intercourse among States by assuming the effects of an exemption/ concession which is nothing but a concept within the scope of taxation.

. The third issue is, can only the first condition of the notification be severed if it is found to be violative of article 304(a) of the Constitution of India without striking down the whole of the notification.

22. Before dealing with the respective contentions raised before us, we shall set out the relevant Provisions of the Act. The dictionary clause defines 'dealer', 'manufacturer', 'tax' 'trade tax' etc. The definitions are therefore extracted and it reads as under:

"(bb) "*Trade Tax*" means a tax payable under this Act on sales or purchases of goods, as the case may be;

(c) "*dealer"* means any person who carries on in Uttar Pradesh (whether regularly or otherwise) the business of buying, selling, supplying or distributing goods directly or indirectly, for cash or deferred payment or for commission, remuneration or other valuable consideration and includes –

(i) a local authority, body, corporate, company, any co-operative society or other society, club, firm, Hindu undivided family or other association of persons which carries on such business;

(ii) a factor, broker, *arhati*, commission agent, *del credere* agent, or any other mercantile agent, by

whatever name called and whether of the same description as herein before mentioned or not, who carries on the business of buying, selling, supplying or distributing goods belonging to any principal, whether disclosed or not;

(iii) an auctioneer who carries on the business of selling or auctioning goods belonging to any principal, whether disclosed or not, and whether the offer of the intending purchaser is accepted by him or by the principal or nominee of the principal;

(iv) a Government which, whether in the course of business or otherwise, buys, sells, supplies or distributes goods, directly or otherwise, for cash or for deferred payment or for commission, remuneration or other valuable consideration;

(v) every person who acts within the State as an agent of a dealer residing outside the State, and buys, sells, supplies or distributes goods in the State or acts on behalf of such dealer as-

(a) a mercantile agent as defined in Sale of Goods Act, 1930; or

(b) an agent for handling of goods or documents of title relating to goods; or

(c) an agent for the collection or the payment of the sale price of goods or as a guarantor for such collection or such payment;

(vi) a firm or a company or other body corporate, the principal office or headquarters whereof is outside the State, having a branch or office in the State, in respect of purchases or

distribution of goods through such branch or office;

[(vii) every person who carries on the business of transfer of property in goods (whether as goods or in some other form) involved in the execution of a works contract;

(viii) every person who carries on the business of transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;

[(n) *"tax"* includes an additional tax and the composition money accepted under Section 7-D];

[(e-1) "manufacture" means producing making , mining, collecting, extracting, altering, ornamenting , finishing, or otherwise processing, treating or adapting any goods; but does not include such manufactures or manufacturing processes as may be prescribed;]

[(ee) 'Manufacturer' in relation to any goods means the dealer who makes the first sale of such goods in the State after their manufacture and includes:—

(i) a dealer who sells bicycles in completely knocked down form;

(ii) a dealer who makes purchases from any other dealer not liable to tax on his sale under the Act other than sales exempted under Sections 4, 4-A and 4-AAA.]

[(h) 'Sale', with its grammatical variations and cognate expressions, means any transfer of property in goods (otherwise than by way of a mortgage, hypothecation,

charge or pledge) for cash or deferred payment or other valuable consideration, and includes—

(i) a transfer, otherwise than in pursuance of a contract of property in any goods for cash, deferred payment or other valuable consideration;

(ii) a transfer of property in goods (whether as goods, or in some other form) involved in the execution of a works contract;

(iii) the delivery of goods on hire purchase or any system of payment by instalments;

(iv) a transfer of the right to use any goods for any purpose (whether or not for a specified period) for cash, deferred payment or other valuable consideration;

(v) the supply of goods by any unincorporated association or body of persons to a member thereof for cash, deferred payment or other valuable consideration; and

(vi) the supply, by way of or as part of any service or in any other manner whatsoever, of goods, being food or any other article for human consumption or any drink (whether or not intoxicating) where such supply or service is for cash or deferred payment or other valuable consideration;]"

23. Section 3 of the Act is the charging provision. Section 3-A provides for the rate of tax payable by a dealer under the Act. Section 4 of the Act provides for grant of general exemption for the purposes of the Act. Section 4-A of the Act provides for grant of exemption from trade tax when the State Government is of the opinion that it is necessary so to do for increasing the production of any goods or for promoting the development of any industry in the State. Section 4–AA provides for concession in the rate of tax to certain industrial units not exceeding twenty-five per cent on the sale of goods manufactured by such industrial [illegible]s

employment to the persons belonging to the scheduled caste and scheduled tribe, and other backward classes. Section 4AAA authorizes the State Government to grant special concession to certain industrial undertakings in special situations and circumstances. Section 5 of the Act authorizes the State Government to grant rebate of tax on certain purchases or sales if it is satisfied that it is in the public interest so to do by issuing a notification allow a rebate up to the full amount of tax on the sale or purchase of any goods or the sale or purchase of such goods by such person or class of persons as may be specified in the notification. Section 5 is relevant for the purpose of this case and therefore the same is extracted:

'Sec. 5 – Rebate of tax on certain purchases or sale:

1. Where the State Government is satisfied that it is expedient in the public interest so to do, it may by notification, and subject to such conditions and restrictions as may be specified therein, allow a rebate up to the full amount to ;

(a) the sale or purchase of any goods,

(b) the sale or purchase of such goods by such person or class or persons as may be specified in the said notification.

2. The rebate under sub-Section (1) may be allowed with effect from a date prior to the notification.

24. Section 5 of the Act is in three parts. Firstly, it authorizes the State Government that if it is satisfied that grant of rebate of tax is expedient in the public interest it may do so by issuing the notification and secondly, that the notification may allow a rebate up to the full amount of tax levied on a specified point of sale or purchase of any goods or the sale or purchase of such goods by such person or class of persons. Lastly, the notification may also impose such conditions or restriction for

availing the benefit under the notification.

25. In exercise of such power, as we have already noticed, the State Government has issued notification dated 27.02.1998 reducing the tax liability of the dealers by twenty five per cent on goods having fly-ash contents between 10 to 30 per cent weight and has reduced the tax liability of the dealer by fifty per cent on goods having fly-ash contents exceeding thirty per cent by weight. Further, the notification states that such reduction is available in the districts mentioned in the column 2 and for the period mentioned in the column 3 of the annexure to the notification. A tax rebate/ tax cut is a reduction in taxes. The immediate effect of such rebate or tax cut decreases the real revenue of the Government and an increase in the real income of those whose tax rate has been lowered.

26. To appreciate the first issue before us, it is necessary to extract articles 301 and 304 of the Constitution of India. The said articles are as under:-

"301. Freedom of trade, commerce and intercourse.— Subject to the other provisions of this Part, trade, commerce and intercourse throughout the territory of India shall be free.

304. Restrictions on trade, commerce and intercourse among States — Notwithstanding anything in article 301 or article 303, the Legislature of a State may by law—

(a) impose on goods imported from other States or the Union territories any tax to which similar goods manufactured or produced in that State are subject, so, however, as not to discriminate between goods so imported and goods so manufactured or produced; and

(b) impose such reasonable restrictions on the freedom of trade, commerce or

within that State as may be required in the public interest:

Provided that no Bill or amendment for the purposes of clause (b) shall be introduced or moved in the Legislature of a State without the previous sanction of the President."

27. Article 304(a) of the Constitution is an exception to article 301 of the Constitution of India. Article 304(a) does not prevent levy of tax on goods; what is prohibited is such levy of tax on goods as would result in discrimination between goods imported from other States and similar goods manufactured or produced within the State. The object is to prevent imported goods being discriminated against by imposing a higher tax thereon than on local goods. What article 304(a) demands is that the rate of taxation on local as well as imported goods must be the same. This is designed to discourage States from creating State barriers or fiscal barriers at the boundaries. Article 304(a) of the Constitution empowers the State to levy tax, with an intent that Part XIII of the Constitution does not affect the power of taxation given under Part XII of the Constitution. It is to preserve and protect the broad object of article 301 of the Constitution, article 304(a) only limits the power of the State legislature from imposing such taxes that would discriminate between imported goods and domestic goods and restrict free movement of goods between States. The broad issue whether article 304(a) is an exception to article 301 of the Constitution of India is discussed in the case of *Atiabari Tea Co. Ltd. v. The State of Assam and Ors*; AIR (1961) SC 232; it was about the Constitutionality of the Assam Taxation (on goods carried by Roads or Inland Waterways) Act, 1954 (Act XIII of 1954) which was challenged by the appellants from whom tax was demanded under the Act for carriage of tea in chests, from Sibsagar district in Assam and from Jalpaiguri in West Bengal, to Calcutta over the waterways of State of Assam. The constitutional objection against the Act was that it was covered by the inhibition implied by the freedom enunciated in article

301 and that it could be saved from being struck down only if it satisfied the condition prescribed in article 304(b).

28. In the majority judgment, Gajendragadkar, J., as he then was, accepted the appellant's contention that article 301 embraced freedom from all kinds of impediments and burdens on commerce including those imposed by tax laws; and a tax law also, in order to survive, must, satisfy the conditions laid down in clause (b) of article 304. As the learned Judge pointed out, there was ample evidence in the text of Part XIII itself to show that it dealt with impediments caused by taxation as well as in other ways. Article 304(a) saved certain taxes on goods from the operation of articles 301 and 303, implying thereby that in the absence of the provision in article 304(a) those laws would be hit by article 301 or 303 of the Constitution of India. Justice Hidayatullah, in the Atiabari Case dissented and observed: "Article 304(a) imposes no ban but lifts the ban imposed by articles 301 and 303 subject to one condition." This observation led to controversy and the use of the word 'ban' was understood as giving enormous power to the State to legislate overlooking the economic unity of the nation which was prioritized in article 301 of the Constitution of India. Therefore, in the case of *State of Kerala v. Abdul Kadir*; it was further clarified that only on a finding that the tax offended article 301 the question whether it was saved by article 304(a) arose.

29. Again, article 304(a) of the Constitution admits two exception in favour of the State legislature to the rule that trade, commerce, and intercourse throughout the territory of India shall be free. Clause(b) to article 304(a) is an exception which enables a State legislature to impose such "reasonable restrictions" on the freedom of trade, commerce and intercourse as may be required in the "public interest". But no bill or amendment for the purpose of clause(b) shall be introduced or moved in the legislature of a State without the previous sanction of the President.

30. The Principle of 'non- Discriminatory tax' as provided in article 304(a) of the Constitution of India is a *sine-qua–non* to free movement of goods between nations/States in several jurisdictions and also in international trade and policy. Discrimination as explained under World Trade Organization ("WTO", for short) jurisprudence is spoken of in terms of effect and intention behind such discrimination. Intent is referred to as 'aim' or 'motive' or 'purpose' of such discrimination and the other factor commonly associated with discrimination is 'effect' that is whether a measure has a discriminatory effect (also known as the disparate impact) against imports (as explained in the famous case of *Japan v. Alcohol*, panel report). WTO members are free to choose any system of taxation they deem appropriate provided that they do not impose on foreign products taxes in excess of those imposed on like products. The effect of tax should not be such that two like goods are given discriminatory treatment.

31. At the same time, it cannot be doubted that rising of protective walls may be justified in international trade. The Government can and has been providing such protectionist measures all these years to encourage the growth and establishment of industries in the country and to protect them from competition from foreign manufacturers. But unlike the international trade policies and the commerce clause in United States Constitution, our Constitution provides for regulating inter-State trade and commerce. The Parliament can take all protective measures under article 302 of the Constitution of India as may be required in public interest. But there are certain obvious differences between the powers conferred to the Parliament under article 302 and State legislature under article 304(a) of the Constitution. The powers given to the State legislature are not unrestricted and are bound to function within limitations stipulated under article 304(a) of the Constitution of India. The powers even under article 304(b) are to be exercised sparingly and after fulfilling all the conditions of article 304 of

the Constitution of India. The power conferred under article 304(a) although an exception to article 301 of the Constitution, but is not a blanket power intended to be conferred to the State legislature.

32. To decide the issue at hand, it is pertinent to discuss, whether rebate of tax has the same effects of concessional rate of tax.

33. Article 304(a) ensures only equal rate of tax for incoming goods. So if such goods are taxed at a higher rate or where they are taxed at any rate when indigenous goods enjoy concessional rate of tax, article 304(a) is attracted. They are simple cases of hostile discrimination. Therefore, whether a particular tax is discriminatory within the meaning of this clause, the effect of the tax on the flow of goods from outside the taxing State has to be taken into consideration and, if the overall effects of rebate of tax is such that they fall within the meaning concessional rate of tax. A detailed discussion on the effects and scope of rebate is done in the following paragraphs under the head Issue 2 in the judgment.

ISSUE 2

34. To answer the second issue we need to discuss the concept of 'rebate of tax' and its overall impact on the trade, commerce and intercourse in the context of the case pleaded by the parties.

35. 'Rebate' as defined in the New International Websters' pocket dictionary and Bloomsbury Concise English Dictionary is "discount", to allow as a deduction from a gross amount. It is a discount repaid to the payer. Rebate as defined in corpus Juris Secundum, Vol. 52 C.J Pg. 1189 is as under:-

> " The etymological or dictionary meaning of the term includes any discount or deduction from a stipulated payment, charge, or rate not tak of

payment, but handed back to the payer after he has paid the stipulated sum, even when such discount or deduction is equally applied to all from whom such payment is demandable"

36. The concept of rebate of tax in the instant case is akin to concessional/ reduced rate of tax. Rebate is though *ex-hypothesi* in the nature of subsidy and other incentives given by the Government but conceptually rebate of tax and incentives are different and it needs to be explained in reference to the purpose and nature of such rebate of tax introduced by the legislature. The legislation in respect of a rebate has taken different forms, one of them is a partial rebate in the tax, where the deduction is given partially on the gross amount and the other is the power reserved for the Government to permit rebate in respect of any goods to the full amount of the tax levied at any point in the series of sales of such goods. A dealer who is entitled to a rebate under any notification will collect the tax from the consumers at the point of purchase and then have to pay the full amount of sales tax due on his turnover in that quarter; and claim rebate in terms of the notification in accordance with the provision in the rules. However, the claim for rebate need not necessarily be handed back to the payer after he has paid the stipulated sum, it can also be paid in advance of payment. It is nothing but a remission or a payment back or it is sometimes spoken of as a discount or a drawback. It cannot be disputed that it is the discretion of the State Government, through its legislature, to grant rebate to the full amount of sales tax, unless its power of taxation is limited by Constitutional provisions. In the facts of the present case, the legislature authorizes the State Government under Section 5 of the Act to issue notification in the public interest to grant rebate up to the full amount of the tax levied on any specific point in the series of sales/ purchase of such goods. Such rebate is only extended to the districts in State of Uttar Pradesh. The Government of Uttar Pradesh has the power to refund or discount to the full

amount of rate of sales tax levied on a dealer, provided the power to discount does not overall has effects of a weapon of taxation that would discriminate between the goods imported and manufactured in Uttar Pradesh as laid down in article 304(a) of the Constitution.

37. The discrimination through a weapon of taxation is explained in the case of *Shree Mahavir Oil Mills* (supra). The case pertains to unconditional and total exemption from tax on edible oil granted to in-State manufacturers by the State Government. Such an exemption was held discriminatory and violative of articles 301 and 304(a) of the Constitution of India. This case further clarifies the position in Video Electronics case (supra). The Court observed that States are certainly free to impose tax on subjects which fall under List II of the Seventh Schedule of the Constitution, but power shall not be exercised to bring about discrimination between the imported goods and the similar goods manufactured in that State and concluded that total exemption granted in favour of small-scale industries in Jammu and Kashmir producing edible oil is not sustainable in law. It clarified the exception carved out by the three judges bench in the case of *Video Electronics Ltd. v. State of Punjab*; 1989 SCR Supp.(2) 731, where it explained that notification issued by two States (Punjab and Haryana) in that case exempting new units, established in new areas specified the exemption to be provided to a special class to whom exemption was provided for a specific period on specific conditions and was not extended to all producers of goods and therefore did not offend the freedom guaranteed under articles 301 and 304 of the Constitution. Similarly in the case of Punjab notification, it was held that since the exemption is for certain specific goods and also because an overwhelmingly large number of local manufacturers of similar goods are subject to a sales tax; it cannot be said that the local manufacturers were favored against the outside manufacturers and further the exemption was granted for a limited pe[illegible]e

above case also laid down that while judging whether a particular exemption granted by the State offends articles 301 and 304, it is necessary to take into account the economic backwardness of a State and the need for concessions and subsidies to such new industries for their development. Therefore, this case clarified that the limited exception created in the said judgment, if extended to all will rob the salutary principle underlying Part XIII of the Constitution and further it is not possible to go on extending the limited exception. It is with this observation, this Court in the above case, held the exemption to be violating article 304(a) read with article 301 of the Constitution of India.

38. Article 304(a) is a provision that deals with taxation. It places goods imported from sister States on a par with similar goods manufactured or produced within the State in regard to State taxation in the allocated field. The object of article 304(a) was to limit the power of taxation by States so as to prevent discrimination against imported goods by imposing taxes on such goods as a higher rate than is borne by indigenous goods. The tax referred to in article 304(a) is a 'tax on goods'. The word "tax" and "taxation" as said by Justice Weaver of the Iowa Supreme Court *in the case of State v. Chicago & N. W. R. Co.,* 128 Wis 449, 108 N. W. is referred to as all sorts of exaction which swell the public funds. Taxation in its broadest and most general sense, includes every charge or burden imposed by the sovereign power upon persons, property or property right, for the use and support of the Government and to enable it to discharge its appropriate functions, and in that broad definition there is included a proportionate levy upon persons or property and various other methods or devices by which revenue is extracted from persons and property. The term 'tax' is to be read in all-embracing and sweeping sense. Such methods or device used by the Government from time to time are not ordinarily open to serious questions but their scope and application vary according to the

nature of the subject under discussion and the circumstances under which they are used. 'Rebate of tax' in the instant case is such a device or weapon of taxation used by the Government from time to time which is though not in question in all situations but their validity is tested in the touchstone of article 304(a) of the Constitution in the circumstance under which they are used. If the rebate of tax by way of repayment to the full amount of tax levied qualifies within the same meaning as that of exemption, then such discount would a *fortori* mean discrimination on the rate of tax by repaying by way of a rebate to one class of local dealers the whole amount of sales tax paid and on the other hand the outside dealers are taxed higher in absence of the benefit of rebate. This situation squarely falls within the meaning of 'discrimination' as contemplated under article 304(a) of the Constitution of India.

39. It is for the aforesaid reasons, it is pertinent to analyze the nature and scope of concessional/ reduced rate of tax/ exemption by drawing inspiration from their understanding in other jurisdictions and under what circumstance could a rebate be termed a hindrance to or as interfering with the freedom of trade, commerce or intercourse. In appreciating the effects of an exemption parallel to a rebate of tax, we may refer to the observation made in *Congressional Budget and Fiscal Operations, 2 U.S.C.A.§ 622* , where exemptions is understood to have been in the category known as "tax expenditures" because the revenues lost by such exemptions are similar to direct expenditures made by the government, the only difference being that they are made through the tax system and not the legislative appropriations process. These tax expenditure programmes are sometimes defined as "subsidies provided through the taxation systems," but the broadest definition includes all categories of "deductions, credits, exclusions, exemptions, preferential tax rates and tax deferrals." Justice Wayne in the case of *Jefferson Branch Bank v. Skelly;* 66 U.S. 436 while explaining the power [illegible]

forbidden by Constitution explained, that the legislature has the power to exempt from taxation according to its views of public policy provided no constitutional provisions are violated. The United States Constitution under the Equality and uniformity clause mandates that where the Constitution requires taxation to be equal and uniform, it is held in most States that the legislature must tax all such persons or property and cannot grant any exemptions unless the power to exempt is expressly conferred by the Constitution. In some states, however, the contrary is held but even in such states it is held that exemptions are not valid unless including all property and persons of the same class whether such person as subject to such exemption is inside the State or situated outside the State.

40. Exemption as we normally understand has two-fold impact. First, exemptions/ concessional rate of tax affect consumer choice by impacting relative pricing and, thus, materially altering the economic balance. It is because consumption will tend to shift towards untaxed items, the prices of those items and the items used to produce them will increase while the prices of taxed items will decrease relatively. Second, such exemptions unfairly burden some businesses either within the same industry or in other competing industries.

41. Rebate is another such device used by the Government which when given on the rate of tax to the full amount of tax levied, it gives favourable treatment to one class of dealers situated within the state barring the dealers similarly placed outside the State manufacturing goods using the same raw material. The grant of such rebate has the colour of exemption/ concessional rate of tax along with the same deleterious effects of an exemption.

42. Therefore, the test to be applied to determine whether rebate is within the realm of tax defined in article 304(a) of the Constitution of India so as to say that it discriminates between the two class of goods: locally manufactured goods and the

imported goods when both the class of dealers meet the conditions required to qualify for the grant of rebate *i.e.* the use of fly-ash, is the overall effect or impact of such rebate on the manufacturer. This issue is no longer *res-integra* and is discussed in several cases including in the case of *Firm A.T.B Mehta Masjid & Co v. State of Madras and Anr.,* AIR 1963 SC 928*,* where the question for consideration was whether Rule 16 of the Madras General Sale Tax Rules, 1939 subjected tanned hides and skins outside the State, and sold within the State to a higher rate of tax than the tax imposed on hides or skins tanned and sold within the state and therefore violating article 304(a) of the Constitution. This Court observed that to determine whether the rule was discriminatory, the effect of this rule is to be seen. The result therefore is that the sale of hides or skins which had been purchased in the State and then tanned within the State is not subject to any further tax. Hides and skins tanned within the State are mostly those which had been purchased in their raw condition in the State and therefore on which tax had already been levied on the price paid by the purchaser at the time of their sale in the raw condition. If the quantum of tax had been the same, there might have been no case for grievance by the dealer of the tanned hides and skins which had been tanned outside the State. The grievance arises on account of the amount of tax levied being different on account of the existence of a substantial disparity in the price of the raw hides or skins and of those hides or skins after they had been tanned, though the rate is the same under Section 3(1)(b) of the Act. If the dealer has purchased the raw hide or skin in the State, he does not pay on the sale price of the tanned hides or skins, he pays on the purchase price only. If the dealer purchases raw hides or skins from outside the State and tans them within the State, he will be liable to pay sales-tax on the sale price of the tanned hides or skins. He too will have to pay more for tax even though the hides and skins are tanned within the State, merely on account of his having imported the hides and skins from outsid rt

held that this rule on this ground alone is discriminatory of article 304(a) of the Constitution of India.

43. The above principle was re-iterated in the case of *W.B. Hosiery Association and others v. State of Bihar;* (1988) 4 SCC 134 *and in the case of H. Anraj v Government of Tamil Nadu;* (1986) 1 SCC 414*;* wherein the effect of an exemption was discussed. The issue before the Court was that the locally manufactured goods within the State were exempted but those manufactured in other States and imported into the State were subjected to a high rate of tax. The hosiery manufacturers and dealers in the State of West Bengal in their prayer in the writ petition asked for a direction asking the respondents to forbear from levying or imposing or collecting any sales tax on the sale of hosiery goods imported into Bihar from other States. The State Government by a notification exempted dealers from sales tax of hosiery goods manufactured and produced in the State of Bihar whereas levied sales tax on the dealers outside the State. This Court opined that from the commercial or normal point of view, such a discriminatory levy of sales tax would have an effect that would be bound to affect the free flow of hosiery goods from outside State into the State of Bihar and would therefore violate article 301 read with article 304(a) of the Constitution of India.

44. The above decision is also followed in the case of *Western Electronics and Another v. State of Gujarat and others*, 1988 2 SCC 568; and in the case of *Loharn Steel Industries v. State of Andhra Pradesh;* (1997) 2 SCC 37 wherein the impact of exemption on the manufacturer was such that the manufactures outside Andhra Pradesh had to pay a higher rate of tax as compared to the manufacturers in Andhra Pradesh because of the entire tax exemption granted to the all re-rolled steel products sold in the Andhra Pradesh and manufactured out of tax paid raw-material purchased in the State of Andhra Pradesh. Therefore, the notification in this case

was considered to be violating article 304(a) of the Constitution of India.

45. This Court in the case of *State of U.P. and another v. Laxmi Paper Mart and others,* AIR 1997 SC 950 has explained that exempting the exercise books made from paper purchases within Uttar Pradesh produced within the State and the levying of the tax on the exercise books produced outside Uttar Pradesh and sold in Uttar Pradesh at the rate of 5% is discriminatory and offends clause(a) of article 304 of the Constitution of India. Again in *Lakshman v. State of Madhya Pradesh;* 1983 SCR 3124*,* the petitioner was nomad grazier belonging to Gujarat who wandered from place to place with his cattle. State of Madhya Pradesh did not like this and imposed a higher duty for out-of-State cattle owners. The levy was found invalid by the Court.

46. Rebate, therefore, as it is defined in the case of *Estate of Bernard H. Stauffer, Bonnie H. Stauffer, Executrix, v. Commissioner of Internal Revenue,* 48 U.S. T.C. 277, means abatement, discount, credit, refund, or any other kind of repayment. Rebates have been normally used as justifiable incentives given by the Government to stimulate small industries or newly established industries. But to understand Rebate of tax as rebate per se would be a misnomer. Rebate of tax is the rebate on rate of tax and is essentially the arithmetic of rate. The term 'rate' is often used in the sense of standard or measure. It is the tax imposed at a certain measure or standard on the total turnover of the goods. Rate, in other words is the relation between the taxable turnover and the tax charged. Rebate of tax or exemption is distinguished from non-imposition or non-liability in the case of *A.V. Fernandez v. The State of Kerala;* AIR 1957 SC 657 wherein the Court held that in rebate of tax, the sales or purchases would have to be included in the gross turnover of the dealer because they are prima facie liable to tax and the only thing which dealer is entitled to in respect thereof is the deduction from the gros[illegible]o

arrive at the net turnover on which the tax can be imposed. On the other hand, in the case of non-imposition or non-liablity, the sales or purchases are exempted from taxation altogether. The Legislature cannot enact a law imposing or authorizing the imposition of a tax thereupon as they are not liable to any such imposition of tax. If they are thus not liable to tax, no tax can be levied or imposed on them and they do not come within the purview of the Act at all. The very fact of their non-liability to tax is sufficient to exclude them from the calculation of the gross turnover as well as the net turnover on which sales tax can be levied or imposed.

47. The exemption or rebate of tax is therefore within the purview of taxation. In the instant case, if the grant of rebate of tax by the State Government under Section 5 of the Act is to the full amount of tax levied, then for the dealers manufacturing cement using fly-ash outside the State of Uttar Pradesh but selling it in Uttar Pradesh, though the State Government contends that the rate of tax is same for the dealers inside Uttar Pradesh and outside Uttar Pradesh, but the overall effect is that there is no tax levied on the net turnover after deductions being made from the gross turnover but, on the other hand, the dealers manufacturing or producing cement using fly-ash outside Uttar Pradesh are taxed at the rate of 12.5%. Therefore, it can be said that the rebate of tax is in the nature of exemption and the instant case can be decided on the basis of catena of decisions of this Court where blanket exemption without reasons are said to be discriminatory and violating article 304(a) of the Constitution of India.

ISSUE 3:-

48. To decide the third issue, the concept of severability needs to be noticed. Doctrine of severability provides that if an enactment cannot be saved by construing it consistent with its constitutionality, it may be seen whether it can be partly saved. The doctrine of severability was considered in the case of *RMD*

Chamarbaugwala v. Union Of India, AIR 1957 SC 628*;* in which it was observed that "when a statute is in part void, it will be enforced as against the rest, if that is severable from what is invalid". The Court also observed seven propositions of severability, out of which, one of them provided that if the valid and the invalid portions are distinct and separate that after striking out what is in-valid, what remains is in itself a complete code independent of the rest, then it will be upheld notwithstanding that the rest has become unenforceable. The principles of severability was also discussed in the case of *A. K. Gopalan v. State of Madras,* AIR 1950 SC 27, wherein the Court observed that what we have to see is, whether the omission of the impugned portions of the Act will "change the nature or the structure or the object of the legislation". In the facts of the present case, striking down Clause (1) of the notification alone does not change the object of the legislation. It is a notification passed in public interest and therefore even if Clause (1) of the notification is expunged, leaving behind the rest of the notification intact, the purpose of the Government to grant rebate to provide incentive to the manufacturing units using fly-ash is not lost.

49. This doctrine was also enunciated in the case of *D.S. Nakara* (*supra*). The question that arose was whether, for the purpose of application of the liberalized pension rules, the Government of India could stipulate March 31, 1979 as the date for dividing Government employees into two classes: one class who had retired before March 31, 1979 who would not be entitled to the benefits of the liberalized pension rules and the other class who retired after March 31, 1979 who would be entitled to such benefits. One of the questions that came up for consideration is whether a specified date could be severed if it is found to be wholly irrelevant and arbitrary. This Court observed that, if the event is certain but its occurrence at a point of time is considered wholly irrelevant and arbitrary and having an undesirable effect of dividing homo

introducing the discrimination, the same can be easily severed and set aside. The Court further opined that while examining a case under article 14 of the Constitution, the approach is removal of arbitrariness and if that can be brought about by severing the mischievous portion the Court ought to remove the discriminatory part retaining the beneficial portion. The Court therefore concluded that severance never limits the scope of legislation but rather enlarges it.

50. In the light of the observation made by this Court, we are of the opinion that the condition No. 1 is discriminatory and violates article 304(a) of the Constitution of India and therefore needs to be severed from the rest of the notification which can operate independently without altering the purpose and the object of the notification.

51. The learned counsel, Shri Gupta, would argue that since the assessing authorities would not be in a position to verify the claim for grant of rebate of tax by manufacturers of cement using fly-ash outside the State of Uttar Pradesh, the benefit under the notification cannot be extended to them. We do not agree. The explanation appended to the notification authorises the assessing authorities to verify the claim that may be made by the manufacturers including the fact whether an assessee(s) satisfy the conditions prescribed in the notification. If they do not fall within the parameters of the notification the assessing authority can always reject the claim of the manufacturers.

52. Further we may also refer to the submission of Shri Dhruv Agarwal, who would rely on the observations of this Court in the case of *G.B. Prabharkar Rao v. State of Andhra Pradesh*, 1985 Supp. SCC 432; wherein the age limit of retirement was first raised and then reduced which created an administrative chaos and therefore merely because it created an administrative chaos the provision reducing the age could not have been declared invalid. On the basis of the aforesaid

submission, he would submit that the machinery provisions cannot be used to test the constitutional validity of a statute because the liability is always created through substantive provisions. We agree with the submission made by, Shri Dhruv, and are of the opinion that issue of territoriality should not be a factor to determine the constitutional validity of the notification.

53. In view of the aforesaid discussion, we hold 'rebate of tax' granted by the State Government to cement manufacturing units using fly-ash as raw material in a unit established in the districts of State of Uttar Pradesh alone is violative of the provisions contained in articles 301 and 304(a) of the Constitution of India. We further declare that the notification would also apply to respondent(s)- cement manufacturing units.

54. With these observations and directions, all the civil appeals are disposed of. There shall be no order as to costs.

Ordered accordingly.

K.K.T. Appeals disposed of.

T.S.R. SUBRAMANIAN & ORS.
v.
UNION OF INDIA & ORS.
(Writ Petition (Civil) No. 82 of 2011)

OCTOBER 31, 2013

[K.S. RADHAKRISHNAN AND PINAKI CHANDRA GHOSE, JJ.]

Civil Service – Preservation of integrity, fearlessness and independence of civil servants – Need of reforms for – Writ petition seeking writ of mandamus requiring Union, State and Union Territories to create independent Civil Services Board, to provide fixed tenure for posting of civil servants and requirement for every civil servant to record instructions/orders – Held: There are various lacunae in the present system in which the civil servants function, which calls for serious attention – Directions issued to constitute Civil Services Board (CSB) with high ranking serving officers, till the Parliament brings in proper legislation in setting up of CSB – Direction to appropriate directions to secure minimum tenure of service to the civil servants – Direction also to issue directions requiring the civil servants to record oral orders/instructions – Absence of recording oral instructions would defeat the rights guaranteed under Right to Information Act and would also give room for favouratism and corruption – Constitution of India, 1950 – Chapter XIV and parts V and VI – Right to Information Act, 2005 – ss. 3 and 4 – All India Service (Conduct) Rules, 1968 – r. 3(3)(iii).

The present writ petitions were filed by retired civil servants highlighting the necessity of various reforms for preservation of integrity, fearlessness and independence of civil servants at the Centre and the State levels in the country. They sought for creation of an independent Civil

Services Board (CSB), fixed tenure of civil servants and requirement for recording instructions/directions/orders/ suggestions received from administrative superiors, political authorities, legislators, commercial and business interests. The reliefs prayed for were based on the Hotta Committee Report, 2004, 2nd Administrative Reforms Commission (10th Report) 2008, 2nd Administrative Service Commission (15th Report), the Report of the Committee on Prevention of Corruption, Santhanam Committee Report etc.

Disposing of the writ petitions, the Court

HELD: 1. The constitutional provisions under Chapter XIV and Parts V and VI of the Constitution generally deal with the power of the executive. The principles governing the roles and responsibilities of political executive and civil servants, are therefore, constitutionally defined and also based on the basis of various rules framed by the President and Governor for the conduct of business in the Government. Ministers are responsible to the people in a democracy because they are the elected representatives of the Parliament as well as the General State Assembly. Civil servants have to be accountable, of course to their political executive but they have to function under the Constitution, consequently they are also accountable to the people of this country. [Para 24] [1023-H; 1024-A-B]

2. In the present political scenario, the role of civil servants has become very complex and onerous. Often they have to take decisions which will have far reaching consequences in the economic and technological fields. Their decisions must be transparent and must be in public interest. They should be fully accountable to the community they serve. Many of the recommendations made by the Hota Committee, various reports of the 2nd Administrative Reforms Comm[illegible]d

Santhanam Committee Report have high-lighted various lacunae in the present system which calls for serious attention by the political executive as well as the law makers. [Para 26] [1024-G-H; 1025-A-B]

3.1 It is difficult to give a positive direction to constitute an independent CSB at the Centre and State Level, without executive control, which Hota Committee has recommended to be statutory in nature, that too, comprising of persons from outside the Government. CSB, consisting of high ranking in service officers, who are experts in their respective fields, with the Cabinet Secretary at the Centre and Chief Secretary at the State level, could be a better alternative (till the Parliament enacts a law), to guide and advise the State Government on all service matters, especially on transfers, postings and disciplinary action, etc., though their views also could be overruled, by the political executive, but by recording reasons, which would ensure good governance, transparency and accountability in governmental functions. Parliament can also under Article 309 of the Constitution enact a Civil Service Act, setting up a CSB, which can guide and advice the political executive transfer and postings, disciplinary action, etc. CSB consisting of experts in various fields like administration, management, science, technology, could bring in more professionalism, expertise and efficiency in governmental functioning. [Paras 27 and 28] [1025-C, F-H; 1026-A]

Prakash Singh and Ors. vs. Union of India **(2006) 8 SCC 1: 2006 (6) Suppl. SCR 473 – relied on.**

3.2. Therefore, the Centre, State Governments and the Union Territories are directed to constitute such Boards with high ranking serving officers, who are specialists in their respective fields, within a period of three months, if not already constituted, till the Parliament

brings in a proper legislation in setting up CSB. [Para 29] [1026-B]

4.1. The civil servants are not having stability of tenure, particularly in the State Governments where transfers and postings are made frequently, at the whims and fancies of the executive head for political and other considerations and not in public interest. Fixed minimum tenure would not only enable the civil servants to achieve their professional targets, but also help them to function as effective instruments of public policy. Repeated shuffling/ transfer of the officers is deleterious to good governance. Minimum assured service tenure ensures efficient service delivery and also increased efficiency. They can also prioritize various social and economic measures intended to implement for the poor and marginalized sections of the society. [Para 30] [1026-C-F]

4.2. Therefore, the Union, State Governments and Union Territories are directed to issue appropriate directions to secure providing of minimum tenure of service to various civil servants, within a period of three months. [Para 31] [1026-F-G]

5.1. The recommendations of the Hota Committee, 2004 and Santhanam Committee Report have highlighted the necessity of recording instructions and directions by public servants. Much of the deterioration of the standards of probity and accountability with the civil servants is due to the political influence or persons purporting to represent those who are in authority. Santhanam Committee on Prevention of Corruption, 1962 has recommended that there should be a system of keeping some sort of records in such situations. Rule 3(3)(iii) of the All India Service Rules specifically requires that all orders from superior officers shall ordinarily be in writing. Where in exceptional circumstances action has to be taken on the basis of o s

mandatory for the officer superior to confirm the same in writing. The civil servant, in turn, who has received such information, is required to seek confirmation of the directions in writing as early as possible and it is the duty of the officer superior to confirm the direction in writing. [Para 32] [1026-G-H; 1027-A-C]

5.2. The civil servants cannot function on the basis of verbal or oral instructions, orders, suggestions, proposals, etc. and they must also be protected against wrongful and arbitrary pressure exerted by the administrative superiors, political executive, business and other vested interests. Further, civil servants shall also not have any vested interests. Resultantly, there must be some records to demonstrate how the civil servant has acted, if the decision is not his, but if he is acting on the oral directions, instructions, he should record such directions in the file. If the civil servant is acting on oral directions or dictation of anybody, he will be taking a risk, because he cannot later take up the stand, the decision was in fact not his own. Recording of instructions, directions is, therefore, necessary for fixing responsibility and ensure accountability in the functioning of civil servants and to uphold institutional integrity. [Para 33] [1027-D-F]

5.3. Democracy requires an informed citizenry and transparency of information. Right to Information Act, 2005 recognizes the right of the citizen to secure access to information under the control of public authority, in order to promote transparency and accountability in the working of every public authority. Section 3 of the Act confers right to information to all citizens and a corresponding obligation under Section 4 on every public authority to maintain the records so that the information sought for can be provided. Oral and verbal instructions, if not recorded, could not be provided. By acting on oral

directions, not recording the same, the rights guaranteed to the citizens under the Right to Information Act, could be defeated. The practice of giving oral directions/ instructions by the administrative superiors, political executive etc. would defeat the object and purpose of RTI Act and would give room for favoritism and corruption. [Para 34] [1027-G-H; 1028-A-C]

5.4. Therefore, all the State Governments and Union Territories are directed to issue directions like Rule 3(3) of the All India Services (Conduct) Rules, 1968, in their respective States and Union Territories which will be carried out within three months from the date of the judgment. [Para 35] [1028-C-D]

Case Law Reference:

2006 (6) Suppl. SCR 473 relied on Para 27

CIVIL ORIGINAL JURISDICTION : Under Article 32 of the Constitution of India.

Writ Petition (Civil) No. 82 of 2011.

WITH

W.P.(C) No. 234 of 2011.

K.K. Venugopal, Menka Guruswamy, Ankur Talwar, Raeesa Vakil, Ashwati Balraj, Manu Chaturvedi, Nikhil Nayyar, Dr. Ashok Dhamija, Sonia Dhamija (for Dr. Kailash Chand) for the Petitioners.

A. Mariarputham, Paras Kuhad, J.S. Attri, S.K. Dubey, Manjit Singh, Jasbir Singh Malik (for Milind Kumar) Ajay Kapur, Sapam Biswajit Meitei, Kh. Nobin Singh, Bina Madhavan, Amit Kumar Singh (for K. Enatoli Sema), Parth Tiwari, (for Pragati Neekhra), R. Rakesh Sharma (for B. Balaji), Ashok Panigarhi, Surajit Bhaduri, Santosh Kumar, Asha G. Nair, Sadhana Sandhu, Shailendra Saini, M. Khairati, F[illegible]or

D.S. Mehra), Nandini Gupta, (for Hemantika Wahi), Anil Kr. Jha, Priyanka Tyagi, Ravi P. Mehrotra, Vibhu Tiwari, Abhinav Malik, Ranjan Mukherjee, Subhro Sanyal, Aruna Mathur, Yusuf, Vishi, G.N. Reddy, B. Debojit, Bala Shivudu M., Chandan Kumar (for Gopal Singh), Nanvit Kumar (for Corporate Law Group), Pragyan Sharma, Heshu Kayina, V.G. Pragasam, M.R. Shamshad, Dinesh Kumar, Jagjit Singh Chhabra, Aniruddha P. Mayee, Charudatta Mahindrakar, Mishra Saurabh, A. Subhashini, Anil Katiyar, C.K. Sucharita, Naresh K. Sharma, Tara Chandra Sharma, K.V. Mohan, B.S. Banthia, V.N. Raghupathy, P.V. Yogeswaran, K.V. Jagdishvaran, G. Indira, Dharmendra Kumar Sinha, T. Harish Kumar, Balaji Srinivasan for the Respondents.

The Judgment of the Court was delivered by

K.S. RADHAKRISHNAN, J. 1. Article 32 of the Constitution of India has been invoked by few eminent retired civil servants highlighting the necessity of various reforms for preservation of integrity, fearlessness and independence of civil servants at the Centre and State levels in the country. Prayers made in this writ petition are based on various reports and recommendations made by several Committees appointed for improving the public administration. On the basis of various reports, following reliefs are sought in the writ petition :-

(i) Issue a writ in the nature of mandamus or any other appropriate writ, order or direction requiring the Respondents to create an "independent" Civil Service Board or Commission both at the Centre and the State based on recommendations by the Hota Committee, 2004 (para 5.09, para 5.11, Main Recommendations No.38); the 2nd Administrative Reforms Commission 2008 (10th Report, para 9.8); the statement adopted at the Conference of Chief Ministers on Effective and Responsive Administration, 1997;

(ii) Issue a writ in the nature of mandamus or any other appropriate writ, order or direction requiring the respondents to fixed tenure for civil servants ensuring stability based on recommendations by Jha Commission 1986 (para 7.2); Central Staffing Scheme, 1996 (para 17.01, para 17.02, para 17.03, para 17.12), the 2nd Administrative Reforms Commission (10th Report, para 8.7, para 9.8, para 17.5), Hota Committee Report, 2004 (Main Recommendations No.39);

(iii) Issue a writ in the nature of mandamus or any other appropriate writ, order or direction requiring the respondents to mandate that every civil servant formally record all such instructions/directions/ orders/suggestions which he/she receives, not only from his/her administrative superiors but also from political authorities, legislators, commercial and business interests and other persons/quarters having interest, wielding influence or purporting to represent those in authority based on the principles recognized by Rule 3(3)(ii)(iii) of the All India Service Conduct Rules, 1968 and as implicitly recognized by the Santhanam Committee Report, 1962 (Section 6, sub-para 33[iii].

2. This Court, considering the importance of the matter, issued notice to various State Governments and the Union Territories so as to ascertain their views on the various issues raised in this case. Most of the States have filed detailed counter affidavits explaining their stand with regard to the reliefs prayed for in this writ petition.

3. Shri K.K. Venugopal, learned senior counsel appearing for the writ petitioners, referred elaborately to the above-mentioned reports and highlighted the necessity of the creation of a Civil Service Board (for short 'CSB'), both at the Centre and State level, with a degree of indep[illegible]n

make recommendations on all transfers and postings without sacrificing the executive freedom of the Government. Learned senior counsel pointed out that such CSB shall function in a bare advisory capacity and its recommendations will not impose any constraint on the independence of the political authority to effect postings and transfers, including premature transfers. Learned senior counsel also highlighted the necessity for providing a fixed tenure for civil servants ensuring stability which is highly necessary for implementing various programmes which will have social and economic impact on the society. Learned senior counsel also highlighted the reasons for recoding of instructions, directions and orders by the civil servants so that they can function independently and the possibility of arbitrary and illegal decisions could be avoided.

4. Mr. Paras Kuhad, learned ASG appearing for the Union of India, opposed in principle prayer for setting up of independent CSB at the Centre and the State levels, which, according to the learned ASG, would be interfering with the governmental functions. Learned ASG also submitted that any mechanism within the governmental structure could be thought of, but involvement of any person, howsoever high he may be, who is not part of the Centre or the State Government, would not be advisable, especially in the absence of any such provision in the Constitution or the laws made by Centre and the State Governments. Learned ASG also submitted that based on the 2nd Administrative Reforms Committee (ARC), a draft Bill entitled "Civil Services Performance Standards and Accountability Bill, 2010" was provided incorporating certain recommendations in the above-mentioned reports. Further, it was pointed out that the draft Cabinet Note for the introduction of the said Bill in the Parliament is under consideration of the Central Government. Further, it was also submitted that for fixing the minimum tenures of cadre post in the Indian Administrative Service was initiated in November, 2006 by the Department of Personnel & Training. Cadre controlling authorities of the

Indian Police Service and Indian Foreign Service were also requested to take necessary follow-up action for fixing the minimum tenures in the cadre post for the Indian Police Service and Indian Foreign Service. During the process of consultation, it was pointed out that comments of the State Governments were sought on the proposal of fixing minimum tenure of posting of IAS Officers. 13 State Governments agreed with the proposal, while some States did not agree. The matter was further discussed in the meeting with the Chief Secretary/ Principal Secretaries of the States concerned on 31.5.2007 and again on 4.7.2008 in Delhi. Notification providing for two years minimum tenure for IAS posting having been issued for 13 States/Joint Cadres. Reference was also made to study report of "Centre for Good Governance", Hyderabad and it was stated that the same is under consideration with the Central Government. With regard to the prayer for recording of instructions/directions, etc., it was pointed out that the requirements are provided under the All India Service Conduct Rules.

5. Learned counsels appearing for the State Governments and the Union Territories have also placed their stand on various reliefs sought for in this writ petition. Learned Standing counsel appearing for the State of Uttar Pradesh submitted that the State has already established Civil Service Boards in terms of the Government orders dated 24.12.2001 and 19.5.2007, which is meant to operate with respect to IAS and Provisional Civil Services, Indian Police Services and Provisional Police Services and for Indian Forest Services and their feeder services. Over and above, the State has also formulated transfer policy dated 15.5.2008. Learned counsel appearing for the State of Maharashtra also made reference to the Maharashtra Government Servants Regulations of Transfers and Prevention of Delay in Discharge of Official Duties Act, 2005 and submitted that the Act provided for transfer of Government servants and prevention of delay in discharge of official duties.

6. Reliefs prayed for in this writ petition are based on the Hotta Committee Report, 2004, 2nd Administrative Reforms Commission (10th Report), 2008. 2nd Administrative Service Commission (15th Report), the Report of the Committee on Prevention of Corruption, Santhanam Committee Report, etc. We have gone through those reports in detail.

A. CIVIL SERVICE BOARD (CSB):

7. The Government of India on 3rd February, 2004, appointed the Hota Committee to examine the whole gamut of Civil Service reforms and the terms of reference of the Committee were as follows :-

"(i) Making the Civil Service

- responsive and citizen-friendly;
- transparent;
- accountable; and
- ethical

in its (a) actions and (b) interface with the people,

(ii) Making the civil service e-governance friendly.

(iii) Putting a premium on intellectual growth of civil servants and on upgrading their domain knowledge,

(iv) Protecting the civil service against wrongful pressure exerted by

(a) administrative superiors;

(b) political executive;

(c) business interests; and

(d) other vested interests.

(v) Changes, if any necessary, in the various All India Services Rules and Central Civil Rules to provide a statutory cover to the proposed civil service reforms.

(vi) Changes in rules governing the disciplinary proceedings against civil servants to decentralize the process as far as practicable, and to make the disposal of such proceedings time-bound.

(vii) Any other matter that the Committee may consider relevant to the subject of civil service reforms."

8. On establishment of Indian Civil Services Board, the Hota Committee made the following recommendations :-

"5.09 We found that some States complied with the recommendations of the Conference of Chief Ministers and set up Civil Services Boards/Establishment Boards with Chief Secretary of the State as the Chairman and other senior officials of the State as Members. But the Boards set up by executive order in different States have failed to inspire confidence as more often than not, they have merely formalized the wishes of their Chief Ministers in matters of transfer of officials. We are firmly of the view that a Civil Services Act has to be enacted to make the Civil Services Board / Establishment Board both in the States and in the Government of India statutory in character. In the proposed set up in the Government of India, the Appointments Committee of the Cabinet will be the final authority for transfer of officers under the Central Staffing Scheme. The same principle of fixed tenure should apply to senior officers, who are not under the Central Staffing Scheme, but are working under the Government of India for which the Departmental Minister in charge is the final authority for transfer. The Chief Minister will be the final authority for transfer of all Group 'A' officers of State Service and AIS officers serving in [illegible]s

of the State. If a Chief Minister does not agree with the recommendations of the Civil Services Board/ Establishment Board, he will have to record his reasons in writing. An officer transferred before his normal tenure even under orders of the Chief Minister can agitate the matter before a three-member Ombudsman. The Chairperson of the Ombudsman will be a retired official of proven honesty and integrity. The other two members can be on part-time basis from among serving officers. In all such premature transfers the Ombudsman shall send a report to the Governor of the State, who shall cause it to be laid in an Annual Report before the State Legislature. The Ombudsman may also pay damages to the officer so transferred to compensate him for dislocation and mental agony caused due to such transfer. We are conscious that we are recommending a statutory barrier to frequent transfer of senior officials but the matter has come to such a pass that it requires a statutory remedy. We also clarify that the Chief Minister as the highest political executive has the final powers to order transfer of an officer before his tenure is over.

5.10 We are also of the opinion that postings of all Group 'B' officers must be done by the Head of the Department in a State and the same tenure rule shall be given a statutory backing. We were advised by some witnesses that only the Chief Minister's orders for transfer should be taken in case of Group 'A' officers / officers of All India Services and no Minister of a State should have any powers to order a transfer or approve a proposal for transfer of any official either of any State Service or of the All India Service. We agree with the view, as in our opinion owing to reasons of political expediency or even due to unwholesome reasons, Ministers in States often are not able to make proper use of the power vested in them for transfer of their departmental officers. If a Minister has cogent reasons to ask for transfer of an official before he

completes his tenure, he will move the Civil Services Board to be set up under the new Civil Services Act and the Civil Services Board, with its views on report of inquiry by a designated officer, shall submit the case to the Chief Minister for final orders. Thus in a State Government, a Minister's proposal for transfer of any officer of Group 'A'/ Group 'B' will be formally decided by the Chief Minister of the State.

5.11 In our opinion, Civil Services Boards must be set up in all States on similar lines as at the Centre. The Central Act should have a provision to enable the States to adopt the law and make it applicable in the States, without going through the long process of drafting a new law and getting it passed in the Legislature. The Civil Services Board in a State - chaired by the Chief Secretary and comprising senior officers - shall perform the functions relating to transfer, empanelment, promotion, and deputation of officers performed by the Establishment Board of Government of India/Special Committee of Secretaries of Government of India, both of which are chaired by the Cabinet Secretary. Under Article 309 of the Constitution, Parliament may also enact a Civil Services Act setting up a Civil Services Board for the Union Government which will perform the functions being performed at present by the Establishment Board presided over by the Cabinet Secretary. The Civil Services Act may also provide for a Special Committee of Secretaries to prepare panel of names for appointment for posts of Additional Secretaries and Secretaries to Government of India. Under the new Civil Services Act, a Cabinet Minister/Minister of State with independent charge in Government of India may be given a time limit to accept/send back proposals for the Establishment Board regarding posting of officers with his observations. In any particular case, if the Establishment Board after giving the views of the Minister in charge its utmost consideration does not

recommendation, the Cabinet Secretary may send proposals of the Establishment Board with observations of the Minister in charge through the Home Minister, a Member of the ACC to the Prime Minister, who heads the ACC for a final decision.

5.12 Inter alia, a Civil Services Board of a State shall also perform functions of recommending officers of All India Service/Group 'A1 service of the State for transfer to different posts under the State Government. It would be expedient before an officer is sought to be transferred in the public interest when he has not completed his tenure, that an administrative inquiry of a summary nature is held to ascertain if the transfer is justified as a matter of public policy. The administrative inquiry will be conducted as expeditiously as possible by a designated officer nominated by the Civil Services Board. In appropriate cases, the Civil Services Board may also direct the officer to proceed on leave on full pay and allowances till the administrative inquiry is over and a decision is taken regarding his transfer. The designated officer to conduct the inquiry will be ordinarily the Reporting Officer of the officer sought to be transferred. The Civil Services Board on receipt of the report of inquiry of the designated officer shall advise the Chief Minister regarding justification for transfer of the officer in the public interest before his normal tenure is over. Ordinarily the Chief Minister is expected to agree with the recommendations of the Civil Services Board as transfer of an official is a routine administrative matter on which a Civil Services Board must have a decisive role. But if the Chief Minister does not agree with the Civil Services Board and orders transfer of an official before his tenure is over, he may have to record in writing reasons for such transfer. If the official is transferred before his tenure without adequate justification, he will have the right to approach a three member Civil Service Ombudsman set up for the purpose.

Recommendation 38: In the proposed Civil Service law, the highest political executive shall continue to be the final authority to order transfer of any officer before his tenure is over; but he will be expected to give due consideration to Report of the Administrative Inquiry/views of the Civil Service Board/Establishment Board and record reasons on the need for premature transfer of an officer. It is reiterated that the political executive shall have the final authority to transfer an officer at any stage in the public interest. An officer aggrieved by order of premature transfer can agitate the matter before a three-Member Ombudsman, who may, where suitable, award monetary compensation to the aggrieved officer. The constitution of the Ombudsman will be the same as the Ombudsman proposed for the Disputes Redressal Council as at para 6.19 of this Report. The President/Governor shall receive reports from the Ombudsman and shall lay an Annual Report on such transfers on the table of the Legislature. There should be a suitable provision in the law to enable States to adopt it and make it applicable in the States without going through the long process of drafting a law and get it passed in the Legislature. {para 5.03 to 5.10)"

9. The 2nd Administrative Reforms Commission was set up by the President reflecting the Resolution dated 31st August, 2005 passed by the Government of India. The Commission was set up to suggest measures to achieve a preemptive responsible, accountable, sustainable and effective administration for the country at all levels of the government. The tenure of the Committee was extended from time to time and the Committee submitted its report in the year 2008. On the question of the setting up of the independent CSB, the Committee has made the following recommendations :

"9.7.1 The Commission suggests that an independent 'Authority' should deal with matters of assignment of domains, preparing panels for po[illegible]e

level of SAG and above, fixing tenures for various posts, deciding on posts which could be advertised for lateral entry etc. As this Authority would be performing the above-mentioned crucial tasks, it would be necessary to ensure its independence by giving it a statutory backing and stipulating that it should be headed by an eminent person with experience of public affairs to be appointed by the Prime Minister in consultation with the Leader of the Opposition in the Lok Sabha. The Authority should have a full time Member-Secretary of the rank of Secretary to Government of India, and persons of eminence in public life and professionals with acknowledged contributions to society as Members of the Authority. This Authority, to be named as the Central Civil Services Authority, should be constituted under the proposed Civil Services Act. As the constitution of the Central Civil Services Authority under a new law may take some time, the said Authority may be constituted, initially, under executive orders."

10. Para 9.8.e also refers to the composition of the Committee which reads as follows :-

"9.8.e. A Central Civil Services Authority should be constituted under the proposed Civil Services Bill. The Central Civil Services Authority shall be a five-member body consisting of the Chairperson and four members (including the member-secretary). The Authority should have a full time Member-Secretary of the rank of Secretary to Government of India. The Chairperson and members of the Authority should be persons of eminence in public life and professionals with acknowledged contributions to society. The Chairperson and members of the Authority shall be appointed by the President on the recommendations of a Committee consisting of the Prime Minister and the Leader of the Opposition in the Lok Sabha.

(Explanation:- Where the Leader of the Opposition in the

Lok Sabha has not been recognized as such, the Leader of the single largest group in the Opposition in the Lok Sabha shall be deemed to be the Leader of the Opposition)."

11. The Second Administrative Reforms Commission Fifteenth Report (April 2009) has also made various suggestions in order to provide legislative backing to these measures, the Commission has recommended enactment of a Civil Services Law which will cover all personnel holding civil posts under the Union. The Commission recommended for the constitution of a Central Civil Service Authority, among other things, which reads as follows:

"VIII. **Constitution of the Central Civil Services Authority**:

i. The Central Government shall, by notification in the Official Gazette, constitute a body to be known as the Central Civil Services Authority to exercise the powers conferred on, and to perform the functions assigned to it, under this Act.

ii. The Central Civil Services Authority shall be a five-member body consisting of the Chairperson and four members (including the member-secretary). The Authority should have a full time Member-Secretary of the rank of Secretary to Government of India. The Chairperson and members of the Authority should be persons of eminence in public life and professionals with acknowledged contributions to society. The Chairperson and members of the Authority shall be appointed by the President on the recommendations of a Committee consisting of the Prime Minister and the Leader of the Opposition in the Lok Sabha.

(Explanation:- Where the Leader o e

Lok Sabha has not been recognized as such, the Leader of the single largest group in the opposition in the Lok Sabha shall be deemed to be the Leader of the Opposition).

2.4.2.5 Subsequently, in its Report on "Refurbishing of Personnel Administration" (the Tenth Report), the Commission suggested a detailed procedure for placement of officers at the

middle and top management levels in the Union Government. It calls for the constitution of a Central Civil Service Authority by law, which will be an independent five member body consisting of persons of eminence in public life and professionals with acknowledged contributions to Society. This Authority will be empowered to deal with a large number of issues concerning civil services such as assignment of domain to officers, preparing panels for posting at the levels of Joint Secretary and above, fixing tenures for senior assignments and such other matters that may be referred to it by the Union Government. The Commission is of the view that there should be a similar Civil Services law and a State Civil Services Authority for each State. The mandate and functions of the State Body would largely coincide with those prescribed under the proposed Union Civil Services Law. This Authority should deal with issues of appointment and tenure of higher officials of all ranks in the State Governments including the Chief Secretary, Principal Secretaries, Engineer-in-Chiefs and the Principal Chief Conservator of Forests. However, till the time the proposed law is enacted and the State Civil Service Authority is constituted, recommendations made at para 2.14.2.5 above may be immediately adopted by all the State Governments.

2.4.2.6 Recommendations:

(a) After enactment of the State Civil Services Law on

the lines of the proposed Union enactment, the proposed State Civil Service Authority should deal with matters concerning appointment and tenure of senior officers of all ranks in the State Governments (including the Chief Secretary, Principal Secretaries, Engineer-in-Chiefs, other Agency Heads and Principal Chief Conservator of Forests).

(b) Till the time that such an Authority is constituted, the following mechanism may be adopted for appointment of the Chief Secretary and Principal Conservator of Forests in the States:-

- There should be a collegiums to recommend a panel of names to the Chief Minister/ Cabinet for these two posts. For the post of Chief Secretary, this collegium may consist of (a) a Minister nominated by the Chief Minister, (b) the Leader of the Opposition in the State Legislative Assembly and (c) the incumbent Chief Secretary. For the selection to the post of Principal Chief Conservator of Forests the collegiums may consist of (a) The Minister In-charge of Forests, (b) the leader of Opposition in the State Legislative Assembly and (c) the Chief Secretary.
- There should be a fixed tenure of atleast two years for both these posts.
- The selection for the post of Chief Secretary and Principal Chief Conservator of Forests should be widened to include all officers above a specified seniority (e.g. 30 years). All officers with a eniority higher than a prescribed limit should be eligible to be a part of the panel.

(c) As regards the appointment and tenure of the Director General of Police, the recommendations made by the Commission in its Report on "Public Order" at para 5.2.3.7 should be implemented."

12. We have elaborately referred to the Report of the Hota Committee, Report of the 2nd Administrative Commission, 2008-2009, which highlighted the necessity of creation of an independent CSB at the Centre as well as the State level.

B. FIXED TENURE:

13. Various Committees have also recommended and highlighted the necessity of providing fixed tenure for a civil servant so as to ensure stability and efficiency of administration. The Central Staffing Scheme, 1996, highlighted the necessity of a fixed tenure to provide certain degree of stability to the administration. Reference in this regard may be made to paras 17.01, 17.02, 17.03, 17.12 and 17.13 and the same are extracted hereinbelow for easy reference :

"17.01 The fixed tenure of deputation of posting under the Central Government is the heart of the Central Staffing Scheme. Rotation between the Centre and the States, Central Ministries and parent cadres, and headquarters and the field, provide a certain degree of pragmatism to policy formulation and programme implementation from the Central Ministries. Based on the experience gained so far, the periods of tenure at the different levels have been prescribed as under:-

i Under Secretary 3 years

ii Deputy Secretary 4 years

iii. Director 5 years

iv. Joint Secretary 5 years

17.02 An officer holding the post of Joint Secretary or equivalent, when appointed to a post under the Government of India at the level of Additional Secretary, would have a tenure of 3 years from the date of appointment as Additional Secretary subject to a minimum of 5 years and maximum of 7 years of combined tenure as Joint Secretary.

Additional Secretary. Where an officer remains on leave (either from the Centre or from his Cadre authority or both) on the expiry of his tenure as Joint Secretary till his appointment as Additional Secretary, the leave period shall be counted as tenure deputation. Additional Secretary 4 years, except for cases covered under the previous heading.

Secretary No fixed tenure.

17.03 Every officer shall revert at the end of his tenure as indicated above on the exact date of his completing his tenure. He will, however, have a choice to revert to his cadre on the 31st May previous to the date of the end of his tenure in case personal grounds such as children's education etc., necessitate such reversion. No extension after completion of the full tenure would be allowed.

17.12 (a) Officers of the Indian Foreign Service appointed to posts under the Central Staffing Scheme would have a tenure of three years.

(b) They shall not normally be relieved, except with the approval of the appointments Committee of the Cabinet from a Central Staffing Scheme post before their tenure.

17.13 No lateral shifts of officers from one Ministry/I)eptt. to another will normally be considered. However, in the case of Private Secretary to Ministers the policy followed would be :-

(a) The redeployment of a Private Secretary in the same Ministry/Department as Deputy Secretary or Director is discouraged.

(b) The Private Secretary (to Minister) who has been empanelled for holding post of Joint Secretary at the Centre should also not be considered for relocation in the same Ministry/Deptt. and the officer should be posted to some other Ministry/Deptt."

14. The 2nd Administrative Reforms Commission (10th Report) also speaks of the same in paras 8.5.11, 8.5.12, 8.5.14, 8.7 (e)- (g), 9.8(e)-(g) and 17.5(VIII) and the same are extracted hereinbelow for easy reference :

"8.5.11. There appears to be unanimity on the point that it is necessary to give a fixed tenure to a civil servant in his/her post. In fact, the Draft Public Services Bill, 2007 has stipulated in Clause 16(e) that

> "The Central Government shall fix a minimum tenure for cadre posts, which may be filled on the basis of merit, suitability and experience."

8.5.12 In Clause 22, the Bill enjoins the Cadre Controlling Authorities to

> "notify within a period of six months from the coming into force of this Act, norms and guidelines for transfers and postings to maintain continuity and predictability in career advancement and acquisition of necessary skills and experiences as well as promotion of good governance. Transfers before the specified tenure should be for valid reasons to be recorded in writing. Provided that the normal tenure of all public servants shall not be less than two years."

8.5.14 The Commission is of the view that the Central Civil

Services Authority (discussed in detail in Chapter 9) should be charged with the responsibility of fixing the tenure for all civil service posts under the Union Government. At present, the functions of the Authority are envisaged as advisory under the provisions of the Draft Public Services Bill, 2007. This needs to be changed, and so far as the fixation of tenure is concerned, it is suggested that the decision of the Authority should be binding on the Government. The Authority should also be given the responsibility to monitor postings and place before Parliament a periodic evaluation of the actual average tenure for each post and for the Central Government as a whole. Establishment of State Civil Service Authorities for the States with similar responsibilities needs to be urgently taken up by the State Governments where tenures are much less stable. The details of the State Civil Services Authorities would be examined by the Commission in its Report on 'State Administration'.

8.7 (e) – (g) **Placement at Middle Management Level**

[…….]

e. The Central Civil Services Authority should be charged with the responsibility of fixing tenure for all civil service positions and this decision of the Authority should be binding on Government.

f. Officers from the organized services should not be given 'non-field' assignments in the first 8-10 years of their career.

g. State Governments should take steps to constitute State Civil Services Authorities on the lines of the Central Civil Services Authority.

9.8 (e) – (g) **Placement at Top Management Level**

[……]

e. A Central Civil Services Authority should be constituted under the proposed Civil Services Bill. The Central Civil Services Authority shall be a five-member body consisting of the Chairperson and four members (including the member-secretary). The Authority should have a full time Member-Secretary of the rank of Secretary to Government of India. The Chairperson and members of the Authority should be persons of eminence in public life and professionals with acknowledged contributions to society. The Chairperson and members of the Authority shall be appointed by the President on the recommendations of a Committee consisting of the Prime Minister and the Leader of the Opposition in the Lok Sabha.

(Explanation:- Where the Leader of the Opposition in the Lok Sabha has not been recognized as such, the Leader of the single largest group in the Opposition in the Lok Sabha shall be deemed to be the Leader of the Opposition).

f. The Central Civil Services Authority should deal with matters of assignment of domains to officers, preparing panels for posting of officers at the level of Joint Secretary and above, fixing tenures for senior posts, deciding on posts which could be advertised for lateral entry and such other matters that may be referred to it by the Government.

g. A similar procedure should be adopted for filling up vacancies at SAG level and higher in the central police agencies. For example, in the Central Para-Military Forces the senior positions should be opened to competition from officers of the CPMFs, IPS and the Armed Forces (including those completing their Short Service Commissions). Similarly for the intelligence agencies officers from the armed forces as well as the CPOs with experience in the field of intelligence should be considered for postings at higher levels in the intelligence agencies.

17.5 **Recommendations**

"A new Civil Services Bill may be drafted. The following salient features may be included in the proposed Bill.

[…….]

VIII. Fixation of Tenures : All senior posts should have a specified tenure. The task of fixing tenures for various posts may also be assigned to this independent agency – Central Civil Services Authority."

15. The 2nd Administrative Reforms Commission (15th Report), 2009 also speaks of the same in paras 2.4.1.2 and 2.4.2.4 and the same is extracted below for ready reference:-

"2.4.1.2 In order to provide legislative backing to these measures, the Commission has recommended enactment of a Civil Services Law which will cover all personnel holding civil posts under the Union. As recommended at paragraph 17.5 of this Report, the proposed law has the following salient features :

[…..]

V. Fixation of Tenure. All senior psots should have a specified tenure. The task of fixing tenures for various posts may also be assigned to this independent agency – Central Civil Services Authority".

[…..]

IX. Functions of the Central Civil Services Authority. The Central Authority shall discharge the following functions :

[…..]

vi. Fix the tenure for posts at the 'Senior Management Level' in Government of India.

2.4.2.4 For appointments to the posts of the Chief Secretary and the Principal Conservator of Forest, the Commission communicated the following interim suggestions to the Government in December 2007:-

(i) There should be a collegium to recommend a panel of names to the Chief Minister/ Cabinet for these two posts. For the post of Chief Secretary, this collegiums may consist of

(a) a Minister nominated by the Chief Minister,

(b) the Leader of the Opposition in the State Legislative Assembly and

(c) the incumbent Chief Secretary. For the selection to the post of Principal Chief Conservator of Forests the collegiums may consist of

(a) The Minister In-charge of Forests,

(b) the leader of Opposition in the State Legislative Assembly and

(c) the Chief Secretary.

(ii) There should be a fixed tenure of two years for both these posts.

(iii) The selection for the post of Chief Secretary and Principal Chief Conservator of Forests should be widened to include all officers above a specified seniority (e.g. 30 years). All officers with seniority higher than a prescribed limit should be eligible to be a part of the panel."

16. The Hota Committee Report, 2004 also highlights the same as its main Recommendation No.39 which reads as follows :-

"(39). The proposed comprehensive law on the Civil

Services shall incorporate, *inter alia,* a Code of Ethics and a statutory minimum tenure in a post to an officer. Under the proposed law, if an officer is sought to be transferred before his tenure, there would be an expeditious administrative inquiry by a designated senior officer to be earmarked for this purpose. This can be dispensed with if the transfer is on promotion/deputation/foreign training. In all other cases, the Report of Inquiry with the views of the Civil Service Board/Establishment Board would be put up to the Chief Minister if officer of the All India Services Service/other civil services work in the States, or the Appointments Committee of the Cabinet if the officers work under the Central Staffing Scheme. For the officers of the other Central Services working in Ministries/ Departments but not under the Central Staffing Scheme, the new law will prescribe tenure with a provision for administrative inquiry before an officer is sought to be transferred except on specified grounds."

C. RECORDING OF INSTRUCTIONS AND DIRECTIONS:

17. Petitioners have highlighted the serious predicant on which the civil servants are placed when they are asked to implement governmental decisions, on oral directions, suggestions, instructions etc. Much of the deterioration of the standards of probity and accountability, according to the Petitioners, can be traced to practice of issuing and acting on verbal instructions or oral orders which are not recorded. This issue was addressed by the Santhanam Committee way back in 1962. Paragraphs 6.20 and 6.21 deal with those aspects, which are given below for easy reference :

"6.20. We have already mentioned the existence of 'contactmen' and 'touts'. Obviously these do not include genuine representatives of commercial and industrial firms. In this regard our recommendations are :-

(i) No official should have any

claiming to act on behalf of a business or industrial house or an individual, unless he is properly accredited, and is approved by the Department, etc. concerned. Such a procedure will keep out persons with unsavoury antecedents or reputation. There should, of course, be no restriction on the proprietor or manager etc. of the firm or the applicant himself approaching the authorities.

(ii) Even the accredited representatives should not be allowed to see officers below a specified level – the level being specified in each organization after taking into consideration the functions of the organizations, the volume and nature of the work to be attended to, and the structure of the organization. However, care should be taken to limit permissible contacts to levels at which the chances of corruption are considered to be small. This would often mean that no contact would be permitted at the level of subordinate officers.

(iii) There should be some system of keeping some sort of record of all interviews granted to accredited representatives.

(iv) There should be a fairly senior officer designated in each Department to which an applicant etc., may go if his case is being unreasonably delayed.

It is necessary that a proper procedure should be devised in consultation with the Central Vigilance Commission for accrediting and approval by the department. Before granting approval the antecedents of the person proposed to be accredited should, if possible, be verified. In any case no person who is not definitely employed by an established undertaking who will be responsible for his contact and actions should be approved.

6.21. It is also desirable that officers belonging to prescribed categories who have to deal with these representatives should maintain a regular diary of all interviews and discussions with the registered representatives whether it takes place in the office or at home. The general practice should be that such interviews should be in the office and if it takes place at home, reasons should be recorded. Any business or discussion which is not so recorded should be deemed to be irregular conduct, of which serious notice should be taken by the superiors.

18. Further, we also notice the All India Services (Conduct) Rules, 1968, which also states that the directions of the officials superior shall ordinarily be in writing. Rule 3(3) of the above-mentioned Rules reads as follows :-

3(3) (i) No member of the Service shall, in the performance of his official duties, or in the exercise of powers conferred on him, act otherwise than in his own best judgment to be true and correct except when he is acting under the direction of his official superior.

(ii) The direction of the official superior shall ordinarily be in writing. Where the issue of oral direction becomes unavoidable, the official superior shall confirm it in writing immediately thereafter.

(iii) A member of the Service who has received oral direction from his official superior shall seek confirmation of the same in writing, as early as possible and in such case, it shall be the duty of the official superior to confirm the direction in writing.

Explanation I– A member of the Service who habitually fails to perform a task assigned to him within the time set for the purpose and with the quality of performance expected of him shall be deemed to be lack y

within the meaning of the sub-rule (1);

Explanation II – Nothing in clause (i) of sub-rule (3) shall be construed as empowering a Government servant to evade his responsibilities by seeking instructions from or approval of, a superior officer or authority when such instructions are not necessary under the scheme of distribution of powers and responsibilities."

19. We, in this respect, point out that the response of certain States and Union Territories in the matter of creation of an independent CSB, fixed tenure of civil servants and recording of directions, are neither consistent nor positive. But generally, they have welcomed the suggestion for fixation of tenure subject to the rider that in certain exceptional circumstances, the State Governments should have the power to transfer a person prematurely before completion of the tenure. Few States have welcomed the suggestion that every Civil Servant should record all the instructions and directions received.

20. Union and the State Governments apprehend that creation of an independent CSB or institutional arrangement for regulating transfers and postings of officers would be an intrusion into the executive function of the Centre and State Governments headed by the political executives, who are directly responsible to the people. Further, they have also taken up a stand that the said arrangement would lead to a dual line of control, creating complexities in managing administrative functions and affecting efficiency of civil servants. With regard to frequent transfers of officers, they have taken up the stand that there is already a clear cut policy that except in cases of promotion, in the interest of work and administrative reasons, transfer and posting will be done only after completion of three years of tenure. Few States have issued directions, to get written directions in case of oral directions of Superior Officers in line with Rule 3(3)(ii)-(iii) of All India Services (Conduct) Rules, 1968.

21. Chapter XIV of the Constitution of India deals with services under the Union and the States. Article 309 deals with the recruitment and conditions of service of persons serving the Union or the State, which expressly made subject to the other provision of the Constitution of India, In terms of Article 309 appropriate Legislature, Parliament or the State Legislature is empowered to legislate, to regulate the recruitment and conditions of service of persons appointed to public services and post them in connection with the affairs of the Union or of any State. In terms of the proviso to Article 309, number of rules have been made from time to time by the Union and the State Governments and they govern and regulate the public services in India. Article 310 of the Constitution provides for all members of the civil services of the Union and All India Services to be held in civil post at the pleasure of the President and all members of the civil services of the State at the pleasure of the Governor of the State. Article 311 provides certain safeguards regarding dismissal, removal or reduction in rank of persons employed in civil capacity. Article 312 provides constitution of All India Services. Articles 318 to 333 deal with the Union Public Service Commission (UPSC) and State Public Service Commissions (PSC). Article 320 stipulates that it shall be the duty of the Union and the State PSCs to conduct the examinations for appointment to the services of the Union and services of the State, respectively.

22. UPSC or the State PSCs are to be consulted in all matters relating to the method of recruitment to civil services and on the principles to be followed in making appointments to civil services and posts and in making promotions and transfers from one service to another. Of late, the UPSCs and PSCs are being denuded of their powers of consultation while making promotions and transfer from one service to another. Article 323 lays down that it shall be the duty of the UPSC to present annually to the President a report of the work done by the Commission and on receipt of such report the President shall cause a copy thereof together w[illegible],

explaining as regard the cases, if any, where advice of the Commission was not accepted, the reasons for such non-acceptance, to be laid before the House of Parliament. Similar provision also exists for the State PSCs. Article 323A authorizes Parliament to set up administrative tribunals regarding disputes with regard to recruitment and conditions of service, appointed to public services. Parliament in exercise of its powers under Article 309 enacted the All India Service Act, 1951, which authorizes Union Government in consultation with the State Governments, to make rules for the regulations of conditions of service of persons appointed to All India Services.

23. Part V of the Constitution deals with the Union. Article 53 states that the executive power of the Union shall be vested in the President and shall be exercised by him either directly or through officers subordinate to him in accordance with this Constitution. Article 154 of Chapter VI of the Constitution states that the executive power of the State shall be vested with the Governor and shall be exercisable by him either directly or through officers subordinate to him in accordance with the Constitution. Article 73 of the Constitution states that subject to the provisions of the Constitution executive power of the Union shall extend to matters with respect to which Parliament has power to make laws and to the exercise of such rights, authority and jurisdiction, as exercisable by the Government of India by virtue of any treaty or any agreement. Article 163 of the Constitution states that there shall be a Council of Ministers, the Chief Minister as the head to aid and advice the Governor in exercise of his functions, except in so far as he is by or under this Constitution required to exercise his functions or any of them with his discretion.

24. The above are the constitutional provisions which generally deal with the power of the executive. The principles governing the roles and responsibilities of political executive and civil servants, are therefore, constitutionally defined and also

based on the basis of various rules framed by the President and Governor for the conduct of business in the Government. Ministers are responsible to the people in a democracy because they are the elected representatives of the Parliament as well as the General State Assembly. Civil servants have to be accountable, of course to their political executive but they have to function under the Constitution, consequently they are also accountable to the people of this country.

25. Paragraph 15.1.3 of the report of the 2nd Administrative Reforms Committee (2008) reads as follows:

> "A healthy working relationship between Ministers and civil servants is critical for good governance. While the principles governing the roles and responsibilities of Ministers and civil servants are well defined in political theory, in the actual working of this relationship this division of responsibility becomes blurred with both sides often encroaching upon the other's sphere of responsibility. In any democracy, Ministers are responsible to the people through Parliament and therefore the civil servants have to be accountable to the Minister. However, an impartial civil service is responsible not only to the government of the day but to the Constitution of the land to which they have taken an oath of loyalty. At the same time, implementing the policies of the duly elected government is a core function of civil servants. That is why the division of responsibility between the civil servants and ministers needs to be more clearly defined. A framework in which responsibility and accountability is well defined would be useful."

26. Civil servants, as already indicated, have to function in accordance with the Constitution and the laws made by the Parliament. In the present political scenario, the role of civil servants has become very complex and onerous. Often they have to take decisions which will have far reaching consequences in the economic and tec ir

decisions must be transparent and must be in public interest. They should be fully accountable to the community they serve. Many of the recommendations made by the Hota Committee, various reports of the 2nd Administrative Reforms Commission, 2008 and Santhanam Committee Report have high-lighted various lacunae in the present system which calls for serious attention by the political executive as well as the law makers.

27. We find it, however, difficult to give a positive direction to constitute an independent CSB at the Centre and State Level, without executive control, which Hota Committee has recommended to be statutory in nature, that too, comprising of persons from outside the Government. Petitioners placed considerable reliance on the judgment of this Court in *Prakash Singh and Others v. Union of India* (2006) 8 SCC 1 and urged that similar directions be given to insulate, to at least some extent, the civil servants from political/executive interference. Retired persons, howsoever eminent they may be, shall not guide the transfers and postings, disciplinary action, suspension, reinstatement, etc. of civil servants, unless supported by law enacted by the Parliament or the State Legislature.

28. CSB, consisting of high ranking in service officers, who are experts in their respective fields, with the Cabinet Secretary at the Centre and Chief Secretary at the State level, could be a better alternative (till the Parliament enacts a law), to guide and advise the State Government on all service matters, especially on transfers, postings and disciplinary action, etc., though their views also could be overruled, by the political executive, but by recording reasons, which would ensure good governance, transparency and accountability in governmental functions. Parliament can also under Article 309 of the Constitution enact a Civil Service Act, setting up a CSB, which can guide and advice the political executive transfer and postings, disciplinary action, etc. CSB consisting of experts in various fields like administration, management, science,

technology, could bring in more professionalism, expertise and efficiency in governmental functioning.

29. We, therefore, direct the Centre, State Governments and the Union Territories to constitute such Boards with high ranking serving officers, who are specialists in their respective fields, within a period of three months, if not already constituted, till the Parliament brings in a proper legislation in setting up CSB.

30. We notice, at present the civil servants are not having stability of tenure, particularly in the State Governments where transfers and postings are made frequently, at the whims and fancies of the executive head for political and other considerations and not in public interest. The necessity of minimum tenure has been endorsed and implemented by the Union Government. In fact, we notice, almost 13 States have accepted the necessity of a minimum tenure for civil servants. Fixed minimum tenure would not only enable the civil servants to achieve their professional targets, but also help them to function as effective instruments of public policy. Repeated shuffling/transfer of the officers is deleterious to good governance. Minimum assured service tenure ensures efficient service delivery and also increased efficiency. They can also prioritize various social and economic measures intended to implement for the poor and marginalized sections of the society.

31. We, therefore, direct the Union State Governments and Union Territories to issue appropriate directions to secure providing of minimum tenure of service to various civil servants, within a period of three months.

32. We have extensively referred to the recommendations of the Hota Committee, 2004 and Santhanam Committee Report and those reports have highlighted the necessity of recording instructions and directions by public servants. We notice that much of the deterioration of the standards of probity and accountability with the civil servant

influence or persons purporting to represent those who are in authority. Santhanam Committee on Prevention of Corruption, 1962 has recommended that there should be a system of keeping some sort of records in such situations. Rule 3(3)(iii) of the All India Service Rules specifically requires that all orders from superior officers shall ordinarily be in writing. Where in exceptional circumstances, action has to be taken on the basis of oral directions, it is mandatory for the officer superior to confirm the same in writing. The civil servant, in turn, who has received such information, is required to seek confirmation of the directions in writing as early as possible and it is the duty of the officer superior to confirm the direction in writing.

33. We are of the view that the civil servants cannot function on the basis of verbal or oral instructions, orders, suggestions, proposals, etc. and they must also be protected against wrongful and arbitrary pressure exerted by the administrative superiors, political executive, business and other vested interests. Further, civil servants shall also not have any vested interests. Resultantly, there must be some records to demonstrate how the civil servant has acted, if the decision is not his, but if he is acting on the oral directions, instructions, he should record such directions in the file. If the civil servant is acting on oral directions or dictation of anybody, he will be taking a risk, because he cannot later take up the stand, the decision was in fact not his own. Recording of instructions, directions is, therefore, necessary for fixing responsibility and ensure accountability in the functioning of civil servants and to uphold institutional integrity.

RTI Act and Civil Servants

34. Democracy requires an informed citizenry and transparency of information. Right to Information Act, 2005 (RTI Act) recognizes the right of the citizen to secure access to information under the control of public authority, in order to promote transparency and accountability in the working of every public authority. Section 3 of the Act confers right to information

to all citizens and a corresponding obligation under Section 4 on every public authority to maintain the records so that the information sought for can be provided. Oral and verbal instructions, if not recorded, could not be provided. By acting on oral directions, not recording the same, the rights guaranteed to the citizens under the Right to Information Act, could be defeated. The practice of giving oral directions/ instructions by the administrative superiors, political executive etc. would defeat the object and purpose of RTI Act and would give room for favoritism and corruption.

35. We, therefore, direct all the State Governments and Union Territories to issue directions like Rule 3(3) of the All India Services (Conduct) Rules, 1968, in their respective States and Union Territories which will be carried out within three months from today.

36. The Writ Petitions are, accordingly, disposed of with the above directions.

K.K.T. Writ Petitions disposed of.

KN ASWATHNARAYANA SETTY (D) TR. LRS. & ORS.

v.

STATE OF KARNATAKA & ORS.

(Special Leave Petition (C) No.22311 of 2012 etc.)

DECEMBER 2, 2013

[DR. B.S. CHAUHAN AND S.A. BOBDE, JJ.]

Land Acquisition Act, 1894:

ss. 4 and 48(1) – Purchase of land, subsequent to issuance of notification for acquisition of land – Competence of purchaser to challenge the validity of acquisition – Held: Vendee not competent to challenge the validity of acquisition – He can at the most claim compensation on the basis of his vendor's title – In the present case, the de-notification of land having been refused by the courts, vendee cannot seek de-notification of the land – He would be bound by the orders of the court.

ss. 48(1), 16 and 17 – Application of de-notification of acquired land – Maintainability of – Held: Once possession is taken u/ss. 16 and 17, the land vests in State, free from all encumbrances – Once land is vested in State, free from all encumbrances, it cannot be divested – In the facts of the case, since the possession of the land already taken by the State, application for de-notification, not maintainable.

Doctrine – Doctrine of lis pendens – Transfer of property pendente lite – Effect of – Held: Transferee cannot deprive the successful plaintiff of the fruits of decree, if purchased the property pendente lite – He is bound by the decree just as much as he was a party to the suit.

Maxim – Maxim út lite pendente nihil 'innovetur' (During a litigation, nothing new should be introduced).

The land in question was acquired under Land Acquisition Act, 1894 for the benefit of the State Government Houseless Harijan Employees Association (Respondent No.3 Society). The land was further denotified u/s. 48(1) of the Act, at the behest of the owners of the land. After one round of litigation, the order de-notifying the land was set aside by Supreme Court. During pendency of the appeal before Supreme Court, the petitioner purchased the land and approached the Government for denotifying the same from acquisition. Though the land was denotified by the Revenue Minister, by order dated 27.2.2004, the order could not be complied with in view of the fact that the matter had attained finality after having been decided by Supreme Court, and possession of the land had already been taken and handed-over to the respondent-Society on 6.9.2002. Petitioner filed writ petition challenging the order, but the same was dismissed by Single Judge of High Court. Division Bench of High Court affirmed the order of Single Judge. Hence the present appeal.

Dismissing the Petitions, the Court

HELD: 1. At the time of purchase of the suit land by the present petitioners the matter was *sub-judice* before this Court and if the order of de-notification dated 5.8.1993 stood quashed, it would automatically revive the land acquisition proceedings meaning thereby the notification under Section 4 and declaration under Section 6 resurfaced by operation of law. In such a fact-situation, it is not permissible for the present petitioners to argue that merely because there was no interim order in the appeal filed by the respondent No.3, petitioners had a right to purchase the land during the pendency of the litigation and would not be bound by the order of this Court quashing the de-notification of acquisition proceedings. [Para 5] [1037-F-H; 10

2. Doctrine of *lis pendens* is based on legal maxim '*ut lite pendente nihil innovetur*' (During a litigation nothing new should be introduced). This doctrine stood embodied in Section 52 of the Transfer of Property Act 1882. The principle of '*lis pendens*' is in accordance with the equity, good conscience or justice because they rest upon an equitable and just foundation that it will be impossible to bring an action or suit to a successful termination if alienations are permitted to prevail. A transferee *pendente lite* is bound by the decree just as much as he was a party to the suit. A litigating party is exempted from taking notice of a title acquired during the pendency of the litigation. However, mere pendency of a suit does not prevent one of the parties from dealing with the property constituting the subject matter of the suit. The law simply postulates a condition that the alienation will, in no manner, affect the rights of the other party under any decree which may be passed in the suit unless the property was alienated with the permission of the Court. The transferee cannot deprive the successful plaintiff of the fruits of the decree if he purchased the property *pendente lite*. [Para 6] [1038-B-E]

K. Adivi Naidu and Ors. vs. E. Duruvasulu Naidu and Ors. **(1995) 6 SCC 150: 1995 (3) Suppl. SCR 524;** *Venkatrao Anantdeo Joshi and Ors. vs. Malatibai and Ors.* **(2003) 1 SCC 722: 2002 (4) Suppl. SCR 211;** *Raj Kumar vs. Sardari Lal and Ors.* **(2004) 2 SCC 601: 2004 (1) SCR 838;** *Sanjay Verma vs. Manik Roy and Ors.* **AIR 2007 SC 1332 : 2006 (10) Suppl. SCR 469;** *Rajender Singh and Ors. vs. Santa Singh and Ors.* **AIR 1973 SC 2537: 1974 (1) SCR 381;** *T.G. Ashok Kumar vs. Govindammal and Anr.* **(2010) 14 SCC 370: 2010 (14) SCR 560 – relied on.**

3. A person who purchases land subsequent to the issuance of a Section 4 notification with respect to it, is not competent to challenge the validity of the acquisition

proceedings on any ground whatsoever, for the reason that the sale deed executed in his favour does not confer upon him, any title and at the most he can claim compensation on the basis of his vendor's title. In order to meet the menace of sale of land after initiation of acquisition proceedings, various States enacted the Acts and making such transfers as punishable, e.g., The Delhi Lands (Restrictions on Transfers) Act, 1972 made the sales permissible only after grant of permission for transfer by the authority prescribed therein. In absence of such permission if the sale is made in contravention of the statutory provisions it is a punishable offence with imprisonment for a term which may extend to 3 years or with fine or with both. [Paras 10 and 11] [1040-B-D]

V. Chandrasekaran and Anr. vs. The Administrative Officer and Ors. **JT 2012 (9) SC 260;** *Leela Ram vs. Union of India and Ors.* **AIR 1975 SC 2112: 1976 (1) SCR 341;** *Smt. Sneh Prabha etc. vs. State of Uttar Pradesh and Anr.* **AIR 1996 SC 540: 1995 (5) Suppl. SCR 264;** *Meera Sahni vs. Lieutenant Governor of Delhi and Ors.* **(2008) 9 SCC 177: 2008 (10) SCR 1012;** *Tika Ram and Ors. vs. State of U.P. and Ors.* **(2009) 10 SCC 689: 2009 (14) SCR 905 – relied on.**

4. Therefore, it is not permissible to say that in case the petitioners had purchased the suit property during the pendency of the appeal filed by respondent No.3 before this Court, the petitioners are not bound by the final orders of this Court. [Para 8] [1039-C]

5. It is not correct to say that the Supreme Court had quashed the de-notification of acquisition proceedings only on technical ground as the respondent-society was not heard. This Court had held that the withdrawal of the acquisition under Section 48(1) of Land Acquisition Act was vitiated not only because the appellant was not

heard but also because the reason for withdrawal was wrong. [Para 12] [1040-F; 1041-A]

State Govt. Houseless Harijan Employees Association vs. State of Karnataka and Ors. **AIR 2001 SC 437: 2000 (5) Suppl. SCR 483 – referred to.**

6. Upon possession being taken under Section 16 or 17 of the Act, the land vests in the State free from all encumbrances. There is ample evidence on record to show that possession of the suit land had been taken on 6.9.2002. In such a fact-situation, question of de-notifying the acquisition of land could not arise. Thus, the order dated 27.2.2004 could not be passed. Thus, in case possession of the land has been taken, application for release of land from acquisition is not maintainable. Once the land is vested in the State, free from encumbrances, it cannot be divested. [Para 13] [1041-C-D]

LT. Governor of H.P. and Anr. vs. Sri Avinash Sharma **AIR 1970 SC 1576: 1971 (1) SCR 413;** *Satendra Prasad Jain and Ors. vs. State of U.P. and Ors.* **AIR 1993 SC 2517: 1993 (2) Suppl. SCR 336;** *Mandir Shree Sitaramji alias Shree Sitaram Bhandar vs. Land Acquisition Collector and Ors.* **AIR 2005 SC 3581: 2005 (2) Suppl. SCR 969;** *Smt. Sulochana Chandrakant Galande vs. Pune Municipal Transport and Ors.* **AIR 2010 SC 2962: 2010 (9) SCR 476 – relied on.**

Case Law Reference:

1995 (3) Suppl. SCR 524	**relied on**	**Para 6**
2002 (4) Suppl. SCR 211	**relied on**	**Para 6**
2004 (1) SCR 838	**relied on**	**Para 6**
2006 (10) Suppl. SCR 469	**relied on**	**Para 6**
1974 (1) SCR 381	**relied on**	**Para 6**
2010 (14) SCR 560	**relied on**	**Para 7**

JT 2012 (9) SC 260	**relied on**	**Para 9**
1976 (1) SCR 341	**relied on**	**Para 10**
1995 (5) Suppl. SCR 264	**relied on**	**Para 10**
2008 (10) SCR 1012	**relied on**	**Para 10**
2009 (14) SCR 905	**relied on**	**Para 10**
2000 (5) Suppl. SCR 483	**referred to**	**Para 12**
1971 (1) SCR 413	**relied on**	**Para 13**
1993 (2) Suppl. SCR 336	**relied on**	**Para 13**
2005 (2) Suppl. SCR 969	**relied on**	**Para 13**
2010 (9) SCR 476	**relied on**	**Para 13**

CIVIL APPELLATE JURISDICTION : Special Leave Petition (Civil) No. 22311 of 2012.

From the Judgment & Order dated 24.10.2011 of the High Court of Karnataka at Bangalore in W.A. No. 1421 of 2008.

WITH

SLP (C) Nos. 22307-22309 of 2012.

Kailash Vasdev, P. Vishwanath, Girish Ananthmurthy, Umrao Singh Rawat, Vaijayanthi Girish for the Appellant.

Rama Jois, K.N. Bhat Shetty, S.N. Bhat, D.P. Chaturvedi, Ravi Panwar, Dasharath T.M., V.N. Raghupathy, Anantha Narayana M.G., for the Respondents.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. These petitions have been filed against the judgment and order dated 24.10.2011, passed by the High Court of Karnataka at Bangalore in Writ Appeal No.1421 of 2008 etc. affirming the judgment of the learned Single Judge dated 17.4.2008 passed in Writ Petition No. 11502/2006, by which and whereunder the court had quashed the order dated 27.2.2004, passed by [illegible]r,

Government of Karnataka de-notifying the suit land from acquisition.

2. Facts and circumstances giving rise to these petitions are:

A. That a preliminary notification under Section 4(1) of the Land Acquisition Act 1894 (hereinafter referred to as 'Act 1894') was issued in respect of huge chunk of land including Survey No.49/1 admeasuring 15 Acres on 6.8.1991 for the benefit of the State Government Houseless Harijan Employees Association (Regd.) (hereinafter referred to as 'Society'). In respect of the same land declaration under Section 6 of the Act 1894 was issued on 15.5.1992.

B. At the behest of the then owners of the suit land the Government de-notified the land from acquisition vide order dated 5.8.1993 issuing notification under Section 48(1) of the Act 1894.

C. Aggrieved the respondent no.3-Society challenged the said order of de-notifying the land from acquisition by filing Writ Petition which was dismissed by the learned Single Judge. The said order was also affirmed by the Division Bench dismissing the Writ Appeal preferred by the Society. The Society approached this court by filing special leave petitions which were entertained and finally heard Civil Appeal No. 5015/1999 etc. and this court vide judgment and order dated 11.12.2000 quashed the order dated 5.8.1993 de-notifying the suit land from acquisition.

D. During the pendency of Civil Appeal No.5015 of 1999 etc. filed by the respondent-society, the present petitioners purchased the suit land in the years 1997-1998 and approached the Government of Karnataka to de-notify the said land from acquisition. As their application for release was not dealt with by the Government, they preferred Writ Petition Nos.19968-97 of 2002 etc. before the High Court for directions to the

Government to release the land.

E. The High Court vide judgment and order dated 19.2.2003 disposed of the said writ petition, directing the Government to decide their application in accordance with law expeditiously. In pursuance of the High Court order, the Government of Karnataka issued notice to all concerned parties and against all the parties the Hon'ble Revenue Minister passed an order dated 27.2.2004, directing to de-notify the land from acquisition.

F. The order dated 27.2.2004 was not complied with as the Deputy Secretary to the Government of Karnataka raised certain objections and made an endorsement dated 21.9.2005 that the matter had attained finality after being decided by this Court and possession of the land had already been taken and handed over to the respondent-society on 6.9.2002, much prior to the order passed by the Hon'ble Minister.

G. The present petitioners filed Writ Petition No.11502 of 2006 etc. before the High Court to quash the endorsement dated 21.9.2005 made by the learned Deputy Secretary, Government of Karnataka. The writ petition stood dismissed on 17.4.2008 in terms of the judgment of the same date in a similar case, i.e. Writ Petition No.9857 of 2006 (*M.V. Kasturi & Ors. v. State of Karnataka & Ors.*).

H. Aggrieved, petitioners preferred a Writ Appeal No. 1421/2008 which has been dismissed by the impugned judgment and order.

Hence, these petitions.

3. Shri Kailash Vasdev, learned senior counsel appearing for the petitioners submitted that the courts below have committed an error in dismissing the case of the petitioners as the courts failed to appreciate the legal issues. This Court set aside the order of de-notification dated 5 al

ground as the order of de-notification was passed without hearing the respondent-society for whose benefit the land had been acquired. Thus, there could be no prohibition for the State to de-notifying the land from acquisition after hearing the concerned parties. More so, the Hon'ble Minister had competence to deal with the acquisition proceedings and thus the finding recorded by the High Court about his competence is perverse. More so, as there was no interim order of this court in Society's appeal, petitioners could purchase the land. Hence, these petitions should be accepted.

4. Per contra, Shri Rama Jois and Shri K.N. Bhat, learned senior counsel for the respondents have opposed the petitions contending that this Court has set aside the order dated 5.8.1993 de-notifying the land from acquisition not only on the ground of violation of principles of natural justice but also on merits as it had been held by this Court that there was no justification for de-notifying the land. The present petitioners are purchasers of land subsequent to notification under Section 4(1) of the Act 1894, and they could not purchase the land at all. In view of the fact that the appeal filed by the respondent no.3 against the order dated 5.8.1993 was pending before this Court, doctrine of *lis pendens* would apply. Thus, the petitions are liable to be dismissed.

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

The facts are not in dispute. At the time of purchase of the suit land by the present petitioners the matter was *sub-judice* before this Court and if the order of de-notification dated 5.8.1993 stood quashed, it would automatically revive the land acquisition proceedings meaning thereby the notification under Section 4 and declaration under Section 6 resurfaced by operation of law. In such a fact-situation, it is not permissible for the present petitioners to argue that merely because there was no interim order in the appeal filed by the respondent no.3,

petitioners had a right to purchase the land during the pendency of the litigation and would not be bound by the order of this Court quashing the de-notification of acquisition proceedings.

6. Doctrine of *lis pendens* is based on legal maxim '*ut lite pendente nihil innovetur*' (During a litigation nothing new should be introduced). This doctrine stood embodied in Section 52 of the Transfer of Property Act 1882. The principle of '*lis pendens*' is in accordance with the equity, good conscience or justice because they rest upon an equitable and just foundation that it will be impossible to bring an action or suit to a successful termination if alienations are permitted to prevail. A transferee *pendente lite* is bound by the decree just as much as he was a party to the suit. A litigating party is exempted from taking notice of a title acquired during the pendency of the litigation. However, it must be clear that mere pendency of a suit does not prevent one of the parties from dealing with the property constituting the subject matter of the suit. The law simply postulates a condition that the alienation will, in no manner, affect the rights of the other party under any decree which may be passed in the suit unless the property was alienated with the permission of the Court. The transferee cannot deprive the successful plaintiff of the fruits of the decree if he purchased the property *pendente lite*. [Vide : *K. Adivi Naidu & Ors. vs. E. Duruvasulu Naidu & Ors.,* (1995) 6 SCC 150; *Venkatrao Anantdeo Joshi & Ors. vs. Malatibai & Ors.,* (2003) 1 SCC 722; *Raj Kumar vs. Sardari Lal & Ors.,* (2004) 2 SCC 601; and *Sanjay Verma v. Manik Roy & Ors.,* AIR 2007 SC 1332).

7. In *Rajender Singh & Ors. v. Santa Singh & Ors.,* AIR 1973 SC 2537, while dealing with the application of doctrine of *lis pendens,* this court held as under:

"The doctrine of lis pendens was intended to strike at attempts by parties to a litigation to circumvent the jurisdiction of a court, in which a

interests in immovable property is pending by private dealings which may remove the subject matter of litigation from the ambit of the court's power to decide a pending dispute or frustrate its decree."

(See also: *T.G. Ashok Kumar v. Govindammal & Anr.,* (2010) 14 SCC 370).

8. In view of the above, we are of the considered opinion that it is not permissible to say that in case the petitioners had purchased the suit property during the pendency of the appeal filed by respondent no.3 before this Court, the petitioners are not bound by the final orders of this Court.

9. By operation of law, as this Court quashed the de-notification of acquisition proceedings, the proceedings stood revived. In *V. Chandrasekaran & Anr. vs. The Administrative Officer & Ors.,* JT 2012 (9) SC 260, this Court considered the right of purchaser of land subsequent to the issuance of Section 4 notification and held that any one who deals with the land subsequent to a Section 4 notification being issued, does so, at his own peril. Section 4 notification gives a notice to the public at large that the land in respect to which it has been issued, is needed for a public purpose, and it further points out that there will be "an impediment to any one to encumber the land acquired thereunder." The alienation thereafter does not bind the State or the beneficiary under the acquisition. In fact, purchase of land after publication of a Section 4 notification in relation to such land, is void against the State and at the most, the purchaser may be a person-interested in compensation, since he steps into the shoes of the erstwhile owner and may therefore, merely claim compensation. Thus, the purchaser cannot challenge the acquisition proceedings. While deciding the said case this court placed reliance on a very large number of its earlier judgments including *Leela Ram v. Union of India & Ors.,* AIR 1975 SC 2112; *Smt. Sneh Prabha etc. v. State of Uttar Pradesh & Anr.,* AIR 1996 SC 540; *Meera Sahni v.*

Lieutenant Governor of Delhi & Ors., (2008) 9 SCC 177; and *Tika Ram & Ors. v. State of U.P. & Ors.,* (2009) 10 SCC 689.

10. The law on the issue can be summarised to the effect that a person who purchases land subsequent to the issuance of a Section 4 notification with respect to it, is not competent to challenge the validity of the acquisition proceedings on any ground whatsoever, for the reason that the sale deed executed in his favour does not confer upon him, any title and at the most he can claim compensation on the basis of his vendor's title.

11. In order to meet the menace of sale of land after initiation of acquisition proceedings, various States enacted the Acts and making such transfers as punishable, e.g., The Delhi Lands (Restrictions on Transfers) Act, 1972 made the sales permissible only after grant of permission for transfer by the authority prescribed therein. In absence of such permission if the sale is made in contravention of the statutory provisions it is a punishable offence with imprisonment for a term which may extend to 3 years or with fine or with both.

Therefore, we do not see any cogent reason to accept any plea taken by the petitioners that they could purchase the suit land even subsequent to Section 4 notification.

12. We do not find force in the submission made by Shri Kailash Vasdev, learned senior counsel that this Court had quashed the de-notification of acquisition proceedings only on technical ground as the respondent-society was not heard.

This Court in *State Govt. Houseless Harijan Employees Association v. State of Karnataka & Ors.,* AIR 2001 SC 437 held as under:

"71. From all this, the ultimate position which emerges is that the acquisition in favour of the appellant was properly initiated by publication of the Notification under Section 4(1) and by the declaration issued [illegible]e

withdrawal of the acquisition under Section 48(1) was vitiated **not only** because the appellant was not heard **but also because the reason for withdrawal was wrong.** The High Court erred in dismissing the appellant's writ petition. The decision of the High Court is accordingly set aside. The impugned Notification under Section 48(1) is quashed and the appeal is allowed with costs." (Emphasis added)

13. There is ample evidence on record to show that possession of the suit land had been taken on 6.9.2002. In such a fact-situation, question of de-notifying the acquisition of land could not arise. Thus, the order dated 27.2.2004 could not be passed. There cannot be a dispute in law that upon possession being taken under Section 16 or 17 of the Act 1894, the land vests in the State free from all encumbrances. Thus, in case possession of the land has been taken, application for release of land from acquisition is not maintainable. Once the land is vested in the State free from encumbrances, it cannot be divested. (See: *LT. Governor of H.P. & Anr. v. Sri Avinash Sharma,* AIR 1970 SC 1576; *Satendra Prasad Jain & Ors. v. State of U.P. & Ors.,* AIR 1993 SC 2517; *Mandir Shree Sitaramji alias Shree Sitaram Bhandar v. Land Acquisition Collector & Ors.,* AIR 2005 SC 3581; and *Smt. Sulochana Chandrakant Galande v. Pune Municipal Transport & Ors.,* AIR 2010 SC 2962).

14. In view of the above, we do not think it necessary to examine the other issues raised in the petitions particularly, the competence of the Hon'ble Minister to deal with the matter.

15. The petitions are devoid of any merit and are accordingly dismissed. However, it is made clear that the petitioners shall be entitled to compensation as determined under the provisions of the Act 1894.

K.K.T. Petitions dismissed.

MARY PAPPA JEBAMANI
v.
GANESAN & ORS.
(Criminal Appeal Nos.2061-62 of 2013)

DECEMBER 09, 2013

[G.S. SINGHVI AND GYAN SUDHA MISRA, JJ.]

Penal Code, 1860 – ss. 294(b) and 323 – Prosecution under – Summary trial – Acquittal by trial court – Conviction by appellate court – High Court in exercise of its revisional jurisdiction set aside the order of conviction and revived the acquittal order – Held: Since the High Court in exercise of its revisional jurisdiction, set aside the order of first appellate court without assigning any reason, matter remanded to High Court for consideration afresh.

Code of Criminal Procedure, 1973 – s. 311 – Retrial – Held: Court can direct retrial, where prosecution lacks in bringing necessary evidence – Facts of the present case do not justify parameters for retrial.

A summary trial was initiated by the Magistrate on the complaint of the appellant (PW1) u/s. 294(b) and 323 IPC. PWs 2 and 3 i.e. the other two eye-witnesses turned hostile. The trial court giving benefit of doubt to the accused, acquitted them. Appellant-complainant approached first appellate court challenging the order of trial court and also prayed for retrial of the accused. The first appellate court reversed the acquittal order of the trial court and convicted the accused. High Court in revision, revived the order of acquittal, but dismissed the application seeking retrial of the accused, as not maintainable. Hence the present appeals challenging the order of High Court acquitting the accused and the order refusing retrial of the accused.

Dismissing the appeal filed against refusal of retrial and allowing the appeal questioning acquittal of the accused and remitting the same to High Court, the Court

HELD: 1. Where prosecution lacks in bringing necessary evidence, the trial court ought to invoke its powers under Section 311 Cr.P.C. and can direct for retrial. In the present case, the appellant although has alleged that the order for retrial should have been passed, nothing specific has been pointed out why the matter should be sent for retrial specially when the two of the important witnesses had failed to support the prosecution/ complainant version. Apart from this, the complainant herself had failed to disclose as to what exactly was the genesis of the occurrence as also the contents of the abuse which could persuade this court that a *de novo* trial of the accused was essential. Thus the appeal seeking retrial of the complaint case is not fit to be entertained as it is not possible to take a view that the investigation was shoddy or suffered from grave lacunae which would justify the parameters for retrial at the instance of the complainant for the mere asking as it does not meet the legal requirements justifying a retrial. [Paras 10, 11 and 12] [1049-C-G]

Satyajit Banerjee and Ors. vs. State of W.B. and Ors. **(2005) 1 SCC 115: 2004 (6) Suppl. SCR 294;** *Zahira Habibulla H. Sheikh and Anr. vs. State of Gujarat and Ors.* **(2004) 4 SCC 158: 2004 (3) SCR 1050;** *Ram Bihari Yadav vs. State of Bihar* **(1998) 4 SCC 517: 1998 (2) SCR 1097 – relied on.**

2. Since the High Court has failed to record any reason setting aside the order of the first appellate court, when it was exercising merely revisional jurisdiction, it is just and appropriate to remand the matter to the High Court to reconsider and assign reasons for setting aside the order of conviction and recording an order of

acquittal of the respondents, without specifying and ignoring the medical evidence although it was considering the matter only in exercise of its revisional jurisdiction which has limited ambit and scope. [Para 13] [1050-E-F]

Case Law Reference:

2004 (6) Suppl. SCR 294	**relied on**	**Para 9**
2004 (3) SCR 1050	**relied on**	**Para 9**
1998 (2) SCR 1097	**relied on**	**Para 10**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 2061-2062 of 2013.

From the Judgment & Order dated 25.02.2010 of the High Court of Madras in CRLRC No. 620 2008 and Order dated 07.01.2011 in MP SR No. 15619 of 2010 in CRLRC No. 620 of 2008.

Mary Pappa Jebamani appellant-in-person.

P.V. Yogeswaran, M.A. Chinnasamy, S. Muthu Krishnan, K. Krishna Kumar for the Respondents.

The Judgment of the Court was delivered by

GYAN SUDHA MISRA, J.1. Leave as prayed for was granted and hence the counsel for the contesting parties were finally heard.

2. The complainant/appellant (Mary Pappa Jebamani) herein has filed this appeal by way of special leave bearing SLP (Crl.) No.4149/11) against the judgment and order dated 25.2.2010 passed in Crl. R.C. (MD) No.620/2008 of Madurai Bench of the Madras High Court by which the learned single Judge while exercising his revisional jurisdiction was pleased to set aside the judgment and order dated 26.6.2008 passed by the Principal Sessions Court, Vir[illegible]at

Srivilliputhur being the first appellate court who had been pleased to set aside the order of acquittal passed by the trial court against the accused/respondents herein for the offences punishable under Sections 294(b) and 323 of the Indian Penal Code (for short 'IPC'). Thereafter, the appellants herein also filed an application bearing MP (MD) SR No. 15619/2010 in the aforesaid criminal revision for allowing the application by ordering retrial of the accused respondents which petition was dismissed as not maintainable vide order dated 7.1.2011 against which the complainant/appellant filed the analogous petition for Special Leave to Appeal (Crl.) No. 4150/2011. It is thus clear that the complainant has filed one special leave petition against the order by which the acquittal of the respondents/accused persons has been restored by the High Court by allowing their criminal revision and has dismissed the application of the complainant/appellant by which re-trial of the accused respondents had been sought.

3. In order to examine the correctness of the impugned orders of the High Court, it appears essential to relate the facts of the case giving rise to these two appeals which disclose that a criminal complaint bearing crime No. 152/2005 was registered by the Sub Inspector of Police wherein it was stated that at about 7.30 p.m. on 24.6.2005, the appellant/complainant and her father while walking down the street to their residence were way laid by the respondents who verbally abused them and beaten them with wooden logs. Hence a case was registered for offences under Section 294(b) and 323 IPC. After investigation and submission of chargesheet, a summary trial bearing case No. 1/2007 was conducted by the Chief Judicial Magistrate, Virudhunagar District wherein the complainant/PW-1 and her father PW-4 deposed not only against the accused respondents herein but also against three other female members of the accused party. However, PW-2 and PW-3 who were cited as eye-witnesses turned hostile and the deposition of PW-1, PW-4 and PW-9 who is the daughter of PW-1 complainant were not relied upon as the trial court being the

Chief Judicial Magistrate, Virudhunagar District held that the complaint did not disclose the nature of abusive language used by the accused as also the fact that the eye-witnesses had turned hostile. The trial court, therefore, vide its order dated 20.4.2007 was pleased to give benefit of doubt to the accused persons and they were held not guilty for offences under Sections 294(b) and 323 IPC.

4. The appellant/complainant felt seriously aggrieved of the acquittal of the accused respondents and hence filed Crl. R.P.No.25/2008 before the Principal Sessions Court, Srivilliputhur, District Virudhunagar against the trial court/Chief Judicial Magistrate's Order dated 20.4.2007 and also prayed for retrial of the accused respondents. The Principal Sessions Court, Virudhunagar vide order dated 26.6.2008 allowed the revision filed by the complainant/appellant and set aside the order of acquittal dated 20.4.2007 of the accused respondents passed by the Chief Judicial Magistrate.

5. Obviously, it was now the turn of the accused respondents to move the High Court against the order setting aside their acquittal and hence they filed criminal revision in the High Court which was allowed by the High Court vide the impugned order. The complainant/appellant, therefore, has moved this Court by way of this special leave petition challenging the order of acquittal and further filed a Crl. Misc. Petition bearing SR No. 15619/2010 praying for retrial of the accused respondents which was dismissed as not maintainable as already referred to hereinbefore. The analogous special leave petition is directed against this order.

6. The complainant/appellant who appeared in person has challenged the judgment and order of the High Court and submitted that the order of the High Court acquitting the accused respondents is fit to be to quashed and set aside as the clinching evidence on record adduced by the complainant and their witnesses were illegally ignored by the trial court as also the High Court specially the medic[illegible]g

that the appellant's father had taken treatment as an in-patient in the Government Hospital Virudhunagar from 24.6.2005 to 1.7.2005 and had taken treatment as in-patient in the Government Hospital, Madurai, from 2.7.2005 to 16.7.2005 which was for 23 days continuously as a consequence of the injury sustained in the incident which has been totally ignored by the trial court while recording an order of acquittal of the accused respondents. The appellant-in-person relying upon Section 323 of the IPC has further urged that any hurt which endangers life or which can put the sufferer in severe bodily pain for 20 days or render him unable to follow his ordinary daily pursuit, could not have been taken lightly by the trial court so as to acquit the accused respondents even for the offence under Section 323 IPC. The appellant has further relied upon other discrepancies in appreciation of the evidence of the prosecution/complainant while acquitting the accused respondents.

7. In addition to the above, the appellant has also contended that the trial court as also the High Court failed to consider that fair trial had not been conducted by the trial court as all the witnesses could not depose freely and state what exactly had happened. It has been contended that the accused respondents are rough and rowdy persons of disrepute and this scared the complainant as also the witnesses so much so that no one dares to complain against them. It was still further urged that one Rajakani who is the wife of the first accused respondent Ganesan has illicit relation with one BT Selvam who is the appellant's divorced husband. The trial court also overlooked the incidents caused by the accused respondents against whom several cases are pending in various courts.

8. The appellant has further contended that the offence committed by the accused respondents was a pre-planned crime and all the accused persons shared common intention and common object to assault and commit other offences against the complainant. The trial court, therefore, committed

error in acquitting the accused respondents which had been set aside by the first appellate court/the Court of Sessions which in turn set aside the acquittal of the respondents but the High Court wrongly interfered with the same and set it aside. The appellant has further submitted that the investigation conducted in the matter was also full of legal and procedural infirmities and hence it was a fit case for sending the matter for retrial.

9. Learned counsel, representing the respondents' case, however, has supported the impugned judgment and order of the High Court and the trial court and first of all submitted that the order seeking retrial of the accused respondents is wholly unwarranted as the plea for retrial cannot be ordered on a flimsy ground at the instance of the prosecution. To reinforce their submission, reliance has been placed on the ratio of the judgment of this Court delivered in the matter of *Satyajit Banerjee & Ors. Vs. State of W.B. & Ors.,* (2005) 1 SCC 115, wherein this Court has held that direction for retrial should not be made in all or every case where acquittal of accused is for want of adequate or reliable evidence. It is only when an extra-ordinary situation in regard to the first trial is found so as to treat it a farce or a 'mock trial', which would justify directions for retrial. It was further held therein that the trial Judge has to decide the case on the basis of available evidence recorded at the initial stage of the trial and the additional evidence recorded on retrial in the event a retrial had been permitted. This Court has laid down the law on this in the *Best Bakery case* (2004) 4 SCC 158, holding therein that the order for retrial cannot be applied to all cases as that would be against the established principle of criminal jurisprudence. In the *Best Bakery Case*, the first trial was found to be a farce and was described as a 'mock trial'. Therefore, the direction for retrial was, in fact, for a real trial and such an extra-ordinary situation alone could justify the directions for retrial of a case as made by the Supreme Court in *Best Bakery Case*.

10. In yet another case of *Ram Bil* *of*

Bihar, (1998) 4 SCC 517, this Court held that the High Court ought not to have directed the trial court to hold the *de novo* trial and take a decision on the basis of the so-called 'suggested formula'. But the Supreme Court in this matter had refused to set aside the order of retrial since retrial as directed by the High Court had already commenced and further evidence had already been recorded in view of which the Supreme Court declined to set aside retrial and upheld the judgment of the High Court permitting retrial. Thus, it cannot be overlooked that where prosecution lacks in bringing necessary evidence, the trial court ought to invoke its powers under Section 311 of the Criminal Procedure Code and can direct for retrial.

11. In the light of the aforesaid legal position when the facts of the instant matter are examined, it emerges that the appellant although has alleged that the order for retrial should have been passed by the trial court and the High Court, nothing specific has been pointed out why the matter should be sent for retrial specially when the two of the important witnesses had failed to support the prosecution/complainant version. Apart from this, the complainant herself had failed to disclose as to what exactly was the genesis of the occurrence as also the contents of the abuse which could persuade this court that a *de novo* trial of the accused was essential.

12. Having thus considered and analyzed the facts and the evidence that were brought to the notice of this Court, we are of the view that SLP (Crl.) No.4150/2011 seeking retrial of the complaint case bearing Summary Trial case No. 1/2007 is not fit to be entertained as it is not possible to take a view that the investigation was shoddy or suffered from grave lacunae which would justify the parameters for retrial at the instance of the complainant for the mere asking as it does not meet the legal requirements justifying a retrial. However, it so far as SLP (Crl.) No. 4149/2011 is concerned, it is clearly reflected from the impugned order of the High Court allowing the revision petition

at the instance of the accused respondents that it has failed to record any reason whatsoever while exercising revisional jurisdiction for setting aside the order of conviction passed by the Sessions Court which had set aside the order of acquittal of the respondents without examining any evidence more particularly the medical evidence led by the complainant which disclosed that the complainant's father had sustained injuries and was treated at a Government Hospital for several days. Hence, even though we endorse the view of the High Court to the effect that the instant matter might not have been a fit case for referring it for retrial, the High Court certainly had the legal obligation to assign reasons while allowing the revision of the accused respondents stating why it has set aside the judgment and order of the First Appellate Court/Sessions Court while exercising revisional jurisdiction specially when the Sessions Court found sufficient evidence on record to set aside the acquittal of the respondents and upheld their conviction under Section 294 (b) and 323 IPC.

13. Since the High Court has failed to record any reason setting aside the order of the First Appellate Court, when it was exercising merely revisional jurisdiction, we deem it just and appropriate to remand the matter arising out of Criminal Revision No. 620/2008 to the High Court to reconsider and assign reasons for setting aside the order of conviction and recording an order of acquittal of the respondents passed by the First Appellate Court convicting the respondents without specifying and ignoring the medical evidence although it was considering the matter only in exercise of its revisional jurisdiction which has limited ambit and scope. In view of the above discussion, the appeal arising out of SLP (Crl.) 4149/ 2011 shall be treated as allowed in view of the order of remand of the matter to the High Court for fresh consideration. As already stated, appeal arising out of SLP (Crl.) No. 4150/2011 stands dismissed.

K.K.T. Appeal disposed of & remitte t.

RAJESHWAR SINGH

v.

SUBRATA ROY SAHARA & ORS.

Contempt Petition (Civil) No. 224 of 2011

IN

Civil Appeal No.10660 of 2010

DECEMBER 9, 2013

[G.S. SINGHVI AND K.S. RADHAKRISHNAN, JJ.]

Investigation – Court monitored criminal investigation – Interference in – Prevention – Responsibility and duty cast on the court – Held: Is to see that investigation is carried out in the right direction and the Officers entrusted with the task are not intimidated or pressurised by any person, however high he may be – On facts, the allegations raised by the petitioner in the contempt petition were of very serious nature – The petitioner invoked Arts. 129 and 142 of the Constitution to apprise the Supreme Court of the difficulties he faced while carrying on court monitored investigation – Powers of the Supreme Court in contempt matters are not confined merely to the provisions of the Contempt of Courts Act and the Rules framed thereunder – Constitutional powers are conferred on the Supreme Court u/Art.129 to examine, whether, there has been any attempt by anybody to interfere with an investigation monitored by the Supreme Court – Art. 142 also confers powers on the Supreme Court to pass such orders as necessary for doing complete justice in any cause or matter pending before it – Any interference, by anybody, to scuttle a court monitored investigation would amount to interfering with the administration of justice – Contempt petition filed in the case at hand perfectly maintainable – Notice issued to respondents to show cause why proceedings be not initiated against them for interfering with the court monitored criminal investigation – Constitution of India, 1950 – Arts.129, 142 –

Contempt of Courts Act, 1971 – s.2(b) and 2(c)(iii) and 12 – Rules to Regulate Proceedings for Contempt of the Supreme Court, 1975 – r.12.

Civil Appeal No.10660 of 2010, in which the present contempt petition has been preferred, was filed under Article 136 of the Constitution of India praying for a court monitored investigation by the Central Bureau of Investigation (CBI), in what was described as 2G Spectrum Scam and also for a direction to investigate the role played by A. Raja, the then Union Minister for DoT, senior officers of DoT, middlemen, businessmen and others. The Supreme Court after taking into consideration of the report of the Central Vigilance Commission (CVC) as well as the findings recorded by the CAG agreed for a court monitored investigation.

Petitioner - the Assistant Director of Enforcement Directorate was invested with the responsibility and duty of investigating the 2G Spectrum case. He submitted that he was being personally attacked by the respondents through various means so that he does not make further headway in the investigation.

The question arising for consideration before this Court was whether there was any attempt on the part of the respondents to interfere and obstruct the investigation conducted by the petitioner, which was being supervised and monitored by the Supreme Court.

Upholding the maintainability of the contempt petition, the Court

HELD: 1. When a court monitors a criminal investigation it is the responsibility and duty of the court to see that the investigation is being carried out in the right direction and the Officers, who are entrusted with the task be not intimidated or press[illegible]n,

however high he may be. Considerable responsibility and duty is cast on the court when it monitors a criminal investigation. People have trust and confidence when court monitors a criminal investigation and the court has to live up to that trust and confidence and any interference from any quarters to scuttle that investigation, has to be sternly dealt with. [Para 6] [1059-C-D]

Aligarh Municipal Board and Ors. vs. Ekka Tonga Mazdoor Union and Ors. **(1970) 3 SCC 98;** *Bharat Steel Tubes Limited vs. IFCI Limited* **(2010) 14 SCC 77;** *J.R. Parashar, Advocate and Ors. vs. Prashant Bhushan, Advocate and others* **(2001) 6 SCC 735: 2001 (2) Suppl. SCR 239;** *Sahdeo alias Sahdeo Singh vs. State of Uttar Pradesh and others* **(2010) 3 SCC 705: 2010 (2) SCR 1086 and** *Amicus Curiae vs. Prashant Bhushan and another* **(2010) 7 SCC 592: 2010 (8) SCR 723 – cited.**

2.If the allegations raised against the contemnors are accepted, then one has to conclude *prima facie* that there has been an attempt by the respondents to interfere with an investigation undertaken by the petitioner which is being monitored by this Court. The allegations raised by the petitioner in the contempt petition are of very serious nature and, if proved, would amount to interference with the administration of justice, especially in a court monitored investigation. In a court monitored investigation, if the Officer who is entrusted with the task of carrying on that investigation is experiencing any threat or pressure from any quarters, he is duty bound to report the same to the court monitoring the investigation. The Officer should have the freedom to carry on his duty entrusted, without any fear or pressure from any quarters. The petitioner has invoked Article 129 and Article 142 to apprise this Court of the difficulties he faces while carrying on a court monitored investigation. [Paras 17, 18] [1071-B, D-F]

3.1. The Courts, if they are to serve the purpose of administering the justice, must have the power to secure obedience to the orders passed by it to prevent interference with its proceedings. Law is well settled that the powers of the Supreme Court in contempt matters are not confined merely to the provisions of the Contempt of Courts Act and the Rules framed thereunder. Law of Contempt, as is often said, is only one of the many ways in which the due process of law is prevented from being perverted, hindered or thwarted to further the cause of justice. This Court has plenary power to punish any person for contempt of court and for that purpose it may require any person to be present in Court in the manner it considers appropriate to the facts of the case. [Para 20] [1072-B-D]

3.2. Constitutional powers are conferred on this Court under Article 129 of the Constitution of India to examine, whether, there has been any attempt by anybody to interfere with an investigation, which is being monitored by this Court. The jurisdiction of the Supreme Court under Article 129 of the Constitution is independent of the Contempt of Courts Act and the powers conferred under Article 129 of the Constitution cannot be denuded, restricted or limited by the Contempt of Courts Act, 1971. [Para 22] [1073-H; 1074-A-B]

3.3. Article 142 of the Constitution also confers powers on this Court to pass such orders as is necessary for doing complete justice in any cause or matter pending before it. Article 142 is conceived to meet situations which cannot be effectively and appropriately tackled by existing provisions of law. [Paras 23, 24] [1074-C, G]

3.4. The petitioner has *inter alia* invoked the jurisdiction and power conferred on this Court under the above-mentioned constitutional provisions and hence the consent of the Attorney Gener[illegible]y.

Petitioner is only expected to bring to notice of this Court the problems he confronts with while carrying on a court monitored investigation and it is the duty and obligation of this Court to see, rather than the petitioner, that nobody puts any pressure or threat on an Officer entrusted with the duty to investigate a court monitored criminal investigation. Any interference, by anybody, to scuttle a court monitored investigation would amount to interfering with the administration of justice. Courts, if they are to serve the cause of justice, must have the power to secure obedience to its orders to prevent interference with the proceedings and to protect the reputation of the legal system, its components and its personnel, who on its behest carry on a court monitored investigation. The court is duty bound to protect the dignity and authority of this Court, at any cost, or else, the entire administration of justice will crumble and law and order would be a casualty. [Para 25] [1075-B-E]

Delhi Judicial Service Association, Tis Hazari Court, Delhi vs. State of Gujarat and others **(1991) 4 SCC 406: 1991 (3) SCR 936 and** *I. Manilal Singh vs. Dr. H. Borobabu Singh and another* **(1994) Suppl. (1) SCC 718: 1993 (1) SCR 769 – relied on.**

Delhi Development Authority vs. Skipper Construction Co.(P) Ltd. and another **(1996) 4 SCC 622: 1996 (2) Suppl. SCR 295 – referred to.**

4. The petition filed under the above mentioned provisions is perfectly maintainable and this Court has got a constitutional obligation to examine the truth of the allegations as to whether the respondents are attempting to derail the investigation which is being monitored by this Court. Therefore, notice is issued to the respondents to show cause why proceedings be not initiated against them for interfering with the court monitored criminal investigation. [Para 26] [1075-F-G]

Case Law Reference:

(1970) 3 SCC 98	**cited**	**Para 2**
(2010) 14 SCC 77	**cited**	**Para 2**
2001 (2) Suppl. SCR 239	**cited**	**Para 3**
2010 (2) SCR 1086	**cited**	**Para 3**
2010 (8) SCR 723	**cited**	**Para 4**
1991 (3) SCR 936	**relied on**	**Para 20**
1993 (1) SCR 769	**relied on**	**Para 21**
1996 (2) Suppl. SCR 295	**referred to**	**Para 24**

CIVIL ORIGINAL JURISDICTION : Contempt Petition (Civil) No. 224 of 2011.

IN

Civil Appeal No. 10660 of 2010.

B. Krishna Prasad for the Petitioner.

Abhinav Mukerji, Gaurav Kejriwali, Dharmendra Kumar Sinha, Prashant Bhushan, Manoj K. Mishra, Anuvrat Sharma, Kaushal Yadav for the Respondents.

The Judgment of the Court was delivered by

K.S. RADHAKRISHNAN, J. 1. We may, at the outset, point out that, at this stage, we are only examining the maintainability of this contempt petition, on which arguments have been advanced by the learned senior counsels on either side. This contempt petition has been preferred under Article 129, 142 of the Constitution of India, read with Section 12 of the Contempt of Courts Act, 1971 (for short 'the Act') and Rule 12 of the Rules to Regulate Proceedings for Contempt of the Supreme Court, 1975.

2. Shri Ram Jethmalani, learned senior counsel appearing for the first respondent, submitted that this contempt petition is not maintainable since it has been filed without the consent of the Attorney General of India or other officer mentioned in Section 15 of the Act. Learned senior counsel submitted that neither the order of this Court dated 06.05.2011 nor the notice dated 23.05.2011 gives any indication of the nature of the criminal contempt to be defended by the respondent. Learned senior counsel further submitted that even the notice dated 23.05.2011 does not comply with Rule 6 of the Rules to Regulate Proceedings for Contempt of the Supreme Court, 1975. Learned senior counsel also submitted that it does not mention whether it is a civil contempt or a criminal contempt. Learned senior counsel also submitted that there is nothing to show that the first respondent had any knowledge of this Court's order dated 16.03.2011. Consequently, it cannot be said that there was any willful disobedience of that order. Further, such an allegation is not even raised in the notice. Reliance was placed on the Judgment of this Court in *Aligarh Municipal Board and others v. Ekka Tonga Mazdoor Union and others* (1970) 3 SCC 98. Learned senior counsel submitted that the order, on which disobedience is alleged to have been committed, is not within the knowledge of the respondent and he is not expected or bound to know the same from the media or newspapers. Learned senior counsel also pointed out that the burden to prove the knowledge is not on the alleged contemnors, as held by this Court in *Bharat Steel Tubes Limited v. IFCI Limited* (2010) 14 SCC 77.

3. Shri Rajiv Dhawan, learned senior counsel appearing for the second respondent, submitted that consent of the Attorney General is a pre-requisite to initiate contempt of court proceedings, which is not an empty formality. Learned senior counsel submitted that second respondent is not a party to any of the orders passed by this Court and he has not violated any order passed by this court. Further, it was also pointed out that

even the notice is silent in what manner the second respondent has violated the order passed by this Court. Learned senior counsel submitted that even the powers conferred on this Court to issue *suo motu* notice is also limited and could be exercised only in exceptional circumstances. Learned senior counsel placed reliance on the Judgments of this Court in *J.R. Parashar, Advocate and others v. Prashant Bhushan, Advocate and others* (2001) 6 SCC 735 and *Sahdeo alias Sahdeo Singh v. State of Uttar Pradesh and others* (2010) 3 SCC 705.

4. Shri Vikas Singh, learned senior counsel appearing for the third respondent, also refuted all the allegations raised against the third respondent and submitted that he has nothing to do with the service tenure in the Enforcement Directorate or the cases relating to 2G Scam. Learned senior counsel also submitted that the contempt petition itself is not maintainable.

5. Shir K.K. Venugopal, learned senior counsel appearing for the C.B.I., submitted that the contempt alleged is not merely a criminal contempt but also a civil contempt. Learned senior counsel referred to Section 2(b) of the Act and submitted that there has been willful disobedience of the directions of this Court by the respondents jointly and severally. Learned senior counsel also referred to Section 2(c)(iii) of the Act and submitted that the attempt of the respondents is to interfere and obstruct the investigation conducted by the petitioner, which is being supervised and monitored by this Court. Learned senior counsel further submitted that this Court under Article 129 read with Article 142 of the Constitution has the power to see that the investigation which is being supervised/monitored by this Court is not interfered with by any person or from any quarters. Learned senior counsel also submitted that no sanction from the Attorney General is necessary when this Court *suo motu* initiates the contempt proceedings in exercise of the powers conferred under Article 129 read with Article 142 of the Constitution, irrespective of the provisi[illegible]e

Rules to Regulate proceedings for Contempt of the Supreme Court, 1975. Learned senior counsel placed considerable reliance on the Judgment of this Court in *Amicus Curiae v. Prashant Bhushan and another* (2010) 7 SCC 592.

6. We are, in this case, concerned with the question as to whether there has been any attempt on the part of the respondents to interfere with an investigation which is being monitored by this Court. When a court monitors a criminal investigation it is the responsibility and duty of the court to see that the investigation is being carried out in the right direction and the Officers, who are entrusted with the task be not intimidated or pressured by any person, however high he may be. Considerable responsibility and duty is cast on the court when it monitors a criminal investigation. People have trust and confidence when court monitors a criminal investigation and the court has to live up to that trust and confidence and any interference from any quarters to scuttle that investigation, has to be sternly dealt with.

7. Civil Appeal No.10660 of 2010, in which the present contempt petition has been preferred, was filed under Article 136 of the Constitution of India praying for a court monitored investigation by the Central Bureau of Investigation (CBI), what was described as 2G Spectrum Scam and also for a direction to investigate the role played by A. Raja, the then Union Minister for DoT, senior officers of DoT, middlemen, businessmen and others. Before this Court, it was pointed out that the CBI had lodged a first information report on 21.10.2009 alleging that during the years 2000-2008 certain officials of the DoT entered into a criminal conspiracy with certain private companies and misused their official position in the grant of Unified Access Licenses causing wrongful loss to the nation, which was estimated to be more than Rs.22,000 crores. CBI, following that, registered a case No.RC-DAI-2009-A-0045(2G Spectrum Case) on 21.10.2009 under Section 120B IPC, 13(1)(d) of the

Prevention of Corruption Act, 1988 against a former Cabinet Minister and others.

8. The Central Vigilance Commission (CVC) also conducted an inquiry under Section 8(d) of the Central Vigilance Commission Act, 2003 and noticed grave irregularities in the grant of licences. The CVC on 12.10.2009 had forwarded the inquiry report to the Director, CBI to investigate into the matter to establish the criminal conspiracy in the allocation of 2G Spectrum under UASL policy of DoT and to bring to book all wrongdoers. This Court after taking into consideration of the report of the CVC as well as the findings recorded by the CAG agreed for a court monitored investigation and passed the following order:

> "We are, prima facie, satisfied that the allegations contained in the writ petition and the affidavits filed before this Court, which are supported not only by the documents produced by them, but also the report of the Central Vigilance Commission, which was forwarded to the Director, CBI on 12.10.2009 and the findings recorded by the CAG in the Performance Audit Report, need a thorough and impartial investigation. However, at this stage, we do not consider it necessary to appoint a Special Team to investigate what the appellants have described as 2G Spectrum Scam because the Government of India has, keeping in view the law laid down in Vineet Narain's case, agreed for a Court monitored investigation."

9. This Court, with a view to ensure a comprehensive and co-ordinated investigation by the CBI and the Enforcement Directorate, vide its order dated 16.12.2010 gave the following directions:

(i) The CBI shall conduct thorough investigation into various issues high-lighted in the report of the

Central Vigilance Commission, which was forwarded to the director, CBI vide letter dated 12.10.2009 and the report of the CAG, who have prima facie found serious irregularities in the grant of licences to 122 applicants, majority of whom are said to be ineligible, the blatant violation of the terms and conditions of licences and huge loss to the public exchequer running into several thousand crores. The CBI should also probe how licences were granted to large number of ineligible applicants and who was responsible for the same and why the TRAI and the DoT did not take action against those licensees who sold their stake/ equities for many thousand crores and also against those who failed to fulfill rollout obligations and comply with other conditions of licence.

(ii) The CBI shall conduct the investigation without being influenced by any functionary, agency or instrumentality of the State and irrespective of the position, rank or status of the person to be investigated/probed.

(iii) The CBI shall, if it has already not registered first information report in the context of the alleged irregularities committed in the grant of licences from 2001 to 2006-2007, now register a case and conduct thorough investigation with particular emphasis on the loss caused to the public exchequer and corresponding gain to the licensees/service providers and also on the issue of allowing use of dual/alternate technology by some service providers even before the decision was made public vide press release dated 19.10.2007.

(iv) The CBI shall also make investigation into the

allegation of grant of huge loans by the public sector and other banks to some of the companies which have succeeded in obtaining licences in 2008 and find out whether the officers of the DoT were signatories to the loan agreement executed by the private companies and if so, why and with whose permission they did so.

(v) The Directorate of Enforcement/ concerned agencies of the Income Tax Department shall continue their investigation without any hindrance or interference by any one.

(vi) Both the agencies, i.e. the CBI and the Directorate of Enforcement shall share information with each other and ensure that the investigation is not hampered in any manner whatsoever.

(vii) The Director General, Income Tax (Investigation) shall, after completion of analysis of the transcripts of the recording made pursuant to the approval accorded by the Home Secretary, Government of India, hand over the same to CBI to facilitate further investigation into the FIR already registered or which may be registered hereinafter."

10. CBI and the Enforcement Directorate then used to apprise this Court of the various stages of the investigation and seek directions and this Court, on 10.02.2011, passed an order stating that since this Court is monitoring the investigation of 2G Spectrum Scam no court shall pass any order which may, in any manner, impede the investigation being carried out by the CBI and the Directorate of Enforcement. Learned Attorney General also informed this Court that he had received a communication on 16.03.2011 from the Delhi High Court of nominating Shri O.P. Saini, an officer of the Delhi Higher Judicial Service, as the Special Judge of

cases relating to what has been described as 2G Scam. The Court was also informed that two separate notifications would be issued by the Central Government in terms of Section 3(1) the PC Act, 1988 and Section 43(1) of the Prevention of Money Laundering Act, 2002 for establishment of the Special Court to exclusively try the offences relating to 2G Scam and other related offences. Following that, two notifications were published in the Gazette of India Extra Ordinary, on the 28th March, 2011.

11. Noticing the above submissions a detailed order was passed by this Court on 16.03.2011, which *inter alia* reads as follows:

> "While adjourning the case, we make it clear that no one including the newspapers shall interfere with the functioning of the C.B.I. team and the officers of the Enforcement Directorate who are investigating what has been described as 2G Scam and the Court will take serious cognizance of any endeavour made by any person or group of persons in this regard."

12. Petitioner - the Assistant Director of Enforcement Directorate who is invested with the responsibility and duty of investigating the 2G Spectrum case, submits that, during the course of investigation, he could come across various materials, having considerable bearing on the investigation relating to 2G Scam. The petitioner, in this contempt petition, has stated as follows:

> "Facts came to the notice of the Directorate of Enforcement that one M/s Sahara India Investment Corporation, a Sahara group company, now known as M/s Sahara Prime City Ltd., during the course of investigation it is revealed that the said company had invested Rs.14.00 Crores on 28.09.2007 on which date M/s S-Tel Ltd., had applied for 16 more licences. This investment has been purportedly made for purchase of

> shares of M/s S-Tel. Surprisingly, this investment has been sold back on 15.01.2009 for an amount of Rs.16.80 Crores. In view of these financial details being revealed during the course of investigation and considering the fact that this entire 2G Spectrum case, there has been several ways of transactions, which was deemed appropriate to investigate this aspect of the matter also and accordingly on 02.02.2011, a summon had been issued to the Managing Director of the said Company requiring his personal appearance on 17.02.2011. The Managing Director is Mr. Subrata Roy Sahara, who chose not to appear, but, to apply for an adjournment for four weeks. Taking into consideration said request a fresh summon was issued on 30.03.2011 requiring his appearance on 08.04.2011. He is respondent No.1, above named, and he chose not to appear even on 08.04.2011 and has, thus, shown non cooperative attitude."

13. The petitioner, with reference to Sahara India Commercial Corporation Limited, has stated as follows:

> "That there is yet another Sahara Group company by the name Sahara India Commercial Corporation Limited based in Mumbai, which has purportedly paid Rs.9.50 Crores on 06.07.2007 to one M/s Sky City Foundation Pvt. Ltd., as an advance. This Sky City Foundation has in turn invested the very same money with M/s S-Tel, just before the date of application of M/s S-Tel made to the DoT for issuance of Universal Access Service (UAS) Licence on 09.07.2007.
>
> That in view of the said fact, it was deemed appropriate to summon the concerned officials of the said Co. M/s Sahara India Commercial Corporation Limited on 07.04.2011 and for the purpose the summon was issued on 30.03.2011."

14. The petitioner, referring to the

covering the period from 27.11.2010 to 08.02.2011, has referred to the involvement of M/s Sahara India Investment Ltd., now known as M/s Sahara Prime City Ltd. and stated as follows:

> "The said status report also mentions other details about the acquisition of other two companies by a group in March, April, 2009 in respect of which letters for inquiry have been sent to Mauritius. It is deemed expedient not to disclose further details in this application on account of the fact that the Directorate of Enforcement is investigating into the money trail and if further details are disclosed in the application the same is likely to be prejudicial to the interest of investigation. However, the applicant undertakes to disclose such other facts including the status report in a sealed cover to this Hon'ble Court, if so directed.
>
> It is further respectfully submitted that in the third Status Report, covering the period from 09.02.2011 to 17.03.2011 also mentions about a person being issued summon. The said fact is mentioned on page 20 in paragraph 20-D. Details therein clearly show that M/s S-Tel Pvt. Ltd. had arranged for certain funds from various groups to pay licence fee. On Page 21 of the said Status Report, it is mentioned that further investigation in respect of the companies named therein just above paragraph 20-E is in progress. Similarly in the fifth Status Report, filed on 26.04.2011, there is a mention in paragraph 6-B regarding sale of holding of a company and funding of M/s S-Tel by two groups mentioned therein. The fact of Sahara India Commercial Corporation having sought adjournment is also mentioned in the said Status Report."

15. The petitioner, referring to the Sahara Group of Companies, stated as under:

> "It is further submitted that yet another reference dated 11.06.2010 as forwarded by the Head Quarter of the Office of the Directorate of Enforcement has been received from

> an Intelligence Unit of India, which interalia alleges that Sh. Subrata Roy, respondent No. 1 of M/S. Sahara Group of Companies alongwith others have deposited an amount of Rs.150 Crores which has been rotated through a maze of financial transactions between accounts of M/S. Sahara Corporation and M/S. Sahara India within the same branch/bank. On basis of said input, the Directorate of Enforcement had initiated discreet enquiries against M/s. Sahara Corporation and M/s. Sahara India for alleged violation of Foreign Exchange Management Act, 1999. This investigation is handled by the present applicant, who made several enquiries with number of banks by issuing directives on 23.07.2010 and 28.07.2010. This investigation involves over 100 banks and accounts and large financial transactions are being investigated. The modus operandi that was adopted is resorting to cash deposits of huge amounts on different dates in different accounts and at remote far off places of the country and withdrawal immediately by cheques which would show that there is a clear attempt prima facie to legitimize the amounts. Details from four banks have been received which show cash deposits of more than Rs.24 Crores, so far.
>
> That further investigation have revealed that M/s. Sahara India is operating more than 334 bank accounts and details thereof has been sought from all those banks which are yet to be scrutinized. This matter is also referred to the Income Tax Department on 29.09.2010 for further necessary action at their end.
>
> That during the course of enquiries a further information is received from a reliable sources that a company having registered office opposite Domestic Airport in Mumbai, which is a group company of Sahara Group, has given a loan a huge amounts in pounds to a company in Mauritius, which is purp[illegible]m

loan and investment in hospitality sector. This amount was transferred under an automatic route through a bank in Mumbai and this amount is transferred to a foreign country for acquisition of a property of a hotel company whose shares were pledged with the Bank and which money has been utilized to repay the outstanding of the bank. Summons are issued to the concerned bankers of the said companies for 09.05.2011 for appearance of these bankers for recording of their statements. This entire matter is also referred to by the applicant to the Reserve Bank of India on 22.03.2011 and 11.04.2011 and response to some queries are yet to be received and the investigation in the said matter is under progress.

That there is yet another investigation which is popularly referred is as Madhu Koda Scam case in respect of which the Division Bench of High Court of Jharkhand has issued directions, directing the Central Bureau of Investigation to conduct an investigation as regards the predicate offence and directed the Directorate of Enforcement to investigate offence under Foreign Exchange Management Act and Prevention of Money Laundering Act, 2002. These investigations are also under progress and are conducted by the applicant as an Investigating Officer. In this investigation properties worth Rs.125 Crores have already been attached in exercise of powers under Prevention of Money Laundering Act and during the course of investigation it is suspected that large amount of funds which are tainted money which are proceeds of crime have been invested in Sahara Group companies by those accused persons with a view to project them as untainted money. The investigation of this is also being carried.

It is submitted that all these investigations undertaken by the petitioner applicant, before your lordship, has irked the Sahara Group and more particularly the respondents."

16. Petitioner submits that he is being personally attacked by the respondents through various means so that he will not make further headway in the investigation. The petitioner has explained in Paras 5 to 12 of the petition, the manner in which he is being intimidated, which read as follows:

"5. That when investigations have been initiated in the 2G Spectrum case against them, the respondents have conspired to interfere with the original 2G Spectrum case investigations so as to derail the same, the details whereof are stated hereinafter.

It may not be out of place to mention that M/s. Sahara Airlines, which is now taken over by Jet Airways and operated under the banner of Jetlite are also facing investigations for violation under FERA, 1973 and an opportunity show cause notice was issued prior to launching prosecution which has been made subject matter of a challenge before the High Court at Lucknow.

That by an interim order dated 21.05.2002, further proceedings have been stayed and on the said fact having come to my notice while I was Assistant Director Incharge of Lucknow Zone, I had filed application to get the interim order vacated.

6. It is submitted that on 02.05.2011 having come to know from reliable sources that some business house / liaison persons together with disgruntled government officials had initiated a campaign of making false anonymous and pseudonymous complaints to various agencies and started spreading rumours, the applicant deemed appropriate to send the latest immovable properties return. This was necessitated that in view of the fact that in April, 2011, a property which was purchased from Lucknow Development Authority by taking a loan, was disposed off and the proceeds of the disposal were received as refund being

given by the Lucknow Development Authority, a government body.

That this was forwarded to the Additional Director thorough proper channel and it is reliably learnt that the same is in the process being sent even to the Director, Central Bureau of Investigation, on my request.

7. It is submitted that on 05.05.2011, there has been an attempt to intimidate the applicant after hearing of the 2G Spectrum case was concluded before this Hon'ble Court. The applicant has received a letter purported to be sent by the respondent No.3, Shri Subodh Jain, which contain wielded threat to start a campaign against the applicant with a view to intimidate and, thus, interfered in the ongoing investigations against the Sahara Group companies in the 2G Spectrum case.

On 05.05.2011, a copy of the said letter has been delivered by hand at the office of the applicant and at 15.43, the same is received on FAX of the Dy. Director, Directorate of Enforcement, copies thereof are annexed herewith and marked as ANNEXURE-F (COLLY).

8. The response to the queries raised is being produced in a sealed cover together with documents supporting the same for perusal of this Hon'ble Court. The only purpose of producing it in a sealed cover is to see such future intimidation to torpedo the ongoing investigation does not take place. The applicant respectively declares before this Hon'ble Court that he is ready and willing to file an affidavit of these disclosures before this Hon'ble Court.

9. The petitioner applicant respectfully submit that it is, thus, clear that only with a view to dissuade the petitioner, who is the Investigating Officer, to carry the investigation in the right direction against the Sahara Group, the respondents, and more particularly in the 2G Spectrum

case, that the respondents have attempted to intimidate which is nothing sort of contempt of this Hon'ble Court since not only the investigation is monitored by this Hon'ble Court, but, this Hon'ble Court has given directions as contained in their lordship's judgment dated 16.12.2010 and 16.03.2011, which are being carried out by the applicant in the matter of investigation of 2G Spectrum case.

10. It is respectfully submitted that this attempt by the respondents to intimidate the applicant, who is the Investigating Officer is clearly an attempt to interfere or an attempt which tends to interfere with or obstruct or tends to obstruct the administration of justice and is thus a criminal contempt within the meaning of Section 2(c) of the Contempt of Court Act, 1971. It is submitted that this is an attack on the investigating officer carrying out the directions of this Hon'ble Court in his way to obstruct the course of justice by preventing the petitioner, who is the Investigating Officer, from carrying out the directions of this Hon'ble Court.

11. That this conduct is intended to impeach, embarrass and obstruct the applicant in the discharge of his duties and carrying out directions of this Hon'ble Court. It is respectfully submitted that it is expected out of the applicant that he is able to conduct the investigation free from any outside interference and the present letter dated 05.05.2011 intending to cause embarrassment to the applicant and detract him from the ongoing investigation is clearly an act of interference that would jeopardize the ongoing investigation and thus hamper the petitioner from carrying out the directions of this Hon'ble Court.

12. That this communication is intended to influence the petitioner publically and, thus, target him with an intention that the petitioner may not carry on the ongoing 2G

Spectrum investigation as well as other investigations against the Sahara Group."

17. We are of the view that if the allegations raised against the contemnors are accepted, then we have to conclude *prima facie* that there has been an attempt by the respondents to interfere with an investigation undertaken by the petitioner which is being monitored by this Court. The petitioner has stated that he has also filed a complaint of violation under the Foreign Exchange Management Act, 1999 (FEMA) to the extent of Rs.4600 Crores against five more companies including M/s S-Tel and he is in the process of filing five complaints involving an amount of Rs.1800 Crores under the FEMA, 1999 and is also in the process of issuing an order of attachment as contemplated under the Prevention of Money Laundering Act, 2002.

18. We may point out that the allegations raised by the petitioner in the contempt petition are of very serious nature and, if proved, would amount to interference with the administration of justice, especially in a court monitored investigation. In a court monitored investigation, if the Officer who is entrusted with the task of carrying on that investigation is experiencing any threat or pressure from any quarters, he is duty bound to report the same to the court monitoring the investigation. The Officer should have the freedom to carry on his duty entrusted, without any fear or pressure from any quarters. The petitioner has invoked Article 129 and Article 142 to apprise this Court of the difficulties he faces while carrying on a court monitored investigation.

19. Let us examine the extent of the power conferred on this Court under Article 129 of the Constitution, which reads as follows:

"**Article 129**. S**upreme Court to be a court of record –** The Supreme Court shall be a court of record and shall

have all the powers of such a court including the power to punish for contempt of itself."

20. We are of the view that the Courts, if they are to serve the purpose of administering the justice, must have the power to secure obedience to the orders passed by it to prevent interference with its proceedings. Law is well settled that the powers of the Supreme Court in contempt matters are not confined merely to the provisions of the Contempt of Courts Act and the Rules framed thereunder. Law of Contempt, as is often said, is only one of the many ways in which the due process of law is prevented from being perverted, hindered or thwarted to further the cause of justice. This Court has plenary power to punish any person for contempt of court and for that purpose it may require any person to be present in Court in the manner it considers appropriate to the facts of the case. This Court in *Delhi Judicial Service Association, Tis Hazari Court, Delhi v. State of Gujarat and others* (1991) 4 SCC 406, examined at depth the scope of Article 129 of the Constitution and stated as follows:

"The power of the Supreme Court and the High Court being the Courts of Record as embodied under Articles 129 and 215 respectively cannot be restricted and trammeled by any ordinary legislation including the provisions of the Contempt of Courts Act. Their inherent power is elastic, unfettered and not subjected to any limit. The power conferred upon the Supreme Court and the High Court, being Courts of Record under Articles 129 and 215 of the Constitution respectively is an inherent power and the jurisdiction vested is a special one not derived from any other statute but derived only from Articles 129 and 215 of the Constitution of India and therefore the constitutionally vested right cannot be either abridged by any legislation or abrogated or cut down. Nor can they be controlled or limited by any statute or by any provision of the Code of Criminal Procedure or

that has to be observed in exercising this inherent power by summary procedure is that the power should be used sparingly, that the procedure to be followed should be fair and that the contemnor should be made aware of the charge against him and given a reasonable opportunity to defend himself…. Entry 77 of List 1, Schedule 7 read with Article 246 confers power on the Parliament to enact law with respect to the Constitution, organization, jurisdiction and powers of the Supreme Court including the contempt of the Supreme Court. The Parliament is thus competent to enact a law relating to the powers of Supreme Court with regard to 'contempt of itself' such a law may prescribe procedure to be followed and it may also prescribe the maximum punishment which could be awarded and it may provide for appeal and for other matters. But the Central Legislature has no legislative competence to abridge or extinguish the jurisdiction or power conferred on the Supreme Court under Article 129 of the Constitution. ……."

21. This Court, again, in *I. Manilal Singh v. Dr. H. Borobabu Singh and another* (1994) Suppl. (1) SCC 718 has delineated the plenary powers of this Court and stated that the power conferred on this Court under Article 129 is a constitutional power which cannot be circumscribed or delineated either by the Contempt of Courts Act, 1971 or Rules or even the Rules to Regulate Proceedings for Contempt of the Supreme Court, 1975, framed in exercise of powers under Section 23 of the Contempt of Court Act, 1971, read with Article 145 of the Constitution of India.

22. We are of the view that, assuming, there has not been any proper compliance of the provisions of the Contempt of Courts Act, 1971, as contended by the learned senior counsels for the respondents, that would not deter or take away the constitutional powers conferred on this Court under Article 129 of the Constitution of India to examine, whether, there has been

any attempt by anybody to interfere with an investigation, which is being monitored by this Court. The jurisdiction of the Supreme Court under Article 129 of the Constitution is independent of the Contempt of Courts Act and the powers conferred under Article 129 of the Constitution cannot be denuded, restricted or limited by the Contempt of Courts Act, 1971.

23. Article 142 of the Constitution also confers powers on this Court to pass such orders as is necessary for doing complete justice in any cause or matter pending before it. The said Article 142 reads as under:

"**Article 142. Enforcement of decrees and orders of Supreme Court and orders as to discovery, etc.** (1) The Supreme Court in the exercise of its jurisdiction may pass such decree or make such order as is necessary for doing complete justice in any cause or matter pending before it, and any decree so passed or orders so made shall be enforceable throughout the territory of India in such manner as may be prescribed by or under any law made by Parliament and, until provision in that behalf is so made, in such manner as the President may by order prescribe

(2) Subject to the provisions of any law made in this behalf by Parliament, the Supreme Court shall, as respects the whole of the territory of India, have all and every power to make any order for the purpose of securing the attendance of any person, the discovery or production of any documents, or the investigation or punishment of any contempt of itself."

24. Article 142 is conceived to meet situations which cannot be effectively and appropriately tackled by existing provisions of law. In *Delhi Development Authority v. Skipper Construction Co.(P) Ltd. and another* (1996) 4 SCC 622, this Court has held that the very fact that the power is conferred only upon the Supreme Court, and on no

assurance that it will be used with due restraint and circumspection; keeping in view the ultimate object of doing complete justice between parties and the Court's power to do complete justice is not confined by any statutory provision.

25. We may indicate that the petitioner has *inter alia* invoked the jurisdiction and power conferred on this Court under the above-mentioned constitutional provisions and hence the consent of the Attorney General is not necessary. Petitioner is only expected to bring to notice of this Court the problems he confronts with while carrying on a court monitored investigation and it is the duty and obligation of this Court to see, rather than the petitioner, that nobody puts any pressure or threat on an Officer entrusted with the duty to investigate a court monitored criminal investigation. Any interference, by anybody, to scuttle a court monitored investigation would amount to interfering with the administration of justice. Courts, if they are to serve the cause of justice, must have the power to secure obedience to its orders to prevent interference with the proceedings and to protect the reputation of the legal system, its components and its personnel, who on its behest carry on a court monitored investigation. The court is duty bound to protect the dignity and authority of this Court, at any cost, or else, the entire administration of justice will crumble and law and order would be a casualty.

26. We are, therefore, of the view that the petition filed under the above mentioned provisions is perfectly maintainable and this Court has got a constitutional obligation to examine the truth of the allegations as to whether the respondents are attempting to derail the investigation which is being monitored by this Court. We, therefore, issue notice to the respondents to show cause why proceedings be not initiated against them for interfering with the court monitored criminal investigation.

B.B.B. Contempt Petition held maintainable.

SEBASTIAO LUIS FERNANDES (DEAD) THROUGH LRS. & ORS.
v.
K.V.P. SHASTRI (DEAD) THROUGH LRS. & ORS.
(Civil Appeal No. 6183 of 2001)

DECEMBER 10, 2013.

[G.S. SINGHVI, V. GOPALA GOWDA AND C. NAGAPPAN, JJ.]

Evidence Act, 1872:

ss.101 and 102 – Burden of proof – Suit for declaration that plaintiff was owner and in possession of 1/3rd of suit property – Held: It was upon plaintiff-appellants to furnish proof regarding ownership of 1/3rd share of suit property and discharge their burden of proof as per ss. 101 and 102 – It was primarily and essentially necessary for plaintiff-appellants to establish their claim of ownership before they could invite the court to address itself to the issue of their challenge to title of defendants-respondents to suit property – Plaintiff-appellants having failed to do so, their entire claim was liable to be rejected – Trial court and first appellate court erred in assuming certain facts, which are not in existence, to come to erroneous conclusion in the absence of title document in justification of claim of plaintiff and ignored the pleadings of defendants though they have specifically denied ownership right claimed by plaintiff in respect of suit property.

Code of Civil Procedure, 1908:

s.100 – High Court framing substantial questions of law and while answering the same in favour of defendants, setting aside concurrent findings of both the courts below – Held: High Court has rightly come to the conclusion that substantial questions of law were to be answered in the negative, holding

that since plaintiff-appellants have not produced any document of title in relation to suit property, grant of decree in their favour is erroneous in law – Substantial questions of law framed by High Court at the time of admission of second appeal is based on law laid down by Supreme Court – Therefore, High Court was justified in recording cogent and valid reasons to annul the concurrent findings of courts below and in holding that non-appreciation of pleadings and evidence on record by courts below rendered their finding on the contentious issues/points as perverse and arbitrary, and, therefore, the same have been rightly set aside by High Court by answering the substantial questions of law in favour of defendants – There is, therefore, no reason to interfere with the judgment and decree passed by High Court.

In a suit by plaintiff for declaration that she was lawful owner and in possession of 1/3 of the suit property and consequential relief of cancellation of registration in favour of defendants-respondents in respect of 1/3 share in suit scheduled property, defendant no. 1 claimed to have acquired right by way of prescription and defendant no. 2 also denied title of the plaintiff and claimed to be in possession pursuant to conveyance thereof by defendant no. 1. The trial court decreed the suit, holding that the alleged prescription would not operate because defendant-1 was never in the possession of the property, much less in good faith. It was also observed that it was proved from the proceedings by a fact otherwise admitted that the plaintiff had her residential house in the suit schedule property with a common wall with the house of the defendant and this was one more important fact to corroborate the case of the plaintiff, for being relatives descending from the same common trunk having ancestral house. The first appeal filed by the defendant was disposed of holding that the trial judge rightly pointed out that the specific claim made by the plaintiff with regard to the common ownership to the suit

schedule property and the houses was not specifically denied by the defendants. The defendants filed a second appeal and the single Judge of the High Court framed the substantial questions of law: namely (i) The plaintiffs not having produced any document of title, could the courts below decree the suit? (ii) The decision was contrary to the pleadings and the courts below committed breach of procedure in holding that there was admission of original plaintiff, in the pleading when there was no such admission; and (iii) the courts below failed to consider that the defendants had pleaded prescription and that Article 526(2) was fully attracted. The High Court answered the substantial questions of law Nos. 1 and 2 in favour of the defendants holding the findings of the courts below on the relevant contentious issues as perverse.

Dismissing the appeal, the Court

HELD: 1.1. As regards substantial questions of law Nos. 1 and 2 framed and answered in favour of the defendants-respondents and against the plaintiff-appellants, the High Court has rightly held to the effect that it was primarily and essentially necessary for the plaintiff-appellants to establish their claim of ownership before they could invite the court to address itself to the issue of their challenge to the title of the defendants-respondents to the suit schedule property. The plaintiff-appellants having failed to do so, their entire claim was liable to be rejected. The High Court further recorded the finding, that the factum of registration of the suit schedule property under No.16413 in favour of the defendants-respondents is not in dispute, yet the plaintiff-appellants have not produced on the record any document of inscription of the suit schedule property in their name. Therefore, the High Court has rightly come to the conclusion that the first substantial [illegible]s

to be answered in the negative, holding that since plaintiff-appellants have not produced any document of title in relation to the suit schedule property, the grant of decree in their favour is erroneous in law. [para 21] [1095-E-H; 1096-A-B]

1.2. On the second substantial question of law, the High Court has rightly answered in favour of the defendants in the affirmative for the reason that the courts below, without considering the denial made by defendant no.1 with regard to the ownership claim made by the plaintiff-appellants in respect of the suit schedule property, have come to the erroneous conclusion that there is no pleading of fact by the defendants-respondents and lack of evidence in favour of the plaintiff-appellants to prove their title to the suit schedule property. Therefore, the High Court has arrived at the right conclusion and held that the courts below committed serious error in holding that there was admission of defendants in the pleadings with respect to ownership of 1/3rd of the suit schedule property by the plaintiff. [para 21] [1096-C-E]

1.3. The ratio laid down by this Court in *Hira Lal's* case and other decisions is applicable to the fact situation of the instant case as the courts below have erred in assuming certain facts, which are not in existence, to come to the erroneous conclusion in the absence of title document in justification of the claim of the plaintiff in respect of the suit schedule property and ignored the pleadings of the defendants though they have specifically denied the ownership right claimed by the plaintiff in respect of the suit schedule property and on wrong assumption of the facts which are pleaded on the contentious issues, they have been answered in favour of the plaintiff, therefore, the High Court has rightly exercised its appellate jurisdiction by framing the correct

substantial questions of law with reference to the legal position and applied the same to the fact situation of case on hand. [para 22]

Hira Lal and Anr. v. Gajjan and Ors. **1990 (1) SCR 164 = (1990) 3 SCC 285 – relied on.**

1.4. In the considered view of this Court, the substantial questions of law framed by the High Court at the time of the admission of the second appeal are based on law laid down by this Court in the case of *Hira Lal* which view is supported by other cases. Therefore, answer to the said substantial questions of law by the High Court by recording cogent and valid reasons to annul the concurrent findings that the non-appreciation of the pleadings and evidence on record by the courts below rendered their finding on the contentious issues/ points as perverse and arbitrary, and, therefore, the same have been rightly set aside by answering the substantial questions of law in favour of the defendants. [para 23] [1097-C-D]

1.5. The High Court has framed substantial questions of law as per s.100 of the CPC, and there is no error in the judgment of the High Court in this regard and therefore, there is no need for this Court to interfere with the same. [para 24] [1099-A]

Hero Vinoth (minor) v. Seshammal **2006 (2) Suppl. SCR 79 = 2006 (5) SCC 545 – relied on.**

1.6. In the matter of onus of proof and burden of proof as per ss.101 and 102 of the Evidence Act, this Court holds that it was upon the plaintiff-appellants to furnish proof regarding ownership of 1/3rd share of the suit schedule property and discharge their burden of proof as per the said two sections. Therefore, there is no reason whatsoever to interfere

judgment and decree passed by the High Court on this aspect of the case as well. [para 25] [1099-B-C; 1100-E]

Corporation of City of Bangalore v. Zulekha Bi & Ors. **2008 (5) SCR 325 =2008 (11) SCC 306;** *Gurunath Manohar Pavaskar & Ors. v. Nagesh Siddappa Navalgund & Ors.* **2007 (13) SCR 77 = 2007 (13) SCC 565 and** *Anil Rishi v. Gurbaksh Singh* **2006 (1) Suppl. SCR659 = (2006) 5 SCC 558 – referred to.**

Deity Pattabhiramaswamy v. S. Hanymayya & Ors. **AIR 1959 SC 57,** *Dollar Company, Madras v. Collector of Madras* **1975 Suppl. SCR 403 = 1975 (2) SCC 730; and** *Ramanuja Naidu v. V. Kanniah Naidu & Anr.* **1996 (3) SCR 239 = (1996)3 SCC 392;** *Jeevan Diesels & Electricals Ltd. v. Jasbir Singh Chadha, (HUF) & Anr.* **2010 (6) SCR 546 = 2010 (6) SCC 601;** *Rachakonda Venkat Rao & Ors. v. R. Satya Bai & Anr.* **2003 (3) Suppl. SCR 629 =2003(7) SCC 452 - cited.**

Case Law Reference:

1990 (1) SCR 164	**relied on**	**para 7**
AIR 1959 SC 57	**cited**	**para 9**
1975 (0) Suppl. SCR 403	**cited**	**para 9**
1996 (3) SCR 239	**cited**	**para 9**
2008 (5) SCR 325	**referred to**	**para 16**
2007 (13) SCR 77	**referred to**	**para 16**
2006 (1) Suppl. SCR 659	**referred to**	**para 16**
2010 (6) SCR 546	**cited**	**para 18**
2003 (3) Suppl. SCR 629	**cited**	**para 18**
2006 (2) Suppl. SCR 79	**relied on**	**para 24**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6183 of 2001.

From the Judgment & Order dated 14.09.1998 of the High Court of Bombay Bench at Goa in Second Appeal No. 30 of 1986.

Shreyans Singhvi, Umnao Singh Rawat, V.D. Khanna for the Appellants.

Yashraj Singh Deora, Anupama Dhurve, M.P. Jha for the Respondents.

The Judgment of the Court was delivered by

V. GOPALA GOWDA, J. 1. This civil appeal is filed by the appellants as they are aggrieved by the judgment and decree of the High Court of Bombay at Goa passed on 14.9.1998 by the learned single Judge in Second Appeal No. 30 of 1986 raising various questions of law and grounds in support of the same. In this judgment for the sake of convenience the rank of the parties is described according to their position before the trial court. The appellants are the legal representatives of the plaintiff and the respondents are the legal representatives of the defendants. The suit was instituted by the original plaintiff in the Court of Civil Judge, Sr. Division at Quepem (hereinafter referred to as "the trial court") in Civil Suit No.14091 of 1948.

2. The relevant brief facts are stated for the purpose of appreciating the rival legal contentions with a view to examine and find out as to whether the impugned judgment of the High Court of Bombay warrants interference by this Court in this appeal in exercise of its jurisdiction under Article 136 of the Constitution of India.

The original plaintiff, Inacinha Fernandes filed Civil Suit No. 14091 of 1948 on 1.1.1948 before the trial court for declaration that she is the lawful owner in possession of 1/3rd of the property bearing land registration No.16413 and consequential relief for cancellation of registration in favour of the defendants-respondents in respect of such 1/3rd share in the suit schedule property and to register the same in the[illegible]f.

Presently the legal representatives of the original plaintiff are before us as appellants. It is the case of the plaintiff-appellants that suit schedule property is bearing land registration No.16413 and the claim of the plaintiff-appellants is that it belonged to three brothers namely, Francisco Fernandes (who was the father-in-law of the original plaintiff), Francisco Fernandes junior and Pedro Sebastiao Fernandes and they owned and possessed the same jointly and in equal shares. The defendant No. 2-Tereza is the daughter of Francisco Fernandes junior and the original plaintiff-Inacinha Fernandes is the wife of Luis Fernandes, the son of Francisco Fernandes, the first brother. It is their further case that on the death of Francisco Fernandes, he was survived by the husband of the original plaintiff. It is their case that on the death of said Francisco Fernandes, the 1/3rd share of the suit schedule property devolved upon Luis the late husband of the original plaintiff and it was accordingly enjoyed by the plaintiff. Further case of the plaintiff is that on account of a debt of Rs.198/- to one Naraina Panduronga Porobo, the property was attached and thereafter the liability was paid by way of subrogation of rights in favour of the father of the first defendant, K.V.P. Shastri who bought this property which was sold in public auction on 26th April, 1935 and thereafter granted aforementioned property in favour of the husband of Tereza, namely, Tomas Fernandes vide perpetual lease. It is the case of the plaintiff that the right of subrogation in favour of the father of the first defendant should have been granted by the defendant No.2-Tereza only in respect of 1/3rd share and not in relation to the entire property.

3. The case of the plaintiff was sought to be contested by the defendant No.1 *inter alia* contending that the claim of the plaintiff is false and ownership and possession of the suit schedule property stands transferred in favour of the defendant No.1 with effect from 26.4.1935 and he had acquired right by way of prescription as it has been enjoyed for 10 years, pursuant to the registration of the suit schedule property in his name. The defendant No.2 also denied the case of the plaintiff

and claimed to be in possession pursuant to conveyance thereof by the defendant No.1.

4. On the basis of the pleadings of the parties issues were framed and the matter went for trial and both the parties adduced evidence. On appreciation of evidence on record the trial court decreed the suit vide its judgment dated 29.4.1978. The trial court decreed the suit holding it to be tenable and directed the defendants to acknowledge that the plaintiff along with her children is the lawful owner in possession of 1/3rd share of the suit schedule property and to release that 1/3rd share in favour of the plaintiff, by declaring to be null and void the inscription done in the Land Registration Office in respect to the said property which is described under No. 16413 in so far as it covered the 1/3rd part of the plaintiff. Further, the defendants were directed to pay damages caused to the original plaintiff by depriving her of the income corresponding to her 1/3rd portion. The trial court held that the alleged prescription does not operate because the defendant Shastri was never in the possession of the property, much less in good faith. It was also observed that it is proved from the proceedings by a fact otherwise admitted that the plaintiff has her residential house in the suit schedule property with a common wall with the house of the defendant-Tereza and this is one more important fact to corroborate the case of the plaintiff, for being relatives descending from the same common trunk having ancestral house.

5. Being aggrieved by the said judgment and decree the defendants preferred Civil Appeal No. 237 of 1981 before the District Court at Margao and the same was disposed of by judgment dated 16.12.1985 by recording reasons. The first appellate court held that the evidence on record shows that neither the original plaintiff nor the original defendants were able to produce any documentary evidence to support their title to the suit schedule property, besides the claim made by them that the property was acquired from the comm[illegible]r,

it observed that the learned trial judge rightly pointed out that the specific claim made by the plaintiff with regard to the common ownership to the suit schedule property and the houses was not specifically denied by the defendants being a fact that only defendant No.1 namely, Venctexa Govinda Porobo Shastri took a definite stand in this respect. It was thus held that the trial Judge was justified in holding that the common ownership of the suit schedule property had been admitted by the defendants in their written statement and that they could not prove how the suit schedule property in view of this fact this common ownership could subsequently belong exclusively to the daughters of one of the co-owners of the suit schedule property who were the heirs of one of the sons of the original title holder of the property. Further, the circumstances of Tereza and Conceicao having acquired their right through the creditor Shastri who purchased their property in a public auction after its attachment by the court from the heirs of one of the co-owners are certainly not binding on the respondents who were not parties in the said proceedings being also a fact that simply because the original plaintiff did not react either against the attachment or the auction, it cannot be said that this circumstance made her lose her right of the share acquired by her husband through his father who was one of the sons of the original owner of the suit schedule property. Besides, the evidence on record shows that the original plaintiff and her family were residing in the house situated in the suit schedule property even at the time of the filing of the suit and subsequently they shifted their residence after their ancestral house collapsed having built another house in a different property which had been acquired by the plaintiff. It was further held by the first appellate court that the trial Judge has correctly assessed the evidence on record while adjudicating the rights of the parties to the suit in favour of the plaintiff, and the judgment could not be said as having caused any grievance to the defendants-respondents and must be fully affirmed.

6. Being aggrieved by the said judgment Second Appeal

No. 30 of 1986 was filed by the defendants before the learned single Judge of the High Court by urging certain substantial questions of law as required under Section 100 of the Civil Procedure Code, 1908 (for short "the CPC"). The High Court admitted the appeal by framing the following substantial questions of law :-

(1) The plaintiffs not having produced any document of title, could the courts below decree the suit?

(2) The decision is contrary to the pleadings. The courts below committed breach of procedure in holding that there was admission of original plaintiff, in the pleading when there is no such admission.

(3) The courts below failed to consider that the defendants had pleaded prescription and that Article 526(2) was fully attracted.

7. After hearing the learned counsel for the parties and the translated pleadings from Portuguese language to English in the plaint with regard to the claim of ownership of the plaintiff and the pleadings of defendants, the learned single Judge of the High Court has examined the rival legal contentions urged with reference to the substantial questions of law framed by it at the time of admission of the second appeal and placed reliance upon the judgment of this Court in the case of *Hira Lal and Anr. v. Gajjan and Ors.*[1] wherein this Court laid down the statement of law regarding the substantial questions of law in the second appeal under Section 100 of the CPC. The relevant portion of paragraph 8 from the aforesaid judgment reads thus:-

> "8.…if in dealing with a question of fact that the lower appellate court has placed the onus on wrong party and its finding of fact is the result substantially of this wrong approach that may be regarded as a defect in procedure.

1. (1990) 3 SCC 285.

> When the first appellate court discarded the evidence as inadmissible and the High Court is satisfied that the evidence was admissible that may introduce an error or defect in procedure. So also in a case where the court below ignored the weight of evidence and allowed the judgment to be influenced by inconsequential matters, the High Court would be justified in reappreciating the evidence and coming to its own independent decision."

With reference to the statement of law laid down by this Court in the aforesaid case, the learned single Judge of the High Court proceeded to answer the substantial questions of law Nos. 1 and 2 together by recording its reasons in paragraphs 7, 8 and 9 of the impugned judgment. In the second appeal, the High Court on the basis of the statement of law laid down by this Court in *Hira Lal* case (supra) examined the correctness of the concurrent findings of fact recorded by the first appellate court to answer the substantial questions of law referred to supra. The High Court has re-appreciated the evidence in the backdrop of the statement of law laid down by this Court after noticing the fact that the courts below ignored the pleadings of the defendants-respondents and the weight of their evidence and allowed its judgments to be influenced by inconsequential matters, therefore, the High Court was of the view that it is justified in re-appreciating the evidence and coming to its independent decision and answered the substantial questions of law Nos. 1 and 2 in favour of the defendants holding the findings of the courts below on the relevant contentious issues as perverse. In this regard, at paragraph 7, the High Court considered the evidence on record and non-appreciation of the same by the courts below, particularly, the finding recorded by the first appellate court that the plaintiff-appellants have established their title in respect of the suit schedule property, that the defendant Shastri had not denied the claim of ownership of the plaintiff-appellants and further that there is no specific denial of the ownership by Tereza, holding that the lower courts have erroneously recorded

findings on these aspects. The High Court has further proceeded to hold that the fact remains that Tereza is not claiming right independently herself but her claim to the property is through said Shastri. The case of the defendants before the trial court is that the said property was purchased by Shastri in a court auction and subsequently conveyed to Tereza. Therefore, the case of the defendants was accepted by the High Court stating that the pleading of K.V.P. Shastri in relation to the denial of ownership of the plaintiff is more relevant and material rather than that of Tereza. The High Court further made observation that denial of Tereza without there being any such denial by Shastri would have been of no consequence because consequent to the auction to the property through court, Tereza is claiming right to the property only through Shastri and not independently. Therefore, the High Court has arrived at valid finding on this aspect of the matter that irrespective of the denial of such claim of Tereza, had Shastri accepted the claim of the plaintiff then such denial of Tereza would have been of no consequence in the facts and circumstances of the case. The High Court has arrived at a conclusion on the basis of pleadings that undisputedly Shastri has denied the claim of the ownership of the plaintiff-appellants in respect of the suit schedule property, therefore, the findings of both the courts below that there is no denial of the plaintiff's case regarding the ownership right of the suit schedule property is not factually correct and the said finding is held to be totally contrary to the record and the same is arbitrary and perverse and cannot be sustained. The High Court has also come to the conclusion on the basis of the pleadings on record that the claim of the plaintiff-appellants to the suit schedule property is clearly in dispute and plaintiff-appellants have not proved their title to the suit schedule property and further rightly came to the conclusion that the courts below have not properly analyzed the material evidence on record though plaintiff-appellants have failed to produce documentary evidence in so far as the title of their ownership of the suit schedule property is concerned and further the finding recorded by the High

at para 8 namely, to the effect that the challenge of the plaintiff with regard to the acquisition of his right to the suit schedule property by Shastri and Tereza is essentially and solely based on the basis of the claim of ownership of the plaintiff to the suit schedule property.

8. The learned counsel for the plaintiff-appellants has submitted their legal and factual contentions before us. It was contended that the High Court failed to appreciate that under Section 100 of the CPC, only a substantial question of law could be framed for the purposes of examining the contentions of parties and that a substantial question of law is distinctly different from a substantial question of fact.

9. Further the learned counsel contended that the High Court failed to advert to the fact that possession of the ancestral property continued with the original plaintiff. It was contended that the High Court should have considered the fact that the two fact-finding courts had come to the conclusion on fact that the deceased-plaintiff was in possession of the suit schedule property as a co-owner thereof, as 1/3rd of the suit schedule property belonged to her father-in-law Francisco Fernandes. It is submitted that the learned single Judge of the High Court has misread the evidence and pleadings in arriving at the impugned findings. The learned counsel for the plaintiff-appellants has relied on the judgments of this Court in *Deity Pattabhiramaswamy v. S. Hanymayya & Ors.*[2], *Dollar Company, Madras v. Collector of Madras*[3] and *Ramanuja Naidu v. V. Kanniah Naidu & Anr.*[4] to support the contention that in the facts and circumstances of the present appeal the High Court has tried to re-appreciate the evidence in second appeal under Section 100 of the CPC which cannot be done in the second appeal, in the backdrop of the concurrent finding

2. AIR 1959 SC 57.
3. (1975) 2 SCC 730.
4. (1996) 3 SCC 392.

of facts by the lower courts on appreciation of pleadings and evidence on record.

10. It is further contended by the learned counsel that the High Court failed to appreciate that defendant-Tereza was not claiming rights independently and her claim to the suit schedule property is through the said Shastri, when on the contrary, the purported right and interest of Shastri was in view of a purported public auction of the property held to recover the debts of the said Tereza and by an illegal means the said Tereza obtained a perpetual lease of the suit schedule property in her favour from the said Shastri.

11. It was further contended that there was no question of selling the entire property in the public auction in pursuance to court decree when the rights of the said Tereza was only to the extent of 1/3rd of the entire property and the purported attachment of the same is null and void and without any legal effect.

12. The learned counsel has also drawn our attention towards the three points, which arise for consideration by this Court:-

(1) In the absence of documentary proof, whether oral evidence can be relied upon for granting a decree declaring the rights of a party?

(2) Whether the High Court in a Second Appeal should set-aside concurrent findings of fact upon re-appreciating evidence?

(3) Whether improper admission or rejection of evidence can be a ground for new trial or reversal of any decision in any case?

13. He has further submitted that it is manifest that a court is empowered to grant a decree of declaration of title on the basis of only oral evidence and further s[illegible]rt

has settled the scope, limitation of jurisdiction and power of a second appellate court under Section 100 of the CPC specifically after the amendment in 1976. This Court has held that in proceedings under Section 100 of the Code, power to set aside concurrent finding of fact can be exercised only when a substantial question of law exists irrespective of the fact that the finding of fact is erroneous.

14. The learned counsel has also stated that the Indian Evidence Act, 1872 creates a specific bar against conducting a new trial merely on the ground of improper admission or rejection of evidence and that Section 167 of the Indian Evidence Act is specific in this behalf.

15. On the contrary, the learned counsel for the defendants-respondents contended that the present appeal is misconceived and deserves to be dismissed as the High Court has rightly exercised its jurisdiction under Section 100 of the CPC. It is evident from the extracts of the findings of the courts below that the courts below have proceeded on the basis that there is an admission of the claim of the plaintiff regarding 1/3rd ownership of the suit schedule property as the same has not been specifically denied by the respondents. The said finding is not only contrary to the pleadings on record but is also contrary to the well-established principles of law *viz.* (a) that the burden of proof is upon the person who approaches the court, and (b) any averment to be taken as an admission must be clear and unambiguous. It is submitted that it is an admitted fact that the plaintiff-appellants could not produce any document before the trial court to prove their title regarding the suit schedule property.

16. It was further contended by the learned counsel that Sections 101 and 102 of Evidence Act clearly states that burden of proof lies on the person who desires the court to give a judgment on a legal right or liability and who would otherwise fail if no evidence was given on either side. In the present case the plaintiffs-appellants would have to satisfy that burden under

the above said sections of the Evidence Act, failing which the suit would be liable to be dismissed. In this regard, defendants placed reliance on the judgments of this Court in *Corporation of City of Bangalore v. Zulekha Bi & Ors.,*[5] *Gurunath Manohar Pavaskar & Ors. v. Nagesh Siddappa Navalgund & Ors.*[6] and *Anil Rishi v. Gurbaksh Singh,*[7] wherein it has been specifically held by this Court that in a suit for disputed property the burden to prove title to the land squarely falls on the plaintiff.

17. The learned counsel further contended that the trial court and the first appellate court have erroneously discharged the burden of proof as well as the onus of proof on the plaintiff-appellants to prove (a) the title to the property or for that matter (b) that the same was ancestral, by referring to the written statements of Tereza Fernandez and recording an erroneous finding that the rights of the plaintiff was not disputed by the defendants and, therefore, the same amounted to an admission. In this regard the pleadings of the parties become relevant which have been reproduced at page 8 of the impugned judgment and a perusal of which clearly show that there was a clear and specific denial of the right of the plaintiff over the said property as well as the right of the ancestors of the said plaintiff, by the auction purchaser/defendant No. 1. The relevant pleadings regarding the claim of ownership as found on page 8 of the impugned judgment are extracted below:-

> "In the village of Loliem there exists a property known as 'Bodquealem Tican' now described in the Land Registry of this Judicial Division under No.sixteen thousand four hundred thirteen (16,413) and which belonged jointly to Francisco Fernandes, the father-in-law of the plaintiff and his brothers Francisco Fernandes junior, and Pedro Sebastiao Fernandes, who all three had been always holding possession the property jointly and in equal shares.

5. (2008) 11 SCC 306.
6. (2007) 13 SCC 565.
7. (2006) 5 SCC 558.

In answer to the said pleadings the defendant No.1 the predecessor of the appellant no.1 stated thus:-

> 'The plaintiff her husband Luis or the father of this Francisco Fernandes Senior never held in possession the property-Bodquealem Tican-situate at Loliem and described in the Land Registry under No.16413, the boundaries of which and other details set out in the doc. of fls. 5 are deemed to have been reproduced herein for all purposes of law.
>
> The property at issue was always and originally in possession and ownership of the judgment debtors Tomas Fernandes his wife Tereza Fernandes, Santana deSouza and his wife Conceicao Fernandes of Loliem.'

The Other defendants, namely the other appellants stated thus :-

> 'For neither she nor her husband held in possession any property and much less Bodquealem Tican-No.16413 the details of identification of which are borne out from Doc. of fls. 5 and are deemed to have been reproduced herein."

18. It is further submitted that it is settled law that for a decree to be passed on admission, the admission should be clear and unambiguous. In this regard reliance is placed on the judgment of this Court in *Jeevan Diesels & Electricals Ltd. v. Jasbir Singh Chadha, (HUF) & Anr.*[8] Further, he has urged that so far as the written statement is concerned, this Court in the case of *Rachakonda Venkat Rao & Ors. v. R. Satya Bai & Anr.*[9] held that :

8. (2010) 6 SCC 601.

9. (2003) (7) SCC 452.

> "20. The learned counsel for the plaintiff also tried to build argument based on the fact that the 1978 decree has been referred to as a preliminary decree by Defendant 1 in his reply to the plaintiff's application under Order 26 Rules 13 and 14 CPC. According to him this shows that the defendant himself treated the said decree as a preliminary decree. This argument has no merit. We have to see the tenor of the entire reply and a word here or there cannot be taken out of context to build an argument. The reply by Defendant 1 seen as a whole makes it abundantly clear that the defendant was opposing the prayer in the application including the prayer for taking proceedings for passing a final decree."

19. It was further submitted by the learned counsel for the defendant-respondents that in any event of the matter it is an admitted fact that there was clear and specific denial by the defendant No.1/the auction purchaser and owner of the suit schedule property and that the said finding is concurrent vide trial court judgment (para 12) and first appellate court judgment (para 8). The relevant portions of which paragraphs are extracted below:-

Trial Court judgment dated 29.4.1978

> "12…On the other hand a careful perusal of the written statement of the defendant reveals that even though they might have denied that 1/3rd of that property had belonged to the couple of the plaintiff, only the defendant no.1 clearly stated that the same belonged entirely to the defendants Tereza and Conceica…"

First Appellate Court Judgment dated 16.12.1985

> "8.However it was rightly pointed out by the learned Trial Judge, the specific claim taken by the respondents with regard to common ownership of the suit property and the houses was not specifically deni[illegible]s

being a fact that only the original defendant no.1 Xastri took a definite stand in this respect…"

It was further submitted that the owner of the property having specifically denied title of the plaintiffs as well as the fact that the said property was ancestral; it was incumbent upon the plaintiff to prove the title as well as the fact that the said property was ancestral. It was contended that even assuming for the sake of argument that the other defendant *viz.* Tereza who was in possession of the property as a lessee does not deny the title, the same would make no difference as the owner of the property defendant No.1 had specifically denied the title.

20. Learned counsel further argued that the High Court has correctly exercised its jurisdiction under Section 100 of the CPC. It is further submitted that the findings rendered by the courts below on no evidence or drawn on wrong inference from the evidence, as well as casting of onus on the wrong party, are admittedly substantial questions of law.

21. The submissions of both the learned counsel for the parties with reference to the case law referred to supra upon which reliance was placed, are carefully examined by us with a view to find out whether the substantial questions of law Nos. 1 and 2 framed and answered in favour of the defendants-respondents and against the plaintiff-appellants are correct or not. After having heard learned counsel for the plaintiff-appellants as well as defendants-respondents, we have to hold that the High Court has rightly held to the effect that it was primarily and essentially necessary for the plaintiff-appellants to establish their claim of ownership before they could invite the court to address itself to the issue of their challenge to the title of the defendants-respondents to the suit schedule property. The plaintiff-appellants having failed to do so, their entire claim was liable to be rejected. The High Court further recorded the finding, that the factum of registration of the suit schedule property under No.16413 in favour of the defendants-respondents is not in dispute, yet the plaintiff-appellants have

not produced on the record any document of inscription of the suit schedule property in their name. Therefore, the High Court has rightly come to the conclusion and held that the answer to the first substantial question of law is to be answered in the negative and held that since plaintiff-appellants have not produced any document of title in relation to the suit schedule property, the grant of decree in favour of them is erroneous in law. Further, on the second substantial question of law, the High Court has rightly answered in favour of the defendants in the affirmative for the reason that the courts below, without considering the denial made by the defendant no.1 with regard to the ownership claim made by the plaintiff-appellants in respect of the suit schedule property, have come to the erroneous conclusion that there is no pleading of fact by the defendants-respondents and lack of evidence in favour of the plaintiff-appellants to prove their title to the suit schedule property. Therefore, the High Court has arrived at the right conclusion and held that the courts below committed serious error in holding that there was admission of defendants in the pleadings with respect to ownership of 1/3rd of the suit schedule property by the plaintiff.

22. After careful scrutiny of the finding of fact and reasons recorded by the courts below with reference to the substantial questions of law framed by the High Court at the time of admission of the second appeal filed by the defendants, we are satisfied that the ratio laid down by this Court in *Hira Lal's* case (supra) and other decisions referred to supra upon which defendants' counsel placed reliance in justification of the findings and reasons recorded by the High Court in the impugned judgment are applicable to the fact situation of this case as the courts below have erred in assuming certain facts which are not in existence to come to the erroneous conclusion in the absence of title document in justification of the claim of the plaintiff in respect of the suit schedule property and ignored the pleadings of the defendants though they have specifically denied the ownership right claimed by

of the suit schedule property and on wrong assumption of the facts which are pleaded on the contentious issues, they have been answered in favour of the plaintiff, therefore, the High Court has rightly exercised its appellate jurisdiction by framing the correct substantial questions of law with reference to the legal position and applied the same to the fact situation of case on hand.

23. In our considered view, the substantial questions of law framed by the High Court at the time of the admission of the second appeal is based on law laid down by this Court in the above referred case of *Hira Lal* which view is supported by other cases referred to supra. Therefore, answer to the said substantial questions of law by the High Court by recording cogent and valid reasons to annul the concurrent findings that the non-appreciation of the pleadings and evidence on record by the courts below rendered their finding on the contentious issues/points as perverse and arbitrary, and therefore the same have been rightly set aside by answering the substantial questions of law in favour of the defendants.

24. The learned counsel for the defendants relied on the judgment of this Court in *Hero Vinoth (minor) v. Seshammal,*[10] wherein the principles relating to Section 100 of the CPC were summarized in para 24, which is extracted below :

> "24. The principles relating to Section 100 CPC relevant for this case may be summarised thus:
>
> (*i*) An inference of fact from the recitals or contents of a document is a question of fact. But the legal effect of the terms of a document is a question of law. Construction of a document involving the application of any principle of law, is also a question of law. Therefore, when there is misconstruction of a document or wrong application of a principle of law in construing a document, it gives rise to a question of law.
>
> (*ii*) The High Court should be satisfied that the case involves a substantial question of law, and not a mere question of law. A question of law having a material bearing on the decision of the case (that is, a question, answer to which affects the rights of parties to the suit) will be a substantial question of law, if it is not covered by any specific provisions of law or settled legal principle emerging from binding precedents, and, involves a debatable legal issue. A substantial question of law will also arise in a contrary situation, where the legal position is clear, either on account of express provisions of law or binding precedents, but the court below has decided the matter, either ignoring or acting contrary to such legal principle. In the second type of cases, the substantial question of law arises not because the law is still debatable, but because the decision rendered on a material question, violates the settled position of law.
>
> (*iii*) The general rule is that High Court will not interfere with the concurrent findings of the courts below. But it is not an absolute rule. Some of the well-recognised exceptions are where (*i*) the courts below have ignored material evidence or acted on no evidence; (*ii*) the courts have drawn wrong inferences from proved facts by applying the law erroneously; or (*iii*) the courts have wrongly cast the burden of proof. When we refer to "decision based on no evidence", it not only refers to cases where there is a total dearth of evidence, but also refers to any case, where the evidence, taken as a whole, is not reasonably capable of supporting the finding."

10. (2006) 5 SCC 545.

We have to place reliance on the e

to hold that the High Court has framed substantial questions of law as per Section 100 of the CPC, and there is no error in the judgment of the High Court in this regard and therefore, there is no need for this Court to interfere with the same.

25. In the matter of onus of proof and burden of proof as per Sections 101 and 102 of the Evidence Act, we have to hold that it was upon the plaintiff-appellants to furnish proof regarding ownership of 1/3rd share of the suit schedule property and discharge their burden of proof as per the afore-mentioned sections. The relevant extract from *Anil Rishi v. Gurbaksh Singh* (supra) is reproduced below:-

> "19. There is another aspect of the matter which should be borne in mind. A distinction exists between burden of proof and onus of proof. The right to begin follows onus probandi. It assumes importance in the early stage of a case. The question of onus of proof has greater force, where the question is, which party is to begin. Burden of proof is used in three ways: (i) to indicate the duty of bringing forward evidence in support of a proposition at the beginning or later; (ii) to make that of establishing a proposition as against all counter-evidence; and (iii) an indiscriminate use in which it may mean either or both of the others. The elementary rule in Section 101 is inflexible. In terms of Section 102 the initial onus is always on the plaintiff and if he discharges that onus and makes out a case which entitles him to a relief, the onus shifts to the defendant to prove those circumstances, if any, which would disentitle the plaintiff to the same.
>
> 20. In *R.V.E. Venkatachala Gounder v. Arulmigu Viswesaraswami & V.P. Temple* the law is stated in the following terms: (SCC p. 768, para 29)
>
> > "*29*. In a suit for recovery of possession based on title it is for the plaintiff to prove his title and satisfy the court that he, in law, is entitled to dispossess

> the defendant from his possession over the suit property and for the possession to be restored to him. However, as held in *Addagada Raghavamma v. Addagada Chenchamma* there is an essential distinction between burden of proof and onus of proof: burden of proof lies upon a person who has to prove the fact and which never shifts. Onus of proof shifts. Such a shifting of onus is a continuous process in the evaluation of evidence. In our opinion, in a suit for possession based on title once the plaintiff has been able to create a high degree of probability so as to shift the onus on the defendant it is for the defendant to discharge his onus and in the absence thereof the burden of proof lying on the plaintiff shall be held to have been discharged so as to amount to proof of the plaintiff's title."

We therefore do not find any reason whatsoever to interfere with the impugned judgment and decree passed by the High Court on this aspect of the case as well.

26. For the reasons stated above, the appeal is dismissed, there will be no order as to costs. Orders passed by this Court on 27.8.1999 and 3.9.2001 stand vacated.

R.P. Appeal dismissed.

CHATTERJEE PETROCHEM CO. & ANR
v.
HALDIA PETROCHEMICALS LTD. & ORS.
(Civil Appeal No. 10932 of 2013)

DECEMBER 10, 2013

[G.S. SINGHVI AND V. GOPALA GOWDA, JJ.]

Arbitration – Arbitration clause – Validity – Suit seeking injunction against arbitration of disputes – Maintainability – Appellant filed request for arbitration in the International Chamber of Commerce (ICC), Paris in relation to an agreement of restructuring dated 12th January, 2002 by invoking arbitration clause contained in Clause 15 of the agreement dated 12th January, 2002 – Dispute as whether Clause 7.5 of the subsequent Agreement dated 8th March, 2002 invoking the exclusive jurisdiction of the courts of Calcutta nullified the scope of arbitration as mentioned in the agreement dated 12th January, 2002 – Suit filed by respondents, seeking injunction against arbitration of disputes between the parties – Maintainability – Held: In view of the clauses of the Principal Agreement dated 12th January 2002 and subsequent Agreements dated 8th March 2002 and 30th July, 2004, read with section 5 of the A&C Act, it is clear that the Arbitration clause in the Principal Agreement continued to be valid in view of clause no. 6 of the Agreement dated 30th July, 2004 and also by virtue of its mention in different parts of both the supplementary agreements dated 8th March, 2002 and 30th July, 2004 – Appellant thus entitled to invoke the arbitration clause for settling their disputes – Since, the arbitration clause was valid, suit filed by respondent no.1 for declaration and permanent injunction against arbitration of disputes between the parties unsustainable and liable to be dismissed – Parties directed to resolve their disputes through arbitration as mentioned in clause 15 of the letter of

Agreement dated 12th January, 2002 in accordance with the Rules of ICC – Rules of Arbitration of the International Chamber of Commerce – Arbitration and Conciliation Act, 1996 – ss. 5, 16 and 45.

On 21st March, 2012, the appellant- CPMC filed a request for arbitration in the International Chamber of Commerce (ICC), Paris in relation to an agreement of restructuring entered into between CPMC, Government of West Bengal, West Bengal Industrial Development Corporation (WBIDC) and Haldia Petrochemical Limited (HPL) on 12th January, 2002. As per the agreement, the Government of West Bengal was to cause WBIDC to transfer existing shareholding to CPMC to ensure that CPMC holds 51% of the total paid up capital of HPL.

Clause 15 of the agreement dated 12th January, 2002 provided for reference of all disputes, in any way relating to the said Agreement or to the business of or affair of HPL to the Rules of the ICC, Paris. The appellant sought to invoke the said arbitration clause contained in the agreement dated 12th January, 2002 and made a request for arbitration.

The respondent HPL, however, claimed that the Arbitration Agreement contained in clause 15 of the Agreement dated 12th January, 2002 was void and/ or unenforceable and/or had become inoperative and/or incapable of being performed; and filed a suit before the High Court of judicature at Calcutta praying that the arbitration clause in the agreement be declared as void.

The following issues arose for consideration of this Court in these proceedings:

1. Can the Arbitration clause under clause 15 of the letter of Agreement dated 12th January, 2002 be invoked by t d

whether Clause 7.5 of the subsequent Agreement dated 8th March, 2002 invoking the exclusive jurisdiction of the courts of Calcutta nullify the scope of arbitration as mentioned in the previous agreement dated 12th January, 2002?

2. Is the suit, filed by the respondents, seeking injunction against arbitration of disputes between the parties sought for by the appellants as per Clause 15 of the agreement dated 12th January, 2002 maintainable in law?

Allowing the appeal, the Court

HELD: 1.1. The submission made on behalf of the respondents that the transfer of shares to CPIL (the Indian counterpart of CPMC) instead of CPMC substantially changed the legal rights and responsibilities of the parties as per agreement, resulting in novation of contract, is liable to be rejected. It is nowhere mentioned in the letter dated 8th March, 2002 that transfer of shares to CPIL instead of CPMC extinguished the old agreement dated 12th January, 2002 to nullity. In fact, in the letter dated 8th March, 2002, CPMC has been constantly mentioned as a guarantor. It is only to this extent the nature of agreement has changed. Clause 1 of the supplementary agreement dated 30th July, 2004 goes to show that CPIL is an affiliate of CPMC. This is to say, that by means of the letter dated 8th March,2002 CPMC becomes a guarantor whereas CPIL becomes the borrower. Therefore, the same does not change the rights and responsibilities of the parties under the agreement dated 12th January, 2002. Further, the contents of the letter written by CPMC to WBIDC goes to show that the agreement dated 12th January, 2002 remains the principal agreement while agreement dated 8th March 2002 remains a supplementary agreement which was

meant for restructuring of HPL on urgency. Further, and most importantly, an agreement was entered into between the parties dated 30th July, 2004. The subsequent Agreements dated 8th March, 2002 and 30th July, 2004 go to show that there was no alteration in the nature of rights and responsibilities of the parties involved in the contract. Consequently, there was no novation of the contract. [Paras 21, 22, 26, 27 and 28] [1115-F-G; 1116-A; 1117-C, E-F, H; 1118-A-B, E-F]

1.2. It cannot be said that Section 5 of the Arbitration & Conciliation Act, 1996 which bars intervention by judicial authority in Arbitration Agreement will not be applicable to International Agreements such as the present case. [Para 29] [1118-F-G]

1.3. Further, it is pertinent to read Clause 7.5 of the Agreement dated 8th March, 2002 carefully. The phrase 'this agreement' in Clause 7.5 means that the Agreement dated 8th March, 2002 is essentially a supplementary Agreement and does not, by any means, make the Principal Agreement dated 12th January, 2002 subject to the jurisdiction of the Court. [Para 30] [1119-D, F]

1.4. In view of the clauses of the Principal Agreement dated 12th January 2002 and subsequent Agreements dated 8th March 2002 and 30th July, 2004, read with section 5 of the Arbitration & Conciliation Act, 1996, it is clear that the Arbitration clause in the Principal Agreement continued to be valid in view of clause no. 6 of the Agreement dated 30th July, 2004 and also by virtue of its mention in different parts of both the supplementary agreements dated 8th March, 2002 and 30th July, 2004. Therefore, the arbitration clause mentioned in Clause 15 of the Arbitration agreement dated January 12, 2002 is valid and the appellant is entitled to invoke the arbitration clause for settling their disputes. [Para 31] [1119-G-H; 1120-A-B]

Venture Global Engineering v. Satyam Computer Services Ltd. and Anr. **(2008) 4 SCC 190: 2008 (1) SCR 501 – relied on.**

Yograj Infrastructure Ltd. v. Ssang Yong Engineering and Construction Co. Ltd. **(2011) 9 SCC 735: 2011 (14) SCR 301;** *Bhatia International v. Bulk Trading S.A. and Anr.* **(2002) 4 SCC 105: 2002 (2) SCR 411;** *Bajaj Auto Ltd. v. TVS Motor Company Ltd*. **(2009) 9 SCC 797: 2009 (14) SCR 548;** *Shree Vardhman Rice & General Mills v. Amar Singh Chawalwala* **(2009) 10 SCC 257;** *Milmet Oftho Industries & Ors. v. Allergan Inc.* **(2004) 12 SCC 624: 2004 (2) Suppl. SCR 586 and** *Dhariwal Industries Ltd. & Anr. v. M.S.S. Food Products* **(2005) 3 SCC 63 – cited.**

2. It is the claim of the respondent no.3 that the suit was filed by Respondent no. 1 under section 9 of CPC and not section 45 of the Arbitration & Conciliation Act, 1996. Respondent no. 3 contended that the Calcutta High Court (exercising its ordinary original jurisdiction) has the jurisdiction (territorial as well as pecuniary) to entertain the present suit under section 9 of CPC and grant of such interim injunctive relief as it deems fit under Order 39 Rules 1 and 2 of the CPC is permissible in law. This contention is liable to be rejected. It is already held that the Principal Agreement dated 12th January, 2002 continues to be in force with its arbitration clause in place. Also, section 5 of the A&C act will be applicable to Part II of the Act as well. The Agreement dated 12th January, 2002 remains valid and the arbitration clause, with all fours, will be applicable to the parties concerned to get their disputes arbitrated and resolved in the Arbitration as per the Rules of ICC. The fact that CPIL, which initially was a non-signatory to the Agreement does not jeopardize the arbitration clause in any manner. Since, the arbitration clause is valid, suit filed by the respondent no.1 for declaration and permanent

injunction against arbitration of disputes between the parties is unsustainable in law and the suit is liable to be dismissed. [Paras 32, 33, 35, 36, 37] [1120-D, H; 1121-A-B, H; 1122-A-B, C; 1123-D]

Chloro Controls India Pvt. Ltd. v. Severn Trent Water Purification Inc. and Ors. **(2013) 1 SCC 641;** *Ganga Bai v. Vijay Kumar & Ors.* **(1974) 2 SCC 393: 1974 (3) SCR 882 and** *SBP & Co. v. Patel Engineering Ltd. & Anr.* **(2005) 8 SCC 618: 2005 (4) Suppl. SCR 688 – referred to.**

3. The parties are directed to resolve their disputes through arbitration as mentioned in clause 15 of the letter of Agreement dated 12th January, 2002 in accordance with the Rules of ICC. It is seen from the written submission of the appellants that they have already initiated an arbitration proceeding. In such case, the parties shall continue with the arbitration proceeding since the suit filed for permanent injunction against the arbitration proceeding is dismissed by setting aside the impugned judgment and final order passed by the High Court of judicature at Calcutta. [Para 38] [1123-E-G]

Case Law Reference:

2011 (14) SCR 301	cited	Para 8
2002 (2) SCR 411	cited	Para 10
2008 (1) SCR 501	relied on	Para 11
2009 (14) SCR 548	cited	Para 18
(2009) 10 SCC 257	cited	Para 18
2004 (2) Suppl. SCR 586	cited	Para 18
(2005) 3 SCC 63	cited	Para 18
(2013) 1 SCC 641	referred to	Para 19
1974 (3) SCR 882	referred to	Para 32
2005 (4) Suppl. SCR 688	referre	4

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 10932 of 2013.

From the Judgment & Order dated 04.06.2013 of the High Court of Calcutta in APO No. 13 of 2013.

Dr. Abhishek Manu Singhvi, Sudipto Sarkar, Ashok Desai, R.S. Suri, K.K. Venugopal, C.A. Sundaram, Maushumi Bhattacharya, Amit Bhandari, Purnima Bhat Kak, Suruchi Suri, Pallavi Tayal, Anu Bindra, Amar Gupta, Ananya Kumar, Mayank Mishra, Sidharth Nair, Sidharth Sethi, Dheeraj Nair for the Appearing parties.

The Judgment of the Court was delivered by

V. GOPALA GOWDA J. 1. On 21st March, 2012, the appellant Chatterjee Petrochem (Mauritius) Company (hereinafter referred to as 'CPMC') filed a request for arbitration in International Chamber of Commerce (ICC), Paris in relation to an agreement of restructuring which was entered into between CPMC, Government of West Bengal, West Bengal Industrial Development Corporation (in short 'WBIDC') and Haldia Petrochemical Limited (in short 'HPL') on 12th January, 2002. As per the Agreement, the Government of West Bengal was to cause WBIDC to transfer existing shareholding to CPMC to ensure that CPMC holds 51% of the total paid up capital of HPL. Clause 15 of the Agreement provides for reference of all disputes, in any way relating to the said Agreement or to the business of or affair of HPL to the Rules of the ICC, Paris.

2. The respondent HPL on the other hand, claims that the Arbitration Agreement contained in clause 15 of the Agreement dated 12th January, 2002 is void and/ or unenforceable and/ or has become inoperative and/or incapable of being performed.

3. A dispute arose between the parties regarding the allotment of shares and the appellant filed Company Petition

No. 58 of 2009 before the Company Law Board (in short 'CLB')on the grounds of oppression and mismanagement. The appellant also sought transfer of 155 million shares in favour of Chatterjee Petrochem (India) Pvt. Ltd. (in short "the CPIL"), the Indian counterpart of CPMC as was decided in the Agreement.

4. The Company Petition was disposed of by the CLB by upholding the decision of the Company to allot 155 million shares by Indian Oil Corporation (in short 'IOC'). The transfer of 155 million shares to CPIL by WBIDC was also confirmed. The CLB further directed the Government of West Bengal and WBIDC to transfer 520 million shares held by them in HPL to Chatterjee Groups.

5. The Government of West Bengal preferred an appeal against the said Order before the High Court of Judicature at Calcutta under the provisions of Section 10F of the Company's Act, 1956. The High Court set aside the Order of the CLB on the ground that CPIL was not a member of HPL and the CLB could not have enforced its right under private contract entered into between CPIL and WBIDC for transfer of shares as the same could not be the subject matter of a petition under Section 397 of the Companies Act.

6. Aggrieved by the same, the appellant preferred appeal Nos. 5416-5419, 5420, 5437 and 5440 of 2008 before this Court. Vide judgment dated 30.09.2011, this Court held that the claim of the appellant transferring shares to IOC has changed the private character of the Company and was not an act of oppression on the part of the Company. According to this Court, the transfer of shares to IOC was a result of failure on the part of the appellant to infuse adequate funds into the Company by way of equity as promised and to participate in its rights issues. The Company was therefore, constraint to induct IOC as a member and the 155 million shares which was to be transferred to the appellant was instead transferred to the IOC. The relevant paragraph of the judgment reads as un

"103. The failure of WBIDC and GoWB to register the 155 million shares transferred to CP(I)PL could not, strictly speaking, be taken to be failure on the part of the Company, but it was the failure of one of the parties to a private arrangement to abide by its commitments. The remedy in such a case was not under Section 397 of the Companies Act. It has been submitted by both Mr. Nariman and Mr. Sarkar that even if no acts of oppression had been made out against the Company, it would still be open to the learned Company Judge to grant suitable relief under Section 402 of the Act to iron out the differences that might appear from time to time in the running of the affairs of the Company. No doubt, in the Needle Industries case, this Court had observed that the behaviour and conduct complained of must be held to be harsh and wrongful and in arriving at such a finding, the Court ought not to confine itself to a narrow legalistic view and allow technical pleas to defeat the beneficial provisions of the Section, and that in certain situations the Court is not powerless to do substantial justice between the parties, the facts of this case do not merit such a course of action to be taken. Such an argument is not available to the Chatterjee Group, since the alleged breach of the agreements referred to hereinabove, was really in the nature of a breach between two members of the Company and not the Company itself. It is not on account of any act on the part of the Company that the shares transferred to CP(I)PL were not registered in the name of the Chatterjee Group. There was, therefore, no occasion for the CLB to make any order either under Section 397 or 402 of the aforesaid Act. If, as was observed in M.S.D.C. Radharamanan's case (supra), the CLB had given a finding that the acts of oppression had not been established, it would still be in a position to pass appropriate orders under Section 402 of the Act. That, however, is not the case in the instant appeals."

(emphasis laid by this Court)

7. On this decision given by this Court, the appellant sought to invoke the arbitration clause contained in the agreement dated 12th January, 2002 and made a request for arbitration. The respondent no.1 on the other hand, filed a suit before the High Court of judicature at Calcutta praying that the arbitration clause in the agreement be declared as void.

8. Learned senior counsel on behalf of the appellant Dr. Abhishek Manu Singhvi relied upon Clause 15 of the letter of agreement dated 12th January, 2002 to contend that any dispute, difference or claims arising between the parties relating to this letter of agreement dated 12th January, 2002, or any construction or interpretation relating to the working of or the business of the respondent no.1, shall first make an endeavour to settle their disputes, differences etc. in accordance with the Rules of Arbitration of the International Chamber of Commerce. Therefore, the learned senior counsel contended that the validity or existence of the arbitration agreement is to be decided by the Arbitration Tribunal in terms of Article 6 of the ICC Rules, 1998 which is pari-materia to Section 16 of the Arbitration and Conciliation Act, 1996 (in short 'A & C Act')and the Civil Court has no jurisdiction to decide on such issues. In support of this legal contention, the learned senior counsel relied upon the decision of this Court in *Yograj Infrastructure Ltd. v. Ssang Yong Engineering and Construction Co. Ltd.*[1] wherein it was held that the arbitration shall be held as is mentioned in the agreement which in the present case, is at Paris.

9. It is the further case of the appellant that the agreement dated 12th January, 2002 between the parties was not novated by the subsequent agreements. According to the appellant, the agreement dated 12th January, 2002 is the principal agreement, which was later followed by the supplemental agreements dated 8th March, 2002 and 30th July, 2004. The letter of agreement dated 8th March, 2002 did not create any

1. (2011) 9 SCC 735.

independent legal right but was a mere direction from CPMC to transfer 155 million shares to its nominee CPIL to avoid delay. Therefore, according to the appellant, the letter of agreement dated 8th March 2002 provided that the terms and conditions of 12th January, 2002 agreement would continue to remain valid and subsisting between the parties. The relevant clauses will be mentioned in the reasoning portion of the judgment.

10. The learned senior counsel relied upon Section 45 of the A & C Act to contend that the suit instituted by the respondent No. 1 against the request of arbitration by the appellant is not maintainable in law. He further argued that the suit instituted by the respondent No. 1 to restrain a foreign arbitration for resolution of the disputes between the parties was in violation of Section 5 of the A & C Act which limits judicial authority's intervention in arbitration and therefore the impugned order of injunction passed by the High Court of Judicature at Calcutta was contrary to law and therefore, the same is liable to be set aside. In this regard, the learned senior counsel relied upon the three Judge Bench decision of this Court in *Bhatia International v. Bulk Trading S.A. and Anr.*[2] to contend that section 5 of the A & C Act provides that no judicial authority shall intervene except where it is provided. The relevant paragraph will be extracted in the reasoning portion of the judgment.

11. Mr. Sudipto Sarkar, learned senior counsel also appearing on behalf of the appellant further contended that the maintainability of the arbitration of the disputes between the parties can be established by relying on the decision of this Court in *Venture Global Engineering v. Satyam Computer Services Ltd. and Anr.*[3] wherein it was held that Part I of the A & C Act will be applicable to international arbitrations as well. Therefore, Mr. Sarkar contended that the Arbitration clause will

2. (2002) 4 SCC 105.

3. (2008) 4 SCC 190.

be a bar for judicial intervention in the present case in spite of the fact that it is an international arbitration as per the principal agreement which will be continued in force as per the terms of the supplemental agreements.

12. On the other hand, it is the case of the respondent HPL that the arbitration agreement dated 12th January, 2002 is rendered void in respect of the claim for transfer of 155 million shares in favour of CPIL inasmuch as the parties had contracted out of their earlier agreement and the legal liability in respect thereof was redefined in the subsequent 8th March, 2002 Agreement which provided for an exclusive jurisdiction to courts in Calcutta to decide dispute arising out of the said agreement. Therefore, it was pleaded by Mr. Ashok Desai, the learned senior counsel appearing on behalf of the respondent no. 1-HPL that once a party to an arbitration agreement seeks to adjudicate dispute before another forum and such forum arrives at a conclusive findings of fact in relation to the dispute then, the subsequent effort on the part of the same party to refer dispute for arbitration under ICC Rules would be vexatious and abuse of law and it shall be construed that the arbitration clause in the principal agreement has been rendered inoperative by the conduct of the party itself.

13. The learned senior counsel for the respondent no. 1 further claimed that Section 5 of the A & C Act can come into play only when existence of a valid arbitration agreement is established. Institution of such a suit by the respondent no.1 would constitute an "action pending before the judicial authority" necessitating the invocation of Section 45 of the A & C Act, if one of the parties makes a request to refer the matter for arbitration. In such cases, the court must see whether the arbitration agreement is valid, operative and capable of being performed, before referring the parties to arbitration.

14. It is the further case of respondent no.1 that the subsequent agreement through letter dated 8th March 2002 in respect of transfer of 155 million shares

liabilities were created by and between the non- parties to the arbitration agreement. The new agreement also provided for a different dispute resolution mechanism among the parties, that is, the courts in Calcutta. The relevant clause will be extracted in the reasoning portion of the judgment.

15. The learned senior counsel, Mr. K.K. Venugopal, appearing on behalf of Respondent no. 2, Govt. of West Bengal, contended that the Arbitration and Conciliation Act, 1996 does not apply to the present case. According to the learned senior counsel, a party may purport to appoint an arbitrator who may enter upon the arbitration even when there is serious dispute as to whether the arbitration clause exists. In spite of the fact that no arbitration clause exists, if a party resorts to arbitration, then neither section 8 nor section 45 of the A & C Act in case of international arbitration would provide for adjudication of the issue as to whether the arbitration clause exists. It is only where a suit has first been filed, in point of time, on the substantive agreement or the underlying agreement, either by way of specific performance or for compensation for breach of contract, that section 8 or section 45 of the A & C Act would come into play. However, we are not inclined to comment on this contention since it is not pertinent to the case.

16. The learned senior counsel for Respondent no. 2 also contended that when no arbitration clause exists in the agreement, the matter cannot be adjudicated either under Part I or Part II of the A & C Act rather, the matter can be adjudicated only by an independent suit seeking injunction against the party who had initiated arbitration, from proceeding with the arbitration.

17. It is further the case of the learned senior counsel, Mr. K.K. Venugopal that the facts of the present case are extraordinary and that the matter has been extensively litigated in the previous round both, before the Company Law Board and the appellate proceedings thereof. At no point in time did the Chatterjee Group or any of its constituent affiliate, saved or

reserved their right to seek arbitration under the alleged Arbitration Agreement which they now seek to enforce. This Court has already declined the reliefs on merit as well as on the point of jurisdiction. Therefore, he submits that at this juncture, invoking the arbitration clause from the principal agreement by the Chatterjee Group disregarding the Agreement dated 8th March, 2002, is clearly vexatious and abuse of the process of law. Therefore, the suit filed by respondent no. 1 seeking injunction relief on arbitration is maintainable in law.

18. It is further the case of the learned senior counsel on behalf of Respondent no.2 that the matter has been elaborately argued before this Court on complicated issues of law which arise for determination in the case. It is therefore, submitted by him that in such an event this Court would not render findings on questions of law while disposing an appeal against the interlocutory order so as to give finality in such findings. This approach of the Court is adopted in many cases arising under the Intellectual Property law, namely *Bajaj Auto Ltd. v. TVS Motor Company Ltd.*[4], *Shree Vardhman Rice & General Mills v. Amar Singh Chawalwala*[5]*, Milmet Oftho Industries & Ors. v. Allergan Inc.*[6] and *Dhariwal Industries Ltd. & Anr. v. M.S.S. Food Products*.[7] We are inclined to mention at this stage that in this appeal we are confined to deciding upon the validity of the arbitration clause in the principal agreement dated 12th January, 2002 only. Hence, this contention does not require to be addressed in this appeal.

19. The learned senior counsel for respondent No. 3 Mr. C.A. Sundaram contends that jurisdictional issue in the present case, shall be decided as the threshold issue in the present case. In relation to this, he placed reliance upon the three Judge

4. (2009) 9 SCC (para 5).
5. (2009) 10 SCC 257 (para 2)
6. (2004) 12 SCC 624 (paras 9 to 11)
7. (2005) 3 SCC 63 (para 20).

Bench decision of this Court in *Chloro Controls India Pvt. Ltd. v. Severn Trent Water Purification Inc. and Ors.*[8]

20. In the light of the facts and circumstances presented before us on the basis of admitted documents on record, and also based on the legal contentions urged by the learned senior counsel on behalf of both the parties, the following issues would arise for consideration of this Court in these proceedings:

1. Can the Arbitration clause under clause 15 of the letter of Agreement dated 12th January, 2002 be invoked by the appellants and whether Clause 7.5 of the subsequent Agreement dated 8th March, 2002 invoking the exclusive jurisdiction of the courts of Calcutta nullify the scope of arbitration as mentioned in the previous agreement dated 12th January, 2002?

2. Is the suit, filed by the respondents, seeking injunction against arbitration of disputes between the parties sought for by the appellants as per Clause 15 of the principal agreement referred to supra maintainable in law?

3. What Order?

Answer to Point no.1

21. We are inclined to reject the submission made by the learned senior counsel on behalf of the respondents that the transfer of shares to CPIL instead of CPMC substantially changes the legal rights and responsibilities of the parties as per agreement referred to supra thereby, resulting in novation of contract.

22. It is nowhere mentioned in the letter dated 8th March, 2002 that transfer of shares to CPIL instead of CPMC extinguishes the old agreement dated 12th January, 2002 to nullity. In fact, in the letter dated 8th March, 2002, CPMC has

8. (2013) 1 SCC 641.

been constantly mentioned as a guarantor. It is only to this extent the nature of agreement has changed.

23. It is argued by the learned senior counsel Mr. C.A. Sundaram, appearing on behalf of Respondent no.3 that the concurrent findings of facts on the prima facie case by the learned single Judge and the Division Bench of the High Court of Calcutta have held that there has been a novation of agreement between the parties to the principal agreement dated 12th January,2002 by the subsequent agreements dated 8th March, 2002 and 30th July, 2004.

24. It has been held by the learned single Judge of the Calcutta High Court that:

> "……This is a case, where by express words the parties have altered their obligations by a new agreement on 8th March, 2002 with a term that the Courts in Kolkata 'alone' would have jurisdictions. This was affirmed by the 30th July, 2004 agreement. This put an end to the arbitration, once and for all. Therefore, the arbitration clause in the 12th January, 2002 agreement was abrogated by the 8th March agreement. Abrogation of an arbitration agreement could not be made in clearer terms…".

25. Further, the Division Bench of Calcutta High Court vide impugned judgment dated 12th January 2012, made the following observations:

(a.) Agreement of 12th January 2002 was substituted by agreements of March 8, 2002 and July 30, 2004.

(b.) Such a subsequent agreement completely extinguished the rights existing under the January 12, 2002 agreement and also destroyed the arbitration clause.

(c.) Remedy is under Agreement of March 8, 2002 which does not provide for s

that courts at Calcutta alone shall have jurisdiction.

(d.) Agreement of March 8, 2002 is not an ancillary to agreement of January 12, 2002 but materially alters the same. The principle laid down in *Chloro Controls Case* (supra) does not apply. Real intention of the parties in the instant case was to substitute one agreement with another.

26. Clause 1 of the supplementary agreement dated 30th July, 2004 reads as under:

"Pursuant to the said Principal Agreement GoWB has caused WBIDC to transfer to Chatterjee Petrochem (India) Private Limited (CPIL), *an affiliate of CPMC* Rs. 155 crores of shares from the shareholding of WBIDC existing on the date of principal agreement…"

(emphasis laid by this Court)

The abovementioned clause goes to show that CPIL is an affiliate of CPMC. This is to say, that by means of the letter dated 8th March,2002 CPMC becomes a guarantor whereas CPIL becomes the borrower. Therefore, the same does not change the rights and responsibilities of the parties under the agreement dated 12th January, 2002.

27. Further, the letter written by CPMC to WBIDC along with the agreement dated 8th March, 2002 reads as follows:

"…It is clarified that the aforesaid **shall not prejudice any of our rights under the said Agreement dt. January 12, 2002** and **all terms and conditions thereof shall continue to remain valid, binding and subsisting** between the parties to be acted upon sequentially".

(emphasis laid by this Court)

The content of this letter goes to show that the agreement dated

12th January, 2002 remains the principal agreement while agreement dated 8th March 2002 remains a supplementary agreement which was meant for restructuring of HPL on urgency.

28. Further, and most importantly, the agreement entered into between the parties dated 30th July, 2004 states as follows:

"WHEREAS the Parties hereto had entered into an agreement dated January 12, 2002 (hereinafter referred to as the principal agreement…."

Also, the Agreement dated 30th July, 2004 which is based on shareholding issues, also notes through clause 6 that:

"6. The Parties hereby agree, record and confirm that **all other terms and conditions as contained in the said Principal Agreement shall remain binding, subsisting, effective, enforceable** and in force between the parties."

(emphasis laid by this Court)

The abovementioned clauses of the subsequent Agreements dated 8th March, 2002 and 30th July, 2004 go to show that there has been no alteration in the nature of rights and responsibilities of the parties involved in the contract. Consequently, there has been no novation of the contract.

29. It has been further argued by the learned senior counsel for the respondents that Section 5 of the A & C Act, which bars intervention by judicial authority in Arbitration Agreement will not be applicable to International Agreements such as the present case. We are inclined to reject this contention by placing reliance upon the legal principle laid down by this Court in *Venture Global Engineering* case (supra), the relevant paragraph of which reads as under:

"25. …… In order to find out an a d

prime issue and whether the decision in *Bhatia International* (supra) is an answer to the same, let us go into the details regarding the suit filed by the appellant as well as the relevant provisions of the Act. The appellant - VGE filed O.S. No. 80 of 2006 on the file of the Ist Additional District Court, Secunderabad, for a declaration that the Award dated 3.4.2006 is invalid, unenforceable and to set aside the same. Section 5 of the Act makes it clear that in matters governed by Part I, no judicial authority shall intervene except where so provided. Section 5 which falls in Part I, specifies that no judicial authority shall intervene except where so provided. The Scheme of the Act is such that the general provisions of Part I, including Section 5, will apply to all Chapters or Parts of the Act."

(emphasis laid by this Court)

30. Further, it is pertinent to read Clause 7.5 of the Agreement dated 8th March, 2002 carefully. Clause 7.5 reads thus:

"**Jurisdiction:** Courts at Calcutta alone shall have jurisdiction in all matters relating to this Agreement."

The phrase 'this agreement' means the Agreement dated 8th March, 2002 which is essentially a supplementary Agreement and does not, by any mean, make the Principal Agreement dated 12th January, 2002 subject to the jurisdiction of the Court.

31. Therefore, we are of the opinion that both the learned single Judge and the Division Bench erred in arriving at the conclusion mentioned above and their findings are liable to be set aside. In the light of the case mentioned above and also on the basis of the clauses of the Principal Agreement dated 12th January 2002 and subsequent Agreements dated 8th March 2002 and 30th July, 2004, read with section 5 of the A&C Act, we are inclined to observe that the Arbitration clause in the Principal Agreement continued to be valid in view of clause

no. 6 of the Agreement dated 30th July, 2004 and also by virtue of its mention in different parts of both the supplementary agreements dated 8th March, 2002 and 30th July, 2004. Therefore, the arbitration clause mentioned in Clause 15 of the Arbitration agreement dated January 12, 2002 is valid and the appellant is entitled to invoke the arbitration clause for settling their disputes. We, therefore, answer the point no.1 in favour of the appellant.

Answer to Point nos.2 and 3

32. We answer point nos. 2 and 3 together since they are interrelated.

It is the claim of the respondent no.3 that the suit was filed by Respondent no. 1 under section 9 of CPC and not section 45 of the A&C Act. Respondent no.3 further placed reliance upon the decision of this Court in *Ganga Bai v. Vijay Kumar & Ors*[9]. to hold that:

"15. ...There is an inherent right in every person to bring suit of a civil nature and unless the suit is barred by statute one may, at ones peril, bring a suit of one's choice. It is no answer to a suit, howsoever frivolous the claim, that the law confers no such right to sue. A suit for its maintainability requires no authority of law and it is enough that no statute bars the suit. But the position in regard to appeals is quite the opposite. The right of appeal inheres in no one and therefore an appeal for its maintainability must have the clear authority of law. That explains why the right of appeal is described as a creature of statute."

(emphasis supplied by this Court)

Therefore, the learned senior counsel appearing on behalf of respondent no. 3 places reliance upon this decision to contend

9. (1974) 2 SCC 393.

that the Calcutta High Court (exercising its ordinary original jurisdiction) has the jurisdiction (territorial as well as pecuniary) to entertain the present suit under section 9 of CPC and grant of such interim injunctive relief as it deems fit under Order 39 Rules 1 and 2 of the CPC is permissible in law.

33. We are inclined to reject this contention raised by the learned senior counsel appearing on behalf of Respondent no. 3. A careful reading of the decision leaves no doubt in the mind as has been held in *Ganga Bai's* case (supra) that:

> "15. …There is an inherent right in every person to bring suit of a civil nature and unless the suit is barred by statute one may, at ones peril, bring a suit of one's choice……"
>
> (emphasis laid by this Court)

34. The learned senior counsel for respondent no. 3 further places reliance upon the Constitution Bench decision of seven Judges in *SBP & Co. v. Patel Engineering Ltd. & Anr*[10]. wherein it was held that:

> "19…..When the defendant to an action before a judicial authority raises the plea that there is an arbitration agreement and the subject matter of the claim is covered by the agreement and the plaintiff or the person who has approached the judicial authority for relief, disputes the same, the judicial authority, in the absence of any restriction in the Act, has necessarily to decide whether, in fact, there is in existence a valid arbitration agreement and whether the dispute that is sought to be raised before it, is covered by the arbitration clause…."
>
> (emphasis laid by this Court)

35. We have already held that the Principal Agreement dated 12th January, 2002 continues to be in force with its

10. (2005) 8 SCC 618.

arbitration clause in place. We have also mentioned, while answering point no. 1, that section 5 of the A&C act will be applicable to Part II of the Act as well. The Agreement dated 12th January, 2002 remains valid and the arbitration clause, with all fours, will be applicable to the parties concerned to get their disputes arbitrated and resolved in the Arbitration as per the Rules of ICC. The contention raised by the learned senior counsel for Respondent no.2, Mr. K.K. Venugopal regarding the maintainability of the suit while examining the interlocutory order in the appeals, is therefore, untenable in law.

36. The fact that CPIL, which initially was a non-signatory to the Agreement does not jeopardize the arbitration clause in any manner. In this connection, we are inclined to record an observation made in the three Judge Bench decision of this Court in *Chloro Controls India Pvt. Ltd.* (supra), wherein it was held as under:

> "107. If one analyses the above cases and the authors' views, it becomes abundantly clear that reference of even non-signatory parties to arbitration agreement can be made. It may be the result of implied or specific consent or judicial determination. Normally, the parties to the arbitration agreement calling for arbitral reference should be the same as those to the an action. But this general concept is subject to exceptions which are that when a third party, i.e. non-signatory party, is claiming or issued as being directly affected through a party to the arbitration agreement and there are principal and subsidiary agreements, and such third party is signatory to a subsidiary agreement and not to the mother or principal agreement which contains the arbitration clause, then depending upon the facts and circumstances of the given case, it may be possible to say that even such third party can be referred to arbitration."
>
> (Emphasis laid by this Court)

37. The respondent no.1 has filed a suit seeking two remedies against the appellants: firstly, that the Arbitration Agreement contained in Clause 15 of the Agreement dated January 12, 2002 is void and/or unenforceable and/or has become inoperative and/or incapable of being performed, and secondly, the respondent no.1 sought permanent injunction restraining the appellant herein from initiating and/ or continuing with the impugned Arbitration proceedings bearing case no. 18582/ARP pursuant to the Impugned Arbitration Agreement contained in clause 15 of the Agreement dated January 12, 2002 and the Request for Arbitration dated March 21, 2012 and the communication dated April 02, 2012 issued by defendant no. 8 in the Arbitration proceedings connected therewith and incidental thereto.

Since, we have already held that the arbitration clause is valid, suit filed by the respondent no.1 for declaration and permanent injunction is unsustainable in law and the suit is liable to be dismissed.

38. In view of the above, we direct the parties to resolve their disputes through arbitration as mentioned in clause 15 of the letter of Agreement dated 12th January, 2002 in accordance with the Rules of ICC. We have also seen from the written submission of the appellants counsel that the appellants have already initiated an arbitration proceeding. In such case, the parties shall continue with the arbitration proceeding since the suit filed for permanent injunction against the arbitration proceeding is dismissed by setting aside the impugned judgment and final order in A.P.O. No. 13 of 2013 passed by the High Court of judicature at Calcutta on 04.06.2013. Accordingly, the appeal is allowed, but no costs.

B.B.B. Appeal allowed.

SAMTA AANDOLAN SAMITI & ANR.
v.
UNION OF INDIA & ORS.
(Writ Petition (Civil) No. 677 of 2013)

DECEMBER 11, 2013

[K.S.RADHAKRISHNAN AND A.K. SIKRI, JJ.]

Education – Admission – Medical admissions – MBBS – Choice given by respondents to SC/ST/OBC candidates taking admission in open competition, to opt for better Institution of their choice for which he/she would have been eligible as per the rules of reservation – Challenged – Whether once a candidate in reserved category had taken admission under the open competition, he could not have been given a choice for better Institution on the premise that he/she will be governed by Rules of reservation – Held: Respondents, at the time of counseling, only accorded a higher/better choice to meritorious reserved candidates (MRC) who got recommended against general/unreserved seats vis-à-vis those reserved category candidates who were accommodated against their quota – It was an inter-se adjustment between two kinds of persons belonging to reserved category – In inter-se merit, persons who were able to find their place in general list on account of their merit are definitely better placed than those candidates who are selected in the reserved category, though both types of candidates belong to reserved category – If between two categories of persons belonging to same class, higher choice is not given to the persons who are better in merit viz. the MRCs, it would clearly be injustice to them – Action of the respondents not prejudicial to the interests of the petitioners in any manner.

The petitioners filed the instant Writ Petition under

Article 32 of the Constitution pleading that while making admissions in the MBBS course, the respondent-All India Institute of Medical Sciences (AIIMS) was not strictly adhering to the reservation policy; and questioning the manner in which seats were allotted to the candidates belonging to reserved category. As per them, the AIIMS far exceeded the quota prescribed for the reserved category candidates resulting in more than 50 % reservations of the seats, which is contrary to the law laid down by this Court.

The petitioners objected to the choice given by respondents to SC/ST/OBC candidates who had taken admission in the open competition, to opt for a better Institution of their choice for which he/she would have been eligible as per the rules of reservation. This, according to the petitioner, was impermissible as once a candidate in reserved category had taken admission under the open competition, he could not have been given a choice for better Institution on the premise that he/she will be governed by Rules of reservation.

The stand of the respondent-AIIMS, on the other hand, was that the methodology adopted by the AIIMS for admission in MBBS course was perfectly valid and justified. The respondent maintained that 50% quota had not been breached and what was done in fact was *inter se* adjustment among those who belong to reserved class i.e. those who were selected on their own merit and found their way into general category vis-a-vis those who were admitted on the basis of reservation provided in the respective reserved categories. It was contended on behalf of the respondent that this was necessary as otherwise those persons from reserved category who were more meritorious would be in a disadvantageous position vis-à-vis those who secured admission on the basis of relaxed standard under the reserved quota meant for them.

Dismissing the petition, the Court

HELD: 1.1. When certain persons belonging to reserved category get selected in open competition on the basis of their merit, they are not to be counted in the reserved category against the reserved category quota. It is open to the authorities to fill the posts meant for reserved category candidates from amongst the persons in such categories after excluding those who have found their place in general merit. As a fortiori, while calculating the limit of 50% reservation, those candidates belonging to reserved category who have found their place on the basis of their merit competing with general candidates are not to be taken into consideration. [Para 15] [1143-G-H; 1144-A]

1.2. Those members who belong to reserved category but get selected in the open competition on the basis of their own merit have a right to be included in the general/unreserved category. Such Meritorious reserved candidates (MRC) not to be included in the quota reserved for Scheduled Caste etc. It is an admitted position that if these persons are excluded, the respondents have not exceeded the quota meant for reserved category. The respondents, at the time of counseling, have only accorded a higher/better choice to these meritorious reserved candidates (MRC) who got recommended against general/unreserved seats vis-à-vis those reserved category candidates who are accommodated against their quota. It is, therefore, an inter-se adjustment between the two kinds of persons belonging to reserved category. In their inter-se merit, these persons who have been able to find their place in general list on account of their merit are definitely better placed than those candidates who are selected in the reserved category, though both types of candidates belong to reserved category. Thus, [illegible] to

categories of persons belonging to same class, higher choice is not given to the persons who are better in merit viz. the MRCs, it would clearly be injustice to them. In the instant case, neither upper limit of 50% reservation is breached, nor any rights of the petitioners are violated or the action of the respondents have been to their prejudice in any manner. [Paras 19 and 24] [1145-E-H; 1146-A; 1148-G]

Ritesh R.Sah vs. Dr. Y.L. Yamul & Ors. **(1996) 3 SCC 253: 1996 (2) SCR 695 – held applicable**

Indira Swhney vs. Union of India **(1992) Suppl. 3 SCC 212;** *Union of India vs. Ramesh Ram & Ors.* **(2010) 7 SCC 234: 2010 (6) SCR 698 and** *Yoganand Vishwasrao Patil vs. State of Maharashtra* **(2005) 12 SCC 311 – referred to.**

Case Law Reference:

1996 (2) SCR 695	**held applicable**	**Para 12**
(1992) Suppl. 3 SCC 212	**referred to**	**Para13**
2010 (6) SCR 698	**referred to**	**Para 15**
(2005) 12 SCC 311	**referred to**	**Para 22**

CIVIL ORIGINAL JURISDICTION : Under Article 32 of the Constitution of India.

Writ Petition (Civil) No. 677 of 2013.

A. Mariarputham, M.L. Lahoty, Paban K. Sharma, Shobhit Tiwari, Gargi B. Bharali, Lal Pratap Singh, Ram Niwas, Umesh Pratap Singh, Ruchi Kohli, Gopal Shankarnarayanan, Vikramaditya, Dr. R.R. Kishore, Shiva Pujan Singh, Niranjana Singh, Kumar Rajan Mishra, Narender S. Yadav, Alok Prasanna Kumar, D.L. Chidananda, B. Krishna Prasad, Yusuf Khan, Mehmood Pracha, Suit Babbar, Naresh Kumar (for AIIMS) for the appearing parties.

The Judgment of the Court was delivered by

A.K. SIKRI, J. 1. The petitioners have approached this Court by way of filing the present Writ Petition filed under Article 32 of the Constitution of India with the grievance that while making admissions in the MBBS course, the respondent All India Institute of Medical Sciences (AIIMS) is not strictly adhering to the reservation policy and have questioned the manner in which seats are allotted to the candidates belonging to reserved category. As per them, the AIIMS have far exceeded the quota prescribed for the reserved category candidates which has resulted in more than 50 % reservations of the seats, which is contrary to the law laid down by this Court. The stand of the AIIMS, on the other hand, is that there is no violation of the law laid down by this Court in this behalf and the methodology adopted by the AIIMS for admission in MBBS course is perfectly valid and justified. The controversy has arisen in the following backdrop:

2. "The All India Institute of Medical Sciences (AIIMS), New Delhi issued Prospectus for admission in the MBBS course starting from August, 2013 along with admission in Six New AIIMS at Bhopal, Patna, Jodhpur, Rishikesh,Raipur and Bhubaneswar with an intake of 100 students in each new AIIMS. The reservation policy was notified to be 7.5.% ST, 15% SC, 27% OBC and Indian Nationals, 3% reservation for Orthopedic physically handicapped to be provided on horizontal basis. Para 4.2 of the prospectus prescribe the procedure for selection into the MBBS course hereunder:

"4.2 PROCEDURE OF SELECTION:

Based on the result of the Competitive Entrance examination, merit lists will be prepared as below:

(a) Common Merit List: Subject to the Govt. of Indi, DOPT. O.M.No.36011/1/98.Estt.(Res), dated 1st July 1998. It is clarified that only such S s

who are selected on the same standard as applied to general candidates shall not be adjusted against reserved vacancies. In other words, when a relaxed standard is applied in selecting an SC/ST/OBS candidates, for example in the age-limit, experience, qualification, permitted number of chances in written examination, extended zone of consideration larger than what is provided for General Category candidates etc. the SC/ST/ OBS candidates are to be counted against reserved vacancies. Such candidates would be deemed as unavailable for consideration against the unreserved vacancies. Therefore the reserved candidate will be considered on General Seat only if no relaxation of the eligibility level (i.e. % of marks) and at cut off level of marks in MBBS entrance examination is given.

(b) Scheduled Caste candidates list

(c) Scheduled Tribe candidates list

(d) Other Backward Classes candidates list"

3. Thirty seven (37) candidates from the common merit list, eleven (11) candidates from the merit list of Scheduled Caste category and five (5) candidates from the merit list of Scheduled Tribe and 19 (nineteen) candidates from the merit list of Other Backward Classes category will be admitted including 3% reservation for orthopaedic physically handicapped on horizontal basis in the seats available. The reservation will be 7 ½ % ST, 15% SC and 27% for OBC category. In case eleven (11) candidates from the Scheduled Caste or five (5) candidates from the Scheduled Tribe categories and nineteen (19) candidates belonging to OBC are not available, then the number of candidates selected on the basis of merit for general seats shall be correspondingly increased so that the total number of candidates selected for the MBBS course remains seventy two (72). The remaining candidates will be kept on the waiting list in order of merit. Inter se merit of two or more candidates in the same category obtaining equal marks in the competitive entrance examination will be determined in order of preference as under:

(a) Candidates obtaining higher marks in Biology in the entrance examination.

(b) Candidates obtaining higher marks in Chemistry in the entrance examination.

(c) Candidates obtaining higher marks in Physics in the entrance examination.

(d) Candidates older in age to be preferred.

A similar procedure for selection will apply for the six new AIIMS where the number will be calculated for a total of 100 admissions for each."

4. Petitioner No.2 being eligible in all respects under unreserved category had submitted his application form and was allotted application form number-1021016668. He was issued the Admit Card for AIIMS-MBBS 2013 Entrance Examination. Petitioner No.2 appeared in the competitive entrance examination held on 1.6.2013 and secured 1066 over all rank. A counseling letter was issued for counseling at Delhi AIIMS on 10-12 July 2013 and the Petitioner No.1 was called for counseling scheduled to be held on 10th July 2013.

That as per the counseling letter the method of counseling is:

4**. Method of counseling**: The following process will be adapted for counseling for all 7AIIMS Institutes.

i. In the counseling process, the seats to be filled by open (UR) competition should be filled up first, wherein the candidates should be called for counseling based on merit alone irrespective of whether the [illegible] or OBC.

ii. Next, reservation categories like SC/ST/OBC candidates will be counseled to fill up the seats earmarked for them in their respective categories. During this process, if a candidate belonging to SC/ST/OBC who had taken admission under open competition, opts for a better institution of his/her choice for which he or she would be eligible as per the rules of reservation, the seat vacated by him or her in open (UR) competition shall be filled with a candidate from the same reservation category only, in order of merit.

Note: All reserved category candidates who qualify in the open (general) merit list (i.e. 4 times of the open category seats) shall necessarily attend the counseling for open category seats and shall exercise his/her option and then if, he/she desires to opt for a different institution in his/her respective reserved category, he/she may attend the counseling meant for that reserved category.

Provided:

a. If he/she is not present or if present, fails to or refused to take a seat in open category, he/she shall not be allowed for attending the counseling for reserved seats.

b.He/she cannot opt for institution under reservation, if he/she had already opted the same institution in open category.

Methods of counseling: In the counseling process, the seats to be filled by open (UR) competition should be filled up first, wherein the candidates should be called for counseling strictly by merit alone till the last unreserved seat is filled, irrespective of whether they belong to SC,ST or OBC. The counseling for reserved category seat (which will also be strictly by merit) should commence only after filling up of all the unreserved seats (i.e. open category seats). Meritorious reserved candidate belonging to SC/

ST/OBC category, who has taken unreserved seat in any institution after attending the open merit counseling, if exercises his/her option to take a different institute in the reserved category counseling, the seat so vacated by this candidate should be available to next meritorious candidate belonging to that particular reserved category only. In other word if SC/ST/OBC candidate got any institution under unreserved category and if he/she opts different institution under reserved category of his/her choice the resultant vacated unreserved seat shall be allotted to same category candidate in order of merit i.e. the vacated seat of meritorious reserved category candidate should be immediately added to the seats available under the reserved category in the institute he/she had opted during counseling for UR seat.

Note: For example – if a SC meritorious candidate who has initially opted a X institution from open category, vacates a seat in open category because he wants to take Y institution from reserved category during the counseling in reserved category, the same seat (i.e. UR seat of X institute) which is vacated by him/her shall be made available to the next SC candidate in order of merit."

5. Petitioner No.2 appeared in the counseling (1st counseling) conducted by the respondents. The petitioners aver that the respondents had conducted the counseling in strict adherence of the procedure quoted hereinabove. However, the respondents forced reserve candidates to obtain the unreserved (UR) seats by note (4.2.a) in counseling call letter. In this way the respondents deliberately tried to convert UR seats to reserve category seat because of note 4.2. Otherwise the candidates would have been provided freedom to opt seats under UR seats or category seats of their choice in different AIIMS. It is averred that the common practice in the counseling of NEET (National Eligibility cum Entrance Test), AIPMT (All India Pre Medical Test) and states coun[illegible]n

Government Medical Colleges, is parallel counseling for all categories on their merit cum choice basis in which unreserved seats are filled first as per rule framed by this Court in Indira Sawhney case.

6. It is stated that the petitioner No.2 has secured rank 1066 in the competitive entrance examination and counseling for unreserved seats on 1st day of counseling could reach only up to 663 ranks only. In the counseling done for unreserved seats approx. around 140 reserve categories candidate found place on general seats.

7. On the second day of counseling, which is for other backward classes (OBC) category, the counseling started from rank 1st for OBC and approx. around 120 OBC candidates, who has secured their merit position in unreserved category opted for better colleges from their counterpart in unreserved category by enjoying their reserve status on OBC seats. In other words, the seats/position occupied by meritorious reserved category candidates was vacated. All vacated seats and 181 reserve seats were filled on 11 July by comparative low rank OBC candidate. By adding this around 45 percent of candidates from OBC took the benefit of Quota instead of 27 per cent. The case sought to be set up is that by this procedure it exceeds the limit given by the Constitution.

8. This position is sought to be highlighted by the following MBBS seat position in each AIIMS:

Name of Institution	Total Seats	UR	OBC	SC	ST
AIIMS, New Delhi	72	37	19	11	5
AIIMS,Bhopal	100	50	27	15	8
AIIMS,Bhubaneswar	100	50	27	15	8
AIIMS,Jodhpur	100	50	27	15	8

AIIMS, Patna	100	50	27	15	8
AIIMS, Raipur	100	50	27	15	8
AIIMS,Rishikesh	100	50	27	15	8
Total	672	337	181	101	53

9. It is stated that as against 181 seats meant for OBC category, 270 seats have been filled from amongst the candidates belonging to this category which is evidentially impermissible. By the time this matter was argued, as the third and final counseling had taken place and the allotment of the seats was done on the basis of that counseling. The final picture which emerged, is that the last unreserved candidates who secured admission in reserved category had rank of 1476. There were 79 candidates in OBC category who had higher rank than 1476 and were, thus, adjusted as meritorious reserved candidates (MRC) candidates in unreserved candidates. Likewise, this SC candidate with rank above 1476 could make their way to unreserved list.

10. On the aforesaid basis, following prayer is made in the Writ Petition:

(a) Pass writ, order or direction whereby respondents be directed to give admission to petitioner No.1 in unreserved category in MBBS course 2013,

(b) Pass writ, order or direction whereby directions No.4 (reproduced at para No.8 of the writ petition) in counseling letter prescribing procedure for counseling be quashed and set aside.

(c)Pass writ order or direction whereby respondents be directed to make strict compliance of the Hon'ble Supreme Court judgment passed in the case of *Union of India vs. Ramesh Ram* (2010) 7 SCC 234).

(d) Pass writ order or direction whereby respondents be restrained to permit the reserve category candidates to occupy the seats in unreserved category vacated by meritorious category candidates, who have opted/chosen their reserve category for seeking admission in MBBS course 2013.

(e) Pass writ order or direction whereby respondents be directed to undertake the admission exercise for MBBS course 2013 strictly in terms of prayer sought in Paragraph (c).

(f) Pass such other or further order (s) as this Hon'ble Court may deem fit in the facts and circumstances of the case."

11. After issuance of the show cause notice, respondents appeared. Since main contesting party is the AIIMS, counsel affidavit on its behalf filed by Dr.A.B.Dey, Dean, (Research) who had acted as Convener of the counseling in the aforesaid admission process. It is stated by him in his affidavit that the process of counseling was discussed and finalized in the meeting held on 26.5.2013 with all Directors, AIIMS, senior officials and senior faculties. The minutes of the meeting, inter-alia, mentioned that :

"…it was mandatory for all candidates to be present in person for counseling on the days as given in the call letter. No request for authorized representative to be present on behalf of candidate would be entertained. If a candidate failed to come for counseling in person, she/she would be marked absent and her/his candidature would stand cancelled…"

12. It is also stated in the counter affidavit that in this meeting it was decided to constitute a Counseling Committee to undertake three counts of counseling for MBBS and two rounds of counseling for B.Sc. (Hons.) Nursing for 7 AIIMS. For this reason, in the counseling letter, attention of the candidates

was drawn to the provision in the prospectus whereby candidates were asked to give choice about different AIIMS where they would like to be admitted. They were also informed that allocation of seats will be done on merit-cum-choice. In the counseling letter, therefore, candidates were informed that they would exercise their choice of the particular Institute when called during the counseling as per the rank in respective category. Notwithstanding whatsoever choices he/she had made while filling form, choice thus made was to be final and no claim whatsoever on the basis of choices made in admission form was to be entertained. This was widely circulated through newspaper advertisement and posted on AIIMS website as well, well in advance. It is pleaded that this method of counseling adopted by AIIMS was in tune with the judgment of this Court in *Ritesh R.Sah vs. Dr. Y.L. Yamul & Ors.* (1996) 3 SCC 253. The exact nature of the counseling method which was adopted is stated below :

1. In the counseling process, the seats to be filled by open (UR) competition should be filled up first, wherein the candidates should be called for counseling based on merit alone irrespective of whether they belong to SC,ST or OBC.

2. Next, reservation categories like SC/ST/OBC candidates will be counseled to fill up the seats earmarked for them in their respective categories. During this process, if a candidate belonging to SC/ST/OBC who had taken admission under open competition, opts for a better institution of his/her choice for which he or she would be eligible as per the rules of reservation, the seat vacated by him or her in open (UR) competition shall be filled with a candidate from the same reservation category only, in order of merit.

Note: All reserved category candidates who qualify in the open (general) merit list (i.e. 4 times of the open category seats) shall necessarily attend th… n

category seats and shall exercise his/her option and then if, he/she desires to opt for a different institution in his/her respective reserved category, he/she may attend the counseling meant for that reserved category.

Provided

a. If he/she is not present or if present, fails to or refuses to take a seat in open category, he/she shall not be allowed for attending the counseling for reserved seats.

b. He/she cannot opt for institution under reservation, if he/she had already opted the same institution in open category.

Methods of counseling

In the counseling process, the seats to be filled by open (UR) competition should be filled up first, wherein the candidates should be called for counseling strictly by merit alone till the last unreserved seat is filled, irrespective of whether they belong to SC,ST or OBC.

The counseling for reserved category seat (which will also be strictly by merit) should commence only after filling up of all the unreserved seats (i.e. open category seats). Meritorious reserved candidate belonging to SC/ST/OBC category, who has taken unreserved seat in any institution after attending the open merit counseling, if exercises his/her option to take a different institute in the reserved category counseling, the seat so vacated by this candidate should be available to next meritorious candidate belonging to that particular reserved category only. In other word if SC/ST/OBC candidate got any institution under unreserved category and if he/she opts different institution under reserved category of his/her choice the resultant vacated unreserved seat shall be allotted to same category candidate in order of merit, i.e. the vacated seat of meritorious reserved category candidate should be

immediately added to the seats available under that reserved category in the institute he/she had opted during counseling for UR seat.

Note: For example – if a SC meritorious candidate who has initially opted a X institution from open category, vacates a seat in open category because he wants to take Y institution from reserved category during his counseling in reserved category, the same seat (i.e. UR seat of X institute) which is vacated by him/her shall be made available to the next SC candidate in order of merit."

13. It is pleaded that with the adoption of the aforesaid method, the authorities found out the candidates among reserved candidates who qualified on their own merit and are on the open merit list and then asking their option if they want to choose other Institute of their choice which is present in their reserved category and not in unreserved category. This method gives them option to change Institute in their better choice in reserved category and once that is done such candidates are given that reserved seats but while computing the percentage of reservation they are not counted against reservation pool. To achieve that objective, the seat which they vacated is offered to the same reserved category below in merit. It is thus pleaded that 50% of the ceiling is never broken in the present counseling and thus persons belonging to reserved category, who are able to come on their own merit while competing with the general candidates category can be put in the list of general/unreserved category, as held by this Court in the case of *Indira Swhney vs. Union of India* (1992) Suppl. 3 SCC 212.

14. We have already quoted the general proposition of law, in so far as extend of reservation is concerned, as laid down in *Indira Sawhney* (supra). Mr. Lahoti has placed reliance on paragraphs 804, 807 and 809 of this judgment whereas learned counsel for the respondent led emphasis on paras 811 and 813. In the case of Indira Sawhney (supra) the principle was

stated in the following terms: We quote hereunder all these paragraphs:

PART-V

(QUESTION NOS. 6. 7 AND 8)

Question 6: To what extent can the reservation be made?

(a) Whether the 50% rule enunciated in Balaji a binding rule or only a rule of caution or rule of prudence?

(b) Whether the 50% rule, if any, is confined to reservations made under Clause (4) of Article 16 or whether it takes in all types of reservations that can be provided under Article 16?

(c) Further while applying 50% rule, if any, whether an year should be taken as a unit or whether the total strength of the cadre should looked to?

In Balaji, a Constitution Bench of this Court rejected the argument that in the absence of a limitation contained in Article 15(4), no limitation can be prescribed by the court on the extent of reservation. It observed that a provision under Article 15(4) being a "special provision" must be within reasonable limits. It may be appropriate to quote the relevant holding from the judgment.

When Article 15(4) refers to the special provision for the advancement of certain classes or scheduled castes or scheduled tribes, it must not be ignored that the provision which is authorised to be made is a special provision; it is not a provision which is exhaustive in character, so that in looking after the advancement of those classes, the State would be justified in ignoring altogether the advancement of the rest of the society. It is because the interests of the society at large would be served by promoting the advancement of the weaker elements in the society that Article 15(4) authorises special provision to

be made. But if a provision which is in the nature of an exception completely excludes the rest of the society, that clearly is outside the scope of Article 15(4) the Parliament intended to provide that where the advancement of the Backward classes or the Scheduled Castes and Tribes was concerned, the fundamental rights of the citizens, constituting the rest of the society were to be completely and absolutely ignored ... A special provision contemplated by Article 16(4) must be within reasonable limits. The interests of weaker sections of society which are a first charge on the State and the center have to be adjusted with the interests of the community as a whole. The adjustment of these competing claims is undoubtedly a difficult matter, but if under the guise of making a special provision, a State reserves practically all the seats available in all the colleges, that clearly would be subverting the object of Article 15(4). In this matter again, we are reluctant to say definitely what would be a proper provision to make. Speaking generally and in a broad way a special provision should be less than 50%; how much less than 50% would depend upon the relevant prevailing circumstances in each case.

In Devadasan this rule of 50% was applied to a case arising under Article 16(4) and on that basis the carry-forward rule was struck down. In Thomas, however, the correctness of this principle was seriously questioned, Fazal Ali, J. observed:

This means that the reservation should be within the permissible limits and should not be a cloak to fill all the posts belonging to a particular class of citizens and thus violate Article 16(1) of the Constitution indirectly. At the same time Clause (4) of Article 16 does not fix any limit on the power of the Government to make reservation. Since Clause (4) is a part of Article 16 of the Constitution it is manifest that the State cannot be allowed to indulge in excessive reservation so as

contained in Article 16(1). As to what would be a suitable reservation within permissible limits will depend upon the facts and circumstances of each case and no hard and fast rule can be laid down, nor can this matter be reduced to a mathematical formula so as to be adhered to in all cases. Decided cases of this Court have no doubt laid down that the percentage of reservation should not exceed 50%. As I read the authorities, this is however, a rule of caution and does not exhaust all cattgories. Suppose for instance a Stats has a large number of backward class of citizens which constitute 80% of the population and the Government, in order to give them proper representation, reserves 80% of the jobs for them can it be said that the percentage of reservation is bad and violates the permissible limits of Clause (4) of Article 16? The answer must necessarily be in the negative. The dominant object to this provision is to take steps to make inadequate representation adequate.

Krishna Iyer, J. agreed with the view taken by Fazal Ali, J. in the following words:

I agree with my learned brother Fazal Ali, J. in the view that the arithmetical limit of 50% in any one year set by some earlier rulings cannot perhaps be pressed too far. Overall representation in a department does not depend on recruitment in a particular year, but the total, strength of a cadre. I agree with his construction of Article 16(4) *and his view about the 'carry forward' rule*.

823. Mathew, J. did not specifically deal with this aspect but from the principles of 'proportional equality' and 'equality of results' espoused by the learned Judge, it is argued that he did not accept the 50% rule. Bag, J. also did not refer to this rule but the following sentence occurs in his judgment at page 962 and 963:

If a reservation of posts under Article 16(4) *for employees of backward classes could include complete reservation*

of higher posts to which they could be promoted, about which there could be no doubt now, I fail to see why it cannot be partial or for a part of the duration of service and hedged round with the condition that a temporary promotion would operate as a complete and confirmed promotion only if the temporary promotee satisfies some tests within a given time.

Ray, C.J. did not dispute the correctness of the 50% rule but at the same time he pointed out that this percentage should be applied to the entire service as a whole.

807. We must, however, point out that Clause (4) speaks of adequate representation and not proportionate representation. Adequate representation cannot be read as proportionate representation. Principle of proportionate representation is accepted only in Articles 330 and 332 of the Constitution and that too for a limited period. These articles speak of reservation of seats in Lok Sabha and the State legislatures in favour of Scheduled Tribes and Scheduled Castes proportionate to their population, but they are only temporary and special provisions. It is therefore not possible to accept the theory of proportionate representation though the proportion of population of backward classes to the total population would certainly be relevant. Just as every power must be exercised reasonably and fairly, the power conferred by Clause (4) of Article 16 should also be exercised in a fair manner and within reasonable limits -and what is more reasonable than to say that reservation under Clause (4) shall not exceed 50% of the appointments or posts, barring certain extraordinary situations as explained hereinafter. From this point of view, the 27% reservation provided by the impugned Memorandums in favour of backward classes is well within the reasonable limits. Together with reservation in favour of Scheduled Tribes, it comes to a total of 49.5%. In this connection, reference may be had to the Full Bench decision of the

Court in *Narayan Rao v. State ,* striking down the enhancement of reservation from 25% to 44% for O.B.Cs. The said enhancement had the effect of taking the total reservation under Article 16(4) to 65%.

"809. From the above discussion, the irresistible conclusion that follows is that the reservations contemplated in clause (4) of Article 16 should not exceed 50%.

"…811… It is well to remember that the reservations under Article 16 (4) do not operate like a communal reservation. It may well happen that some members belonging to, say Scheduled Castes get selected in the open competition field on the basis of their own merit; they will not be counted against the quota reserved for Scheduled Castes; they will be treated as open competition candidates."

"813….It is however, made clear that the rule of 50% shall be applicable only to reservation proper; they shall not be - indeed cannot be – applicable to exemptions, concessions or relaxations, if any provided to backward class of citizen's under Article 16(4)…"

15. There is no quarrel upto this stage. It is now well entrenched principle of law that those members belonging to reserved category who get selected in the open competition on the basis of their own merit have right to be included in the general list/unreserved category and not to be counted against the quota reserved for Scheduled Caste. This was recognized by the Constitutional Bench judgment of this Court in Indira Sawhney (supra) and has been followed in series of judgments thereafter. Thus, when certain persons belonging to reserved category get selected in open competition on the basis of their merit, they are not to be counted in the reserved category against the reserved category quota. It is open to the authorities to fill the posts meant for reserved category candidates from amongst the persons in such categories after excluding those who have found their place in general merit. As a fortiori, while

calculating the limit of 50% reservation, those candidates belonging to reserved category who have found their place on the basis of their merit competing with general candidates are not to be taken into consideration. It is also not in dispute that such OBC/SC candidates who have been included in general category have come in that category on their own merit with no relaxation of the eligibility level i.e. percentage of marks. However, the objection of Mr. Lahoti, learned counsel for the petitioner, was to the method of counseling which was adopted in the present case as that has come, no doubt, above to the persons in reserved categories. He submitted that as per para 4 of the counseling letter choice was given to SC/ST/OBC candidates who had taken admission in the open competition, to opt for a better Institution of their choice for which he/she would have been eligible as per the rules of reservation. This, according to him, was impermissible as once a candidate in reserved category had taken admission under the open competition, he could not have been given a choice for better Institution on the premise that he/she will be governed by Rules of reservation. For this reason, he took strong objection to the note appended to para 4 of the counseling letter as well which facilitated this process. He, thus, submitted that the counseling letter/circular was opposed to the provision made in the prospectus and was also contrary to the judgment of this Court in *Union of India vs. Ramesh Ram & Ors.* (2010) 7 SCC 234.

16. Learned counsel for the respondent, on the other hand, maintained that 50% quota had not been breached and what was done in fact was inter se adjustment among those who belong to reserved class i.e. those who were selected on their own merit and found their way into general category vis-a-vis those who were admitted on the basis of reservation provided in the respective reserved categories. He argued that this was necessary as otherwise those persons from reserved category who was more meritorious would be in a disadvantageous position vis-à-vis those who secured admission on the basis of relaxed standard under the reserved

His submission was that this was approved by this Court in the case of *Yoganand Vishwasrao Patil vs. State of Maharashtra* (2005) 12 SCC 311.

17. We have considered the submissions of counsel of both the parties. At the outset, we would like to point out that in the present case, we are dealing with the case of admission with medical course, and the position which we are going to explain in the subsequent paragraphs is confined to cases of admissions and not appointment into the service under the Government. Further, this applies only to MBBS Course and not Post Graduate Courses. Further, we are concerned herein admission process in Seven AIIMS only and the position explained does not relate to those cases where their admissions are in different colleges.

18. With this clarification, we proceed to deal with the issue.

19. It is stated at the cost of the repetition that those members who belong to reserved category but get selected in the open competition on the basis of their own merit have a right to be included in the general/unreserved category. Such MRC not to be included in the quota reserved for Scheduled Caste etc. It is an admitted position that if these persons are excluded, the respondents have not exceeded the quota meant for reserved category. The respondents, at the time of counseling, have only accorded a higher/better choice to these meritorious reserved candidates (MRC) who got recommended against general/unreserved seats vis-à-vis those reserved category candidates who are accommodated against their quota. It is, therefore, an inter-se adjustment between the two kinds of persons belonging to reserved category. In their inter-se merit, these persons who have been able to find their place in general list on account of their merit are definitely better placed than those candidates who are selected in the reserved category, though both types of candidates belong to reserved category. Thus, if between these two categories of persons

belonging to same class, higher choice is not given to the persons who are better in merit viz. the MRCs, it would clearly be injustice to them. This was precisely the issue which was referred for decision to the Constitution Bench in the case of Ramesh Ram (supra). In paragraph 3 of the judgment, the Constitution Bench stated the question which was referred for its decision and, the same reads as follows:

> "Whether candidates belonging to reserved category, who get recommended against general/unreserved vacancies on account of their merit (without the benefit of any relaxation/concession), can opt for a higher choice of service earmarked for reserved category and thereby migrate to reserved category."

20. In the light of the submissions made by the counsel for the parties, the Court framed three questions which had arisen for consideration and the same are as under:

> I.Whether the reserved category candidates who were selected on merit (i.e. MRCs) and placed in the list of general category candidates could be considered as reserved category candidates at the time of "service allocation"?
>
> II.Whether Rules 16(2),(3),(4) and (5) of the CSE Rules are inconsistent with Rule 16(1) and violative of Articles 14,16(4) and 335 of the Constitution of India?
>
> III.Whether the order of the Central Administrative Tribunal was valid to the extent that it relied on Anurag Patel vs. U.P.Public Service Commission (which in turn had referred to the judgment in Ritesh R.Sah v. Dr.Y.L.Yamul, which dealt with reservations for the purpose of admission to postgraduate medical course); and whether the principles followed for reservations in admissions to educational institutions can be applied to examine the constitutionality of a policy that deals with reservation in civil services."

21. Dealing with the first question which directly arises in the present case, the Court clarified that a distinction is to be maintained between the cases dealing with the admission to educational institutions and appointment to a service. The Court accepted the general proposition that such a course of action affords a meritorious reserved candidates (MRC), the benefit of reservation in so far as service allocation is concerned, if this is not done, lesser meritorious reserved candidates would be able to secure better discipline. Therefore, this course of action preserves and protects inter-se merit amongst the reserved candidates.

22. No doubt, while doing so, the Court was of the opinion that such meritorious reserved candidates (MRC) who avail the benefit of Rule 16(2) of the Civil Services Examination Rules (which permitted such inter-se transfer) and are eventually adjustment in the reserved category, they should be counted part of reserved category for the purpose of computing aggregate reservation quota. However, it was categorically stated that this proposition applies when there is an appointment to a service under the State and categorically excluded the cases of admission in educational institutions. In so far as admission in educational institutions is concerned, such a MRC was to continue to be treated as belonging to general category, which position he attained because of his initial merit. The Court noted that this was so held in *Ritesh R.Sah v. Dr. Y.L.Yamul* (1996) 3 SCC 253.

23. The question in that case was whether a reserved category candidate who is entitled to be selected for admission in open competition on the basis of his/her own merit should be counted against the quota meant for the reserved category or should he be treated as a general candidate. The Court reached the conclusion that when a candidate is admitted to an educational institution on his own merit, then such admission is not to be counted against the quota reserved for Schedule Castes or any other reserved category. It was so held in the following words:

"……In view of the legal position enunciated by this Court in the aforesaid cases the conclusion is irresistible that a student who is entitled to be admitted on the basis of merit though belonging to a reserved category cannot be considered to be admitted against sets reserved for reserved category. But at the same time the provisions should be so made that it will not work out to the disadvantage of such candidate and he may not be placed at a more disadvantageous position than the other less meritorious reserved category candidates. The aforesaid objective can be achieved if after finding out the candidates from amongst the reserved category who would otherwise come in the open merit list and then asking their option for admission into the different colleges which have been kept reserved for reserved category and thereafter the cases of less meritorious reserved category candidates should be considered and they be allotted seats in whichever colleges the seats should be available. In other words, while a reserved category candidate entitled to admission on the basis of his merit will have the option of taking admission in the colleges where a specified number of seats have been kept reserved for reserved category but while computing the percentage of reservation he will be deemed to have been admitted as an open category candidate and not as a reserved category candidate."

24. Since, we are concerned with the admission to medical course, aforesaid judgment squarely applies to the present case. Thus we find that neither upper limit of 50% reservation is breached, nor any rights of the petitioners are violative or the action of the respondents have been to their prejudice in any manner. Thus, we do not find any merit in the present petition, which is accordingly dismissed. No costs.

B.B.B. Writ Petition dismissed.