U.T. CHANDIGARH & ORS.
v.
GURCHARAN SINGH & ANR.
(Civil Appeal No. 9873 of 2013)

NOVEMBER 01, 2013

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

Service Law:

Pay – Pay-fixation of re-employed pensioners – Pay of re-employed ex-serviceman re-fixed finding that his initial pay fixation was wrong – Administrative Tribunal held that employer was right in rectifying the mistake – High Court held that the re-fixation was wrong – Held: As per the provisions of order regulating fixation of pay of re-employed pensioners and as per the option exercised by the employee, his previous service would not be taken into account for the purposes of his pay fixation – Hence, re-fixation of his pay was justified – Central Civil Services (Fixation of Pay of Re-employed Pensioners) Orders, 1986 – Order 4.

The respondent was appointed as a clerk by the appellant, in the quota reserved for ex-servicemen. His pay was fixed by order dated 2.9.1992. On his retirement, by audit query it was brought to the notice of the appellant that the pay of the respondent had been wrongly fixed. By order dated 13.10.1998, the mistake committed in pay fixation was rectified. The application challenging the re-fixation of salary was dismissed by Central Administrative Tribunal. Writ petition against the order of Tribunal was allowed. Hence the present appeal.

Allowing the appeal, the Court

HELD: 1. The Tribunal was right in coming to the

conclusion that the pay fixation under the order dated 13th October, 1998 was correct because a mistake was committed in the earlier pay fixation under the order dated 2nd September, 1992. The respondent had been given an option. It is clearly revealed from the option form that the respondent had agreed to get his pay fixed as per the minimum of pay in the pay-scale of the Clerk, the post to which he had been re-employed. As per the provisions of the Orders and as per the option exercised by the respondent, service rendered by the respondent to the Indian Army cannot be taken into account for the purposes of his pay fixation as the respondent would be getting his pension and there would not be any deduction from his pension or his salary on account of the pension received by him from the Indian Army. If nothing has been deducted from the pension of the respondent upon being re-employed and as the respondent would continue to get his pension and other benefits from the Army for his past services, the High Court was not right while permitting the respondent to get his higher pay fixed by taking into account the services rendered by the respondent to the Indian Army. [Paras 8, 10 and 11] [859-F-H; 860-A-C, E]

2. If any amount had been paid due to mistake, the mistake must be rectified and the amount so paid in pursuance of the mistake must be recovered. Upon settlement of the account, whatever amount has to be paid to the respondent employee or to the appellant employer shall be paid and the account shall be adjusted accordingly. [Para 12] [860-F-H]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 9873 of 2013.

From the Judgment & Order dated 20.03.2008 of the High Court of Punjab & Haryana at Chandigarh in Civil Writ Petition No. 7006-CAT of 2003.

Kavita Wadia, Shashank Tripathi for the Appellants.

H.S. Saini, Balbir Singh Gupta for the Respondents.

The Judgment of the Court was delivered by

ANIL R. DAVE, J. 1. Leave granted.

2. Being aggrieved by the Judgment delivered in Civil Writ Petition No.7006-CAT of 2003 dated 20th March, 2008 by the High Court of Punjab and Haryana at Chandigarh, this appeal has been filed by the employer – Union Territory of Chandigarh and others.

3. The facts giving rise to the present litigation in a nut-shell are as under:

The respondent was appointed as a Clerk by the appellant Chandigarh Transport Undertaking on the quota reserved for ex-servicemen. The respondent had rendered his services to the Indian Army as a Combatant Clerk upto 31st January, 1990, till the date when he was discharged from the Indian Army.

Upon his appointment as a Clerk under an office order dated 2nd September, 1992, his pay had been fixed and he was paid his salary accordingly. Only when he retired in 1997, it was brought to the notice of the employer, on getting an audit query, that his salary had been wrongly fixed under the order dated 2nd September, 1992. The mistake committed in pay fixation had been rectified by an order dated 13th October, 1998.

4. Being aggrieved by the re-fixation of his pay, the respondent had made several representations but as no change was effected by the appellant-employer in the pay so re-fixed, the respondent had approached the Central Administrative Tribunal (hereinafter referred to as ' the Tribunal') by filing Original Application No.975/CH/2000. The said OA had been dismissed by the Tribunal by an order dated 4th January,

2002. Being aggrieved by the order rejecting the aforestated O.A., the respondent-employee had approached the High Court by filing the aforestated petition which has been allowed by an order dated 20th March, 2008 and being aggrieved by the said order and judgment, this appeal has been filed by the employer.

5. The learned counsel for the appellant had explained the circumstances in which the appellant was constrained to re-fix pay of the respondent so as to rectify the mistake committed while passing the pay fixation order dated 2nd September, 1992. The learned counsel had taken us through the relevant regulations with regard to pay fixation of re-employed pensioners and had taken us through the provisions of the Central Civil Services (Fixation of pay of Re-employed Pensioners) Orders, 1986 (hereinafter referred to as 'the Orders') under which pay of the respondent ought to have been fixed.

6. The learned counsel for the appellant had submitted that there were several different notifications and orders in relation to the pay fixation of re-employed pensioners, including ex-servicemen. So as to see that all the orders are available at one place, the orders had been compiled and notified in 1986 so that pay of the re-employed pensioners can be fixed only upon looking at the provisions of the compilation of the Orders instead of looking at several different orders or notifications which had been issued from time to time. Thus, according to the learned counsel, a comprehensive compilation of all the relevant orders, which had been issued from time to time and which were operative in 1996 was duly considered for the purpose of re-fixation of the pay of the respondent.

7. As the respondent had been given appointment on 15th April, 1990 as a Clerk on a post reserved for the ex-servicemen, the provisions of the Orders were to be looked into for the purpose of pay fixation of the respondent. The learned counsel had further submitted that while fixing the pay on 2nd September, 1992, the appellant did no

provisions of the Orders and an option exercised by the respondent in relation to his pay fixation and therefore, incorrect pay had been fixed under the order dated 2nd September, 1992. By virtue of the said pay fixation, the respondent was given benefit of his past services rendered to the Indian Army and accordingly, he was also given increments which he would have got in the Indian Army. As a result thereof, the respondent's pay was fixed in a higher scale then what he ought to have been allowed. As a matter of fact, as per the provisions of Order 4 of the Orders, the respondent could not have been given benefit of his earlier services in the process of fixing his pay. Order 4 of the Orders, being relevant for the purpose, has been reproduced herein-below:

"4. Fixation of pay of re-employed pensions.

(a) Re-employed pensioners shall be allowed to draw pay only in prescribed scales of pay for the posts in which they are re-employed. No protection of the scales of pay of the post held by them prior to retirement shall be given.

(b) (i) In all cases where the pension is fully ignored, the initial pay on re-employment shall be fixed at the minimum of the scales of pay of the re-employed post.

(ii) In cases where the entire pension and pensionary benefits are not ignored for pay fixation, the initial pay on re-employment shall be fixed at the same stage as the last pay drawn before retirement. If there is no such stage in the re-employed post, the pay shall be fixed at the stage below that pay. If the maximum of the pay scales in which a pensioner is re-employed is less than the last pay drawn by him before retirement, his initial pay shall be fixed at the maximum of the scales of the re-employed post. Similarly, if the minimum of the scales of the

pay in which a pensioner is re-employed is more than the last pay drawn by him before retirement his initial pay shall be fixed at the minimum of the scales of pay of the re-employed post. However, in all these cases, non ignorable past of the pension and pension equivalent of retirement benefits shall be reduced from the pay so fixed.

(c) The re-employed pensioner will be in addition to pay as fixed under para (b) above shall be permitted to drawn separately and pension sanctioned to him and to retain any other form of retirement benefits.

(d) In the case of persons retiring before attaining the age of 55 years and who are re-employed, pension (including pension equivalent of gratuity and other forms of retirement benefits) shall be ignored for initial pay fixation to the following extent.

(i) In the case of ex-servicemen who held posts below commissioned officer rank in the Defence Forces and in the case of Civilians who held posts below Group (A) posts at the time of their retirement benefits shall be ignored.

(ii) In the case of service officers belonging to the Defence Forces and Civilian Pensioners who hold Group 'A' posts at the time of their retirement, the first Rs.500/- of the pension and pension equivalent of retirement benefits shall be ignored."

8. The respondent had been given an option whereby he had opted for the minimum scale of pay, which was paid to the Clerk and therefore, his pay had been rightly fixed as per the option read with Order 4(a) of the Rules. The learned counsel had further submitted that while allowing the writ petition, the High Court had not considered the aforestated facts at all. The High Court did not look into the fact th n

given to the respondent-employee and his pay had been fixed only as per the option exercised by him and as per the provisions of Order 4 of the Orders. It had, therefore, been submitted that the view taken by the Tribunal, confirming re-fixation of pay was correct and the High Court ought not to have disturbed the same by allowing the writ petition. It was, therefore, submitted that the order dated 20th March, 2009 of the High Court should be quashed by allowing the appeal.

9. On the other hand, the learned counsel appearing for the respondent-employee had at the first instance submitted that the respondent was not having a copy of the option and he was not aware about the option so exercised. He had submitted that the pay had rightly been fixed by the order dated 2nd September, 1992 and it ought not to have been re-fixed to the prejudice of the employee after six years. He had, therefore, submitted that the view taken by the High Court was correct. He had further submitted that perhaps the respondent might have to make some payment to the appellant-employer as according to the employer, the respondent had been paid more salary on account of incorrect pay fixation. He had also submitted that recovering the salary so paid would be unjust and therefore, in any case, nothing should be recovered from the respondent-employee.

10. Upon hearing the learned counsel and upon perusal of the option form dated 18-7-1990, in our opinion, the High Court was in error while allowing the petition because it is clearly revealed from the option form that the respondent had agreed to get his pay fixed as per the minimum of pay in the pay-scale of the Clerk, the post to which he had been re-employed. It is pertinent to note that the respondent has been getting regular pension from the Indian Army for his past services rendered to the Indian Army. As per the provisions of the Orders and as per the option exercised by the respondent, service rendered by the respondent to the Indian Army cannot be taken into account for the purposes of his pay fixation as

the respondent would be getting his pension and there would not be any deduction from his pension or his salary on account of the pension received by him from the Indian Army. If nothing has been deducted from the pension of the respondent upon being re-employed and as the respondent would continue to get his pension and other benefits from the Army for his past services, in our opinion, the High Court was not right while permitting the respondent to get his higher pay fixed by taking into account the services rendered by the respondent to the Indian Army. Even from sound common sense, it can be seen that for the past service rendered to the Indian Army, the respondent is getting pension and other perquisites which a retired or discharged soldier is entitled to even after being re-employed. The respondent would, therefore, not have any right to get any further advantage in the nature of higher salary or a higher pay scale, especially when nothing from his salary was being deducted on account of his getting pension or perquisites from the earlier employer.

11. In view of the aforestated position, in our opinion, the Tribunal was absolutely right in coming to the conclusion that the pay fixation under the order dated 13th October, 1998 was correct because a mistake was committed in the earlier pay fixation under the order dated 2nd September, 1992.

12. Though a submission had been made on behalf of the respondent that no amount should be recovered from the salary paid to the respondent, the said submission can not be accepted because if any amount had been paid due to mistake, the mistake must be rectified and the amount so paid in pursuance of the mistake must be recovered. It might also happen that the employer might have to pay some amount to the respondent as a result of some mistake and in such an event, even the appellant might have to pay to the respondent. Be that as it may, upon settlement of the account, whatever amount has to be paid to the respondent employee or to the appellant employer shall be paid and [illegible]e adjusted accordingly.

13. For the aforestated reasons, we are of the view that the High Court was not correct in allowing the writ petition. We quash and set aside the order passed by the High Court so as to restore the order passed by the Tribunal and give effect to the pay fixation order dated 13th October, 1998. The appeal stands disposed of as allowed with no order as to costs. A B

K.K.T. Appeal allowed.

A THE CALCUTTA PORT TRUST AND OTHERS
v.
ANADI KUMAR DAS (CAPT.) AND OTHERS
(Civil Appeal No. 7148 of 2008)

B NOVEMBER 13, 2013

[G.S. SINGHVI AND V. GOPALA GOWDA, JJ.]

Service Law – Pension – Belated application for grant of opportunity to opt for pension scheme, after expiry of cut off
C *date – Maintainability – Held: If an aggrieved retiree seeks intervention of the Court for issue of direction to the employer to give him opportunity to exercise option to switch over from one scheme to the other, the employer can produce evidence to show that the concerned employee had knowledge about*
D *the particular scheme etc – The employer can also show that even though the scheme etc. had not been communicated to the concerned employee in person, he was aware of the same – It cannot be laid down as a general rule that each and every circular/instruction issued by the employer giving*
E *additional monetary benefits to retired employees must be published in the newspapers and absence of such publication or personal communication to a retired employee would entitle him to seek intervention of the Court after lapse of many years – In the instant case, at the time of introduction of the Pension*
F *Scheme, respondent No.1 was very much in service of appellant no.1-Port Trust as a Class-I officer – Relevant circulars pertaining to Pension scheme were also issued during his service tenure – Therefore, it is not possible for any person of ordinary prudence to believe that respondent No.1*
G *was not aware of the Pension Scheme and the opportunities given to the retired employees/officers to exercise option to switch over from the CPF Scheme to the Pension Scheme – Story put forth by respondent No.1 of having acquired knowledge about the circulars issued in 1984 and 1986 from*

H

his friend/colleague rightly discarded by the Single Judge – Failure of respondent No.1 to disclose the name of the concerned friend/colleague adequately supports the inference drawn by the Single Judge – Division Bench of the High Court committed serious error in interfering with the order of the Single Judge by entertaining the highly belated claim lodged by respondent no.1 in the year 2001 – However, keeping in view the peculiar facts of the case, appellants directed to allow respondent No.1 to exercise option in terms of circular dated 19.2.1986.

Respondent No.1 joined the service of appellant No.1-The Calcutta Port Trust on 19.8.1957 as Class-I Officer. At the time of appointment of respondent No.1, there was no Pension Scheme for the employees of appellant No.1 and they were given monetary benefits of the Contributory Provident Fund Scheme (CPF Scheme). For the first time, Pension Scheme was introduced vide circular dated 29th May, 1962 and made effective from 1.6.1962. All the existing employees, who were in service on 1.6.1962 were given the choice to opt for the Pension Scheme, but respondent No.1 did not exercise the option. Respondent no.1 retired from service w.e.f. 1.4.1983 under the Voluntary Retirement Scheme. Vide circular dated 11.8.1979, appellant No.1 extended the cut off date fixed for exercise of option under the Pension Scheme by Class-I and Class-II officers and fixed 9.11.1979 as the last date. Many officers opted for the Pension Scheme but respondent No.1 did not opt for the same. Similar options were given to the employees vide circulars dated 17.1.1981, 11.3.1981, 29.12.1984 and 19.2.1986, but respondent No.1 did not avail any of the opportunities. In the year 2000, the Central Government issued circular dated 7.1.2000 and sanctioned ex gratia at the rate of Rs.600 per month for the CPF beneficiaries. Respondent No.1 took benefit of that circular and received the amount of ex gratia.

In June 2001, the Government of India announced liberalized pensionary benefits for retired Class-I and Class-II officers of Major Ports which resulted in manifold increase in the pension payable to them. On 23.7.2001, i.e. 18 years after his retirement, Respondent No.1 submitted application for grant of permission to exercise of option in terms of circulars dated 29.12.1984 or 19.2.1986. The application was rejected by appellant No.1 on the ground that option to switch over to the Pension Scheme under Circular dated 29.12.1984 was open upto 31.5.1985 and under Circular dated 19.12.1986, it was open upto 30.6.1986. Respondent No.1 filed Writ Petition before the High Court averring that he was never informed or made aware of the option to switch over to the Pension Scheme by way of publication in the newspapers or otherwise and he came to know about the same only in June 2001 from his friend to whom he had paid a courtesy visit and immediately thereafter, he submitted application dated 23.7.2001 for exercise of option in terms of circular dated 19.2.1986.

The Single Judge of the High Court declined to accept the plea of ignorance put forth by respondent No.1 on the ground that being a Class-I officer he was very much aware of the Pension Scheme introduced in 1962 and the circulars issued from time to time for giving opportunity to the retirees to exercise option. The Division Bench of the High Court, however, reversed the order of the Single Judge holding that appellant No.1 was duty bound to publish the circulars in the daily newspapers or circulate the same amongst all the concerned retired employees and that the Single Judge erred by declining relief to respondent no.1 on the assumption that he must have been aware of the circulars issued in 1984 and 1986. Hence the present appeal.

Disposing of the appeal, the Co

HELD: 1.1. Whenever an employer introduces the Pension Scheme or makes the same applicable to retired employees and give them opportunity to exercise option, the circulars/instructions issued for that purpose should either be communicated to the retirees or made known to them by some reasonable mode. Mere display of such notice/instructions on the notice board of the Head Office cannot be treated as an intimation thereof to the retired employees/officers. The employer cannot presume that all the retirees have settled in the city where the Head Office is located. If the employees belong to the services of the Central Government or its agencies/instrumentalities, they are likely to settle in their native places which may be far away from the seat of the Government or Head Office of the establishment or organisation. The retirees are not expected to frequently travel from their native places to the seat of the Government or Head Office to know about additional benefits, if any, extended by the Government or their establishment/organization and it is the duty of the employer to adopt a suitable mechanism for communicating the decision to the retired employees so as to enable them to exercise option. This could be done either by publishing a notice in the newspaper about which the retirees are told at the time of their retirement or by sending copies of the circulars/instructions to the retirees or by sending a copy thereof to the association of the employees and/or officers with a direction to them to circulate the same among the concerned retirees. By taking advantage of the modern technology, the employer can also display the circulars/instructions on a designated website about which prior information is made available to the employees at the time of their retirement. If one of these modes is not adopted, the retired employees can legitimately complain that they have been denied right to exercise the option and can seek intervention of the Court. [Para 20] [885-G-H; 886-A-F]

1.2. If an aggrieved retiree seeks intervention of the Court for issue of a direction to the employer to give him opportunity to exercise option to switch over from one scheme to the other, the employer can produce evidence to show that the concerned employee had knowledge about the particular scheme etc. The employer can also show that even though the scheme etc. had not been communicated to the concerned employee in person, he was aware of the same. Each such case will have to be decided by the competent Court keeping in view the pleadings and evidence produced by the parties and it cannot be laid down as a general rule that each and every circular/instruction issued by the employer giving additional monetary benefits to the retired employees must be published in the newspapers and that in the absence of such publication or personal communication to the retired employee would entitle him to seek intervention of the Court after lapse of many years. [Para 21] [886-F-H; 887-A-B]

1.3. In the instant case, it is not in dispute that at the time of the introduction of the Pension Scheme, respondent No.1 was very much in service as Class-I officer. Circulars dated 11.8.1979, 17.1.1981 and 11.3.1981 were also issued during his tenure as a senior officer of appellant No.1. Therefore, it is not possible for any person of ordinary prudence to believe that respondent No.1 was not aware of the Pension Scheme and opportunities were given to the retired employees/officers to exercise option to switch over from the CPF Scheme to the Pension Scheme. This is precisely what the Single Judge did and no error is found in the approach adopted by him. The story put forth by respondent No.1 of having acquired knowledge about the circulars issued in 1984 and 1986 from his friend/colleague was rightly discarded by the Single Judge. The failure of respondent No.1 to disclose the name of the concerr e

adequately supports the inference drawn by the Single Judge; and the Division Bench of the High Court committed serious error by interfering with the order of the Single Judge. [Para 22] [887-B-F]

1.4. Further, it was neither the pleaded case of respondent No.1 before the High Court nor any evidence was produced by him to show that the copies of the circulars issued by appellant No.1 were not sent to the Association of employees. It was also not the pleaded case of respondent No.1 that he had visited the Association for the first time in 2000 for collecting the circular issued by the Government of India for grant of ex gratia of Rs.600 per month. This being the position, it is not possible to accept the specious argument of respondent No.1 that he had no knowledge of the Pension Scheme and the circulars issued in 1984 and 1986. [Para 23] [887-F-H; 888-A]

Union of India v. M.K. Sarkar **(2010) 2 SCC 59: 2009 (16) SCR 249;** *Dakshin Haryana Bijli Vitran Nigam v. Bachan Singh* **(2009) 14 SCC 793: 2009 (11) SCR 710;** *Union of India v. D.R.R. Sastri* **(1997) 1 SCC 514: 1996 (9) Suppl. SCR 151;** *Kesar Chand v. State of Punjab* **AIR 1988 Punjab 265;** *D.S. Nakara v. Union of India* **(1983) 1 SCC 305: 1983 (2) SCR 165 and** *Subrata Sen v. Union of India* **(2001) 8 SCC 71 – referred to.**

2. In the result, the order passed by the Single Judge is restored. However, keeping in view the peculiar facts of this case, the appellants are directed to allow respondent No.1 to exercise option in terms of circular dated 19.2.1986. At the same time, it is made clear that this direction shall not be treated as a precedent for other cases pending before the High Court, which shall be decided in the backdrop of their own facts. [Para 24] [888-B-C]

Case Law Reference:

2009 (16) SCR 249	**referred to**	**Para 13**
2009 (11) SCR 710	**referred to**	**Para 14**
1996 (9) Suppl. SCR 151	**referred to**	**Para 17**
1983 (2) SCR 165	**referred to**	**Para 19**
(2001) 8 SCC 71	**referred to**	**Para 19**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7148 of 2008.

From the Judgment & Order dated 04.08.2006 in A.P.O. No. 400 of 2002 and dated 08.12.2006 in G.A. No. 3585 of 2006 in A.P.O. No. 400 of 2002 of the High Court at Calcutta.

Mohan Parasaran, SG, Jayant Bhushan, Vibha Datta Makhija, A.V. Rangam, Buddy A. Rangandhan, Rana Mukherjee, Kasturba K., Ajay Majithia, S. Ravi Kumar, Aman Preet Singh, V.S. Lakshmi, A.V. Balan for the appearing parties.

The Judgment of the Court was delivered by

G.S. SINGHVI, J. 1. Whether respondent No.1 was entitled to opt for the Pension Scheme after 18 years of his retirement is the question which arises for consideration in this appeal filed by the appellants against judgment dated 4.8.2006 passed by the Division Bench of the Calcutta High Court. The appellants have also challenged order dated 8.12.2006 by which the Division Bench of the High Court dismissed the application filed for review of judgment dated 4.8.2006.

2. Respondent No.1 joined the service of appellant No.1-The Calcutta Port Trust on 19.8.1957 as Class-I Officer. He was posted as Chief Officer (D&D) under the Marine Department

of the then Commissioners for the Port of Calcutta, which was re-named as the Calcutta Port Trust on 19.8.1957. He got several promotions and ultimately retired from service w.e.f.1.4.1983 under the Voluntary Retirement Scheme.

3. At the time of appointment of respondent No.1, there was no Pension Scheme for the employees of appellant No.1 and they were given monetary benefits of the Contributory Provident Fund Scheme (CPF Scheme). For the first time, Pension Scheme was introduced for the Commissioner's employees vide circular dated 29th May, 1962 and made effective from 1.6.1962. All the existing employees, who were in service on 1.6.1962 were given the choice to opt for the Pension Scheme, but respondent No.1 did not exercise the option.

4. Vide circular dated 11.8.1979, appellant No.1 extended the cut off date fixed for exercise of option under the Pension Scheme by Class-I and Class-II officers and fixed 9.11.1979 as the last date. Many officers opted for the Pension Scheme but respondent No.1 did not opt for the same. Similar options were given to the employees vide circulars dated 17.1.1981, 11.3.1981, 29.12.1984 and 19.2.1986, but respondent No.1 did not avail any of the opportunities.

5. In the year 2000, the Central Government issued circular dated 7.1.2000 and sanctioned ex gratia at the rate of Rs.600 per month for the CPF beneficiaries. Respondent No.1 took benefit of that circular and received the amount of ex gratia.

6. In June 2001, the Government of India announced liberalized pensionary benefits for retired Class-I and Class-II officers of Major Ports. This resulted in manifold increase in the pension payable to them. With a view to take advantage of the policy decision taken by the Central Government, respondent No.1 submitted application dated 23.7.2001 for grant of permission to exercise of option in terms of circulars dated

29.12.1984 or 19.2.1986. The relevant portions of the application read as under:

> "This is to bearing to your kind notice that I joined my service as Chief Officer D & D under the Marine Department of the then Commissioners for the Port of Calcutta, since renamed as Calcutta Port Trust on 19th August, 1957. During the tenure of my service I got several promotions and ultimately retired from service under Voluntary Retirement Scheme with effect from 1st April, 1983 after completion of 25th years and 4 months of continuous service.
>
> At the time of my appointment there was no pension scheme for the employees of the Calcutta Port Trust and as such like all other employees I was given the benefit of Contributory Provident Fund Scheme. Since the time of my retirement. I have no contact with my office.
>
> During the tenure of my service pension scheme was introduced in the Calcutta Port Trust for its employees but the said scheme was not responded to by the majority of its employees partly due to non circulation of the said scheme amongst its employees and partly due to the fact that the scheme so introduced was not at all attractive. However, since a poor response was received by the Calcutta Port Trust, the said scheme did not materialize at all. I however could not exercise such option as I was never advised by the authority concerned either about the introduction of the said scheme or about the benefits arising therefrom.
>
> I further state that at the time of my retirement no such scheme was in vogue for exercising any option to switch over to the pension scheme. As such the provident fund benefits was given to me by way of my terminal benefits.

I further state that even after my retirement the Calcutta Port Trust extended the benefits of the scheme of such pension to the retired persons at least on two occasions. Once is December 1984 and Second in February 1986. But unfortunately even those schemes were neither circulated through mass media nor brought to the notice of retired pension including myself as a result of which I also could not exercise such option pursuant to the said schemes though the said scheme appears to be much more beneficial then the earlier ones. I further state that in these hard days of inflation it is practically impossible to survive without pension and as such I opted for the scheme of ex gratia payment to the retired employees which was introduced in January 2000 whenever it came to my notice through the newspaper circulation. Similarly I also availed of the scheme for medical benefits employees which was introduced in 1998 as per notification issued through newspaper publication.

Very recently it has come to my notice from one of my colleagues that the Calcutta Port Trust also extended the benefits of such pension scheme to the retired pensioners on condonation of delay on sympathetic grounds though there was delayed exercise of such option.

Accordingly I mostly humbly and respectfully pray to you for allowing me to the exercise my option by condonation of delay as I am otherwise entitled to avail of the said benefits as per the circular issued by the Calcutta Port Trust either on 29th December 1984 or on 19th February 1986 which I could not avail of within the stipulated time due to my ignorance about the introduction of the said scheme as it was not at all noticed to me. I undertake to refund the Trustee's contribution towards provident fund together with interest as per your said schemes."

(emphasis supplied)

7. The application of respondent No.1 was rejected by the Financial Adviser and Chief Accounts Officer of appellant No.1 on the ground that option to switch over to the Pension Scheme under Circular dated 29.12.1984 was open upto 31.5.1985 and under Circular dated 19.12.1986, it was open upto 30.6.1986. This was conveyed to respondent No.1 vide letter dated 7.8.2001.

8. Respondent No.1 challenged the rejection of his prayer for permission to opt for pension in Writ Petition No.1830/2001 filed before the Calcutta High Court. After chronologically presenting the facts relating to the Pension Scheme and the circulars issued from time to time for giving opportunity to the retirees to exercise option, respondent No.1 averred that he was never informed or made aware of the same by way of publication in the newspapers or otherwise and he came to know about the same only in June 2001 from his friend to whom he had paid a courtesy visit and immediately thereafter, he submitted application dated 23.7.2001 for exercise of option in terms of circular dated 19.2.1986.

9. In the written statement filed on behalf of the appellants, it was averred that respondent No.1 was very much aware of the Pension Scheme introduced in 1962 and circulars issued from time to time giving additional opportunities to the retired employees and officers to opt for the pension. According to the appellants, respondent No.1 availed benefits under CPF Scheme because it was more beneficial and deliberately refrained from exercising option for the Pension Scheme till it was liberalized in 2001 by the Central Government. The appellants further pleaded that the application made by respondent No.1 after 18 years of his retirement was rightly rejected by the Financial Advisor and Chief Accounts Officer because it was submitted after more than 15 years of the issue of circular dated 19.2.1986.

10. After analyzing the pleadings of the parties and the documents produced by them, the learne[illegible]d

that the plea of ignorance put forth by the writ petitioner (respondent No.1) cannot be accepted because being a Class-I officer he was very much aware of the Pension Scheme introduced in 1962 and the circulars issued from time to time for giving opportunity to the retirees to exercise option. The relevant portion of the order of the learned Single Judge is extracted below:

> "The case has to be judged on the basis of the averment made in the petition so far as ignorance of the petitioner about the aforesaid notification is concerned. In paragraph 10 of the petition it has been stated that petitioner sometimes in the month of June 2001 went to the residence of one of his friends and /or colleagues in the Calcutta Port Trust on a courtesy visit and only then he came to know about the introduction of pension scheme after his retirement. This story of ignorance cannot be accepted as there was no particular as to the date of his visit. No name of his alleged friend nor address of his residence has been given. On the other hand, the petitioner had occasion to know about the above pension scheme. Admittedly on 17th August 2000 he went to the office of the respondent for submitting an application for ex-gratis payment in prescribed from. It is unbelievable story that one will not be knowing of existence of such pension scheme. Actually the petitioner was not really interested in availing of pension scheme at any stage, as this scheme was not advantageous and gainful for him. Now for the reason best known to him, the return yielded from the corpus of provident fund amount is not perhaps advantageous for him, so he has come to switch over his option pension scheme at this belated stage. Mr. Majumdar is right in saying that the approach of the petitioner is not bonafide as at no point of time he was in favour of the pension scheme. In the case cited by Mr.Bhattacharjee the petitioner therein at the first available opportunity exercised his option. Moreover, in that case

> there was delay of less than two years and such delay for ignorance of existence of the said pension scheme during that period is quite reasonable. In this case it is an unbelievable story further that 1984 till June 2001 he would not be knowing of existence of this pension scheme. I am of the view that story made out by the petitioner's absolutely concocted as no supporting affidavit has been filed by the said friend in order to strengthen the belief of such case. It appears further that the petitioner has connection with the pensioners' association of the Calcutta Port Trust wherefrom he has collected copies of the circular of the pension scheme sometimes in the month of July 2001. So, the petitioner could have ascertained the existence of the pension scheme introduced in 1984 had he reasonably been diligent."

11. The Division Bench of the High Court allowed the appeal filed by respondent No.1 and reversed the order of the learned Single Judge by observing that the circulars issued by appellant No.1 were neither published in the daily newspaper nor the same were circulated among the concerned retired employees. The Division Bench was of the view that appellant No.1 was duty bound to publish the circulars in the daily newspapers or circulate the same amongst all the concerned retired employees and that the learned Single Judge committed an error by declining relief to him on the assumption that he must be aware of the circulars issued in 1984 and 1986. The relevant portions of the judgment of the Division Bench are extracted below:

> "There is nothing to show that the said circular allowing the retired employees to exercise option to come under the said pension scheme was circulated amongst all the retired employees. There is also nothing to show that there was any attempt on the part of Port Trust Authority to publish the said circular in the daily newspaper either English or Bengali for bringing the to

the notice of the retired employees. To the contrary, it appears that on 19.2.1986 there was another circular to all Heads of Department, Calcutta Port Trust for granting fresh opportunity to Class-I and Class-II officers who were on the Contributory Provident Fund Scheme to elect the pension scheme by exercising option within 30.6.86. There is also nothing to show that this circular was circulated amongst all the concerned retired employees of Calcutta Port Trust and the same was published in any daily newspaper.

It is needless to say that the circulation of the said orders extending benefit to the retired employees amongst all the concerned retired employees including the writ petitioner was a must and it was incumbent upon the Port Trust Authority to show that the said circular was brought to the knowledge of each and every concerned retired employee by the authority. In order to discharge the heavy onus upon the Calcutta Port Trust not a single scrap of paper was produced by the respondent to show that the said matter was circulated and reached the writ petitioner. It is not claimed by the respondent that the concerned circulars were circulated by publishing the same in any daily newspaper. In para 4(F) of the Affidavit in opposition submitted on behalf of the respondent Nos.1 to 7 it was stated that all the circulars were made through circulation of the Heads of Departments which were in turn circulated through Sectional Heads by displaying in notice board and there was no reason why the writ petitioner being a Class-I employee would not know the same at least till he retired. There is no paper to show that there was any order of displaying the circulars in the Notice Board and really the same was displayed in the Notice Board of the office of the respondent. The first circular granting fresh opportunity to Class-I and Class-II officers who were enjoying the benefits of the Contributory Provident Fund Schemes to elect the pension scheme was issued by the Calcutta Port

Trust to all Heads of Department on 29.12.84 whereas the writ petitioner retired from service on 1.4.83. If it is assumed that the said circular was displayed in the Notice Board of the office still then it cannot be definitely said that the said circular came to the notice of all the retired employees of Calcutta Port Trust including the writ petitioner who retired from service before the date of issue of the circular. It was incumbent on the part of the Calcutta Port Trust to serve the said copy of circular upon the writ petitioner but the Calcutta Port Trust Authority did not make any attempt to send the said circular to the writ petitioner. The same was not published in the newspaper. The Calcutta Port Trust Authority thus failed to discharge the onus of proving that the said circular was brought to the knowledge of the writ petitioner by it and despite the fact that the said circular was brought to the notice of the writ petitioner, the writ petitioner failed to exercise his choice within the stipulated period."

12. The Division Bench noted that even though respondent No.1 did not file affidavit of his friend from whom he is said to have acquired knowledge about the circulars issued by appellant No.1 in 1984 and 1986 but held that it was the duty of the latter to bring those circulars to the notice of respondent No.1 and it cannot take advantage of the weakness of his case.

13. Shri Mohan Parasaran, learned Solicitor General and Shri Jayant Bhushan, learned senior counsel appearing for the appellants relied upon the judgment of this court in *Union of India v. M.K. Sarkar* (2010) 2 SCC 59 and argued that even though the circulars issued by appellant No.1 giving an opportunity to the retirees to opt for pension were not published in the newspapers or through radio/television and copies thereof were not sent to the concerned individuals, respondent No.1 was not entitled to exercise option after a time gap of 15 years counted from the date of issue of circular dated 19.2.1986 and over 16 years counted from 13.11. a

Class-I officer, who remained posted at Calcutta, he will be deemed to be aware of the Pension Scheme introduced in 1962 and multiple opportunities afforded to the employees and officers to opt for pension. Both Shri Parasaran and Shri Jayant Bhushan emphasized that respondent No.1 did not opt for the Pension Scheme because till his retirement the CPF Scheme was more beneficial and he submitted representation in July 2001 only after the Pension Scheme was liberalized and became very lucrative and argued that the Division Bench of the High Court committed serious error by entertaining the claim lodged by respondent No.1 after more than 15 years of the issue of circular dated 19.2.1986.

14. Shri Ajay Majithia, learned counsel for respondent No.1 relied upon the judgment in *Dakshin Haryana Bijli Vitran Nigam v. Bachan Singh* (2009) 14 SCC 793 and argued that the Division Bench of the High Court did not commit any error by granting an opportunity to his client to opt for the Pension Scheme because at no point of time the circulars issued in 1984 and 1986 were communicated to him.

15. We have considered the respective arguments and scrutinized the record. In support of his plea that till 2001 he was unaware of the circulars issued by appellant No.1 in 1984 and 1986, respondent No.1 made the following averments in paragraphs 7 to 17 of the writ petition:

> "7. Your petitioner states that from a newspaper publication your petitioner came to a know that the Government of India, Ministry of Surface Transport (Port Wing) by a letter being No.A-38011/11/98 PET dated 7th January, 2000 decided to grant ex gratia payment to C.P.F. beneficiaries who had retired between 18th November, 1960 to 31st December, 1985 at the rate of 600/- per month with effect from 1st November, 1997 subject to a condition that such persons should have rendered at least 20 years of service.
>
> 8. Your petitioner states that after coming to know about

> the introduction of the said scheme for ex gratia payment your petitioner submitted an application in prescribed form on 17th August, 2000 for grant of ex gratia payment and your Petitioner was granted such ex gratia payment.
>
> 9. Your petitioner further states that your petitioner also availed of the scheme for medical benefits extended by the Calcutta Port Trust to its retired employees which was introduced in 1998 as per the notification issued through newspaper publication.
>
> 10. Your petitioner states that sometimes in the month of June, 2001 your petitioner went to the residence of one of his friends and/or colleague in the Calcutta Port Trust on courtesy visit. It is only then that your petitioner came to know about the introduction of pension scheme introduced even after his retirement. On further enquiry your petitioner came to know that the Calcutta Port Trust extended the benefits of such pension scheme to many of its employees by condoning their defaults for delayed exercise of their options, sometimes on its own and sometimes following the orders passed by this Hon'ble Court in its constitutional writ jurisdiction on different writ petitions filed by various retired employees of the Calcutta Port Trust from time to time.
>
> 11. Your petitioner states that your petitioner came to know that on or about 29th December, 1984. the Financial Adviser and Chief Accounts officer issued a circular to all departmental heads allowing fresh opportunity to all class-I and Class-II officers who were in service on 1st August, 1982 but have retired from service with Contributory Provident Fund benefits after 1st August 1982 and till the date of issue of the said Government order dated 30th November, 1984 provided such retired employees exercise their option by 31st may 1985 and is agreeable to first refund the Trustees contribution towards the provident fund benefits inclusive of

A true copy of the said circular which your petitioner collected from the petitioner's association of the Calcutta Port Trust subsequently sometimes in early July, 2001 is annexed hereto and is marked with Annexure "A" to this petition.

12. Your petitioner states that the said circular was never intimated to your petitioner by the Calcutta Port Trust though it is incumbent upon the Calcutta Port Trust to intimate the retired employees personally about the scheme introduced for the benefit of the retired employees.

13. Your petitioner states that the said circular was also not circulated by the Calcutta Port Trust through the Mass Media such as newspaper publication broadcasting of news over Radio, Television etc. to keep the retired employee informed about the introduction of such scheme. As a result your petitioner could not know about the introduction of the said scheme.

14. Your petitioner states that your petitioner further came to know that by a subsequent notification issued by the Calcutta Port Trust vide Memo No. 1720 P dated 19th February 1986, another opportunity for exercising fresh option to the retired Class I and Class II officers who retired from service after 1st August, 1982 with Contributory Provident Fund benefits and till 1st January 1986 was given by the Calcutta Port Trust provided such retired employees exercised their option within 30th June, 1986 and is agreeable to refund the Trustees contribution towards the Contributory Provident Fund Scheme including interest thereof.

A true copy of the said notice/circular which you petitioner collected subsequently sometimes in early July 2001 is annexed hereto and is marked with Annexure "B" to this petition.

15. Your petitioner states that even the said circular was not intimated to your Petitioner personally by the Calcutta port Trust though the Calcutta Port Trust was aware of your petitioners residential address. Your petitioner further states that like the earlier one, this time also the Calcutta Port Trust did not circulate the said circular through the Mass Media as a result your petitioner could not know about the said circular. Thus for the reasons as aforesaid your petitioner could not exercise his option though he was ready to avail of the benefits of the said pension scheme.

16. Your petitioner states that since the introduction of the aforesaid pension schemes by the Calcutta Port Trust was not known to your petitioner, your petitioner was finding it extremely difficult to survive without pension in these hard days of inflation and as such your petitioner opted for the scheme of ex gratia payment to the retired employees which was introduced in January, 2000 whenever it came to the notice of your petitioner through the newspaper circulation. Your petitioner further states that had your petitioner had known about the said pension scheme earlier then your petitioner would have exercised his option within the stipulated period as the said scheme is much more beneficial to your petitioner.

17. Your petitioner states that however, immediately after coming to know that the Calcutta Port Trust allowed some of its retired employees to come over to the pension scheme by condoning their delayed exercise of option, your petitioner submitted a representation to the concerned respondents by his letter dated 23rd July, 2001 inter alia praying for allowing your petitioner to come over to pension scheme on condonation of delay for exercising such option.

A true copy of the said representation which was received by the concerned respondents on 27th July, 2001 is

Annexed hereto and is marked with Annexure "C" to this petition."

16. The learned Single Judge critically analysed the above reproduced averments and recorded a well reasoned finding that respondent No.1 was aware of the Pension Scheme and the circulars issued by appellant No.1. The learned Single Judge discarded the story of respondent No.1 that he came to know about circular dated 19.2.1986 in the month of June from his friend/colleague. The Division Bench of the High Court neither adverted to the averments contained in the writ petition nor referred to the reasoning of the learned Single Judge and granted relief to respondent No.1 on the premise that appellant No.1 is duty bound to get the circulars published in the daily newspapers and display thereof on the notice board was not sufficient to give an intimation to the retirees.

17. In *Union of India v. D.R.R. Sastri* (1997) 1 SCC 514, to which reference has been made in *Union of India v. M.K. Sarkar* (supra) relied upon by the learned counsel for the appellants, a two Judge Bench of this Court considered whether the Central Administrative Tribunal was right in directing the Railway Board to allow the respondent to exercise option for Pension Scheme after expiry of the cut off date fixed for that purpose. While approving the order of the High Court, which dismissed the writ petition filed by the appellant, this Court observed:

"When this case was listed before this Court on 6-5-1995, it was brought to the notice of the Court that the Government itself has granted a similar benefit to one K.V. Kasthuri by an order dated 19-9-1994, even though he had retired in the year 1973. The Court, therefore, called upon the Union Government to place the necessary material which enabled the Government to grant the relief to Shri Kasthuri and how his case stands on a different footing than the case of the respondent. But no further affidavit was filed by the Union of India nor was any material placed to indicate any distinguishing feature for granting the

relief to Shri K.V. Kasthuri and refusing the same to the respondent. Be that as it may when the matter was again argued on 20-8-1996, it was contended on behalf of the appellant that the respondent having resigned from the Railways and having been absorbed by the Heavy Engineering Corporation would be entitled to the benefits available to him under the Heavy Engineering Corporation and the counsel for the appellant also contended that the Heavy Engineering Corporation has already determined the pension of the respondent by taking into account the entire period of service from 1952. In view of the aforesaid submissions of the learned counsel appearing for the appellant the Court had called upon the railway administration to indicate whether the period of service rendered by the respondent from 1950 till 22-7-1972 under the Railways was taken into account by the Heavy Engineering Corporation in fixing his pension on his retirement from the service of Heavy Engineering Corporation and whether the proportionality of the period of service from 1950 to 31-7-1972 and from 1-8-1972 till the retirement are separated to compute the pension and if so computed whether the respondent would stand to gain any higher pension than is being actually drawn. But unfortunately no further affidavit or material was placed by the appellant. On the other hand the respondent has filed an affidavit stating therein that he has not received any pension on his retirement from the Heavy Engineering Corporation as the Corporation itself had no pensionable scheme. In the aforesaid premises and in the absence of any explanation from the appellant to indicate any special feature for granting similar relief as late as in the year 1994 to Shri K.V. Kasthuri, we see no justification for our interference with the impugned direction of the Tribunal. The respondent had served for about 22 years and he should not be deprived of the pensionary benefit when the Government itself had come forward with the Liberalised Pension Scheme and gave option to the persons already retired to come over to the pension scheme. But his pension is to be calculated as on 31-7-1972 in accordance with the

er

dated 23-7-1974 and in compliance with all the necessary formalities by the respondent in accordance with the said circular. ”

18. The question whether it was incumbent upon appellant No.1 to get the circulars published in the newspapers and communicate the same to the individual employees was considered by a two-Judge Bench in *Union of India and others v. M.K. Sarkar* (supra) and answered in the following words:

> “The Tribunal in this case has assumed that being “aware” of the scheme was not sufficient notice to a retiree to exercise the option and individual written communication was mandatory. The Tribunal was of the view that as the Railways remained unrepresented and failed to prove by positive evidence, that the respondent was informed of the availability of the option, it should be assumed that there was non-compliance with the requirements relating to notice. The High Court has impliedly accepted and affirmed this view. The assumption is not sound.
>
> The Tribunal was examining the issue with reference to a case where there was a delay of 22 years. A person, who is aware of the availability of option, cannot contend that he was not served a written notice of the availability of the option after 22 years. In such a case, even if Railway Administration was represented, it was not reasonable to expect the department to maintain the records of such intimation(s) of individual notice to each employee after 22 years. In fact by the time the matter was considered more than nearly 27 years had elapsed. Further when notice or knowledge of the availability of the option was clearly inferable, the employee cannot after a long time (in this case 22 years) be heard to contend that in the absence of written intimation of the option, he is still entitled to exercise the option.”

In the above noted case, the Court found that the

respondent had made application after 22 years of his retirement for grant of opportunity to opt for the Pension Scheme. The Chairman, Railway Board rejected his representation on the ground that it was highly belated. The Tribunal set aside the decision of the Chairman, Railway Board and the Division Bench of the Calcutta High Court upheld the same. This Court reversed the orders of the Tribunal and the High Court and observed:

> “When a belated representation in regard to a “stale” or “dead” issue/dispute is considered and decided, in compliance with a direction by the court/tribunal to do so, the date of such decision cannot be considered as furnishing a fresh cause of action for reviving the “dead” issue or time-barred dispute. The issue of limitation or delay and laches should be considered with reference to the original cause of action and not with reference to the date on which an order is passed in compliance with a court’s direction. Neither a court’s direction to consider a representation issued without examining the merits, nor a decision given in compliance with such direction, will extend the limitation, or erase the delay and laches.
>
> A court or tribunal, before directing “consideration” of a claim or representation should examine whether the claim or representation is with reference to a “live” issue or whether it is with reference to a “dead” or “stale” issue. If it is with reference to a “dead” or “stale” issue or dispute, the court/tribunal should put an end to the matter and should not direct consideration or reconsideration. If the court or tribunal deciding to direct “consideration” without itself examining the merits, it should make it clear that such consideration will be without prejudice to any contention relating to limitation or delay and laches. Even if the court does not expressly say so, that would be the legal position and effect.”

19. In *Dakshin Haryana Bijli Vit*... *n*

Singh (supra) on which reliance was placed by Shri Ajay Majithia, this Court approved the order of the Punjab and Haryana High Court which had taken the view that the employer was duty bound to inform the retired employees about the instructions issued for giving them opportunity to switch over to the Pension Scheme. This Court referred to the judgment of the Full Bench of the *Punjab and Haryana High Court in Kesar Chand v. State of Punjab* AIR 1988 Punjab 265, the judgments of this Court in *D.S. Nakara v. Union of India* (1983) 1 SCC 305, *Subrata Sen v. Union of India* (2001) 8 SCC 71 and held:

> "In view of the law as has been articulated in a large number of cases where this Court has observed that any discriminatory action on the part of the Government would be liable to be struck down. Hence, in this case, it would be totally unreasonable and irrational to deny the respondent the pensionary benefits under the scheme particularly when the appellants have failed to produce any record showing that the instructions dated 6-8-1993 and 9-8-1994 were actually got noted in writing by the respondent. In the absence of any such material it can well be inferred that the respondent had no knowledge about the options called by the appellants."

From the above extracted observation, it is evident that this Court felt persuaded to approve the order of the High Court because no evidence was produced by the appellant to prove that the respondent knew about the options called by the appellants.

20. We would like to observe that whenever an employer introduces the Pension Scheme or makes the same applicable to retired employees and give them opportunity to exercise option, the circulars/instructions issued for that purpose should either be communicated to the retirees or made known to them by some reasonable mode. Mere display of such notice/instructions on the notice board of the Head Office cannot be

treated as an intimation thereof to the retired employees/officers. The employer cannot presume that all the retirees have settled in the city where the Head Office is located. If the employees belong to the services of the Central Government or its agencies/instrumentalities, they are likely to settle in their native places which may be far away from the seat of the Government or Head Office of the establishment or organisation. The retirees are not expected to frequently travel from their native places to the seat of the Government or Head Office to know about additional benefits, if any, extended by the Government or their establishment/organization and it is the duty of the employer to adopt a suitable mechanism for communicating the decision to the retired employees so as to enable them to exercise option. This could be done either by publishing a notice in the newspaper about which the retirees are told at the time of their retirement or by sending copies of the circulars/instructions to the retirees or by sending a copy thereof to the association of the employees and/or officers with a direction to them to circulate the same among the concerned retirees. By taking advantage of the modern technology, the employer can also display the circulars/instructions on a designated website about which prior information is made available to the employees at the time of their retirement. If one of these modes is not adopted, the retired employees can legitimately complain that they have been denied right to exercise the option and can seek intervention of the Court.

21. If an aggrieved retiree seeks intervention of the Court for issue of a direction to the employer to give him opportunity to exercise option to switch over from one scheme to the other, the employer can produce evidence to show that the concerned employee had knowledge about the particular scheme etc. The employer can also show that even though the scheme etc. had not been communicated to the concerned employee in person, he was aware of the same. Each such case will have to be decided by the competent Court keeping in view the pleadings and evidence produced by the parties d

down as a general rule that each and every circular/instruction issued by the employer giving additional monetary benefits to the retired employees must be published in the newspapers and that in the absence of such publication or personal communication to the retired employee would entitle him to seek intervention of the Court after lapse of many years.

22. We may now revert to the facts of this case. It is not in dispute that at the time of the introduction of the Pension Scheme, respondent No.1 was very much in service as Class-I officer. Circulars dated 11.8.1979, 17.1.1981 and 11.3.1981 were also issued during his tenure as a senior officer of appellant No.1. Therefore, it is not possible for any person of ordinary prudence to believe that respondent No.1 was not aware of the Pension Scheme and the opportunities given to the retired employees/officers to exercise option to switch over from the CPF Scheme to the Pension Scheme. This is precisely what the learned Single Judge did and we do not find any error in the approach adopted by him. The story put forth by respondent No.1 of having acquired knowledge about the circulars issued in 1984 and 1986 from his friend/colleague was rightly discarded by the learned Single Judge. The failure of respondent No.1 to disclose the name of the concerned friend/colleague adequately supports the inference drawn by the learned Single Judge and the Division Bench of the High Court committed serious error by interfering with the order of the learned Single Judge.

23. We may add that it was neither the pleaded case of respondent No.1 before the High Court nor any evidence was produced by him to show that the copies of the circulars issued by appellant No.1 were not sent to the Association of employees. It was also not the pleaded case of respondent No.1 that he had visited the Association for the first time in 2000 for collecting the circular issued by the Government of India for grant of ex gratia of Rs.600 per month. This being the position, it is not possible to accept the specious argument of respondent

No.1 that he had no knowledge of the Pension Scheme and the circulars issued in 1984 and 1986.

24. In the result, the appeal is allowed, the impugned judgment and order are set aside and the one passed by the learned Single Judge is restored. However, keeping in view the peculiar facts of this case, we direct the appellants to allow respondent No.1 to exercise option in terms of circular dated 19.2.1986. The needful be done within a period of two months from the date of receipt of copy of this judgment. At the same time, we make it clear that this direction shall not be treated as a precedent for other cases pending before the High Court, which shall be decided in the backdrop of their own facts.

B.B.B. Appeal disposed of.

BEENU RAWAT & ORS
v.
UNION OF INDIA & ORS.
(Writ Petition (Civil) No. 446 of 2013)

NOVEMBER 19, 2013

[G.S. SINGHVI, SHIVA KIRTI SINGH AND C. NAGAPPAN, JJ.]

Constitution of India, 1950 – Art.21 – Human Rights – Rights relating to life, liberty, equality and dignity of the individual – Protest/ agitation by petitioners at Police station seeking registration of FIR in respect of an alleged occurrence of rape – Petitioners allegedly rounded up by policemen and mercilessly beaten by them – Injuries caused to petitioners in the incident – Petitioners seeking independent investigation by a Special Investigation Team (SIT) into the incident of alleged police atrocities – Grievance of petitioners that they were subjected to excessive use of force and abuses etc. and hence they were deprived of their fundamental right to a life of dignity – Counter plea of respondents that the petitioners had vandalized the police station and caused damage to the public property and that the police resorted to the minimal use of force only enough to disperse the large violent crowd – Held: The petitioners are ordinary persons with clean antecedents – The fact that the video footage recorded at the instance of the police does not show acts of rioting or any arms or brickbats in the hands of the protestors and the recording was stopped as soon as police started using lathis upon the protestors, make it clear, at least prima facie, that in the incident in question, peaceful protestors were subjected to beating by lathis etc. by the police force which included policemen from the concerned police station as well as force called from adjoining police station – Counter version of the respondents that the petitioners indulged in rioting and

damaged public property neither supported by photographs nor by the video footage – In that view of the matter, the whole incident requires to be investigated/enquired by an independent agency or by a Special Investigation Team (SIT) – NHRC directed to enquire into the complaint of the petitioners regarding violation of their fundamental rights particularly u/Article 21 of the Constitution – Protection of Human Rights Act, 1993 – s.12A, 13 & 14.

The petitioners claim to be volunteers of 'Aam Aadmi Party'(AAP). They approached this Court under Article 32 of the Constitution *inter alia* seeking issuance of a writ of mandamus or any other writ or direction to order independent investigation by a Special Investigation Team (SIT) into the incident of police atrocities which allegedly took place on 19.06.2013 at Gokul Puri Police Station in Delhi against the petitioners and if such allegations were found correct, issuance of further consequential and necessary directions, including initiation of criminal prosecution as well as disciplinary proceedings against the errant police officials of the Delhi Police.

The incident of 19.06.2013 at Gokal Puri Police Station in Delhi occurred in course of a protest by the volunteers of AAP. The protestors wanted registration of an FIR in respect of an alleged occurrence of rape but allegedly the police was reluctant to register the FIR and hence a number of volunteers including the petitioners joined the protest. It is the case of the petitioners that they were suddenly rounded up by a large number of policemen and mercilessly beaten by them. Initially, police arrested seventeen volunteers but three of them were let off as they were minor girls. Subsequently, petitioner Nos. 2 and 10 were also taken into custody and allegedly beaten in police custody. The nineteen petitioners claim to have sustained [illegible]n head, back, arm and legs.

**The respondents, on the other hand, submitted there A
was no lapse on behalf of the police to help the
prosecutrix and the police resorted to the minimal use of
force only enough to disperse the large violent crowd and
safeguard the police personnel trapped inside the police
station. It was alleged that the protestors had entered the B
premises, blocked entry to the police station, pelted
stones and damaged public property, and that the violent
acts of the crowd caused injuries to five police personnel
and that FIR had been registered against the protestors
bearing no.251/13 for rioting etc.** C

**The question which, therefore, arose for
consideration before this Court was whether the
petitioners had made out a case that their fundamental
right to live with human dignity guaranteed by Article 21
of the Constitution had been invaded, atleast *prima facie*, D
so as to direct for an independent investigation/enquiry
so that the perpetrators may not get away scot free if
petitioners' case was found true.**

Allowing the writ petition, the Court E

**HELD: 1. In part III of the Constitution of India, Article
21 enjoys special status. Right to life and Right to liberty
are of historical importance. The law is now well settled
that the State or its functionaries cannot deprive any
person of his life which includes right to live with human F
dignity except in accordance with law. The maximum
threat to such fundamental right is perceptible when any
kind of protest or agitation is directed against the police
force for reasons which are self-evident. Police is licensed
to carry arms for protecting the people. This itself creates G
a situation where the power of arms may be misused
under the mistaken belief in the absolutism of the police
power or on account of lack of sensitivity to the
democratic rights of the people to register peaceful
protest, against wrongs, especially that of public** H

A **functionaries. The submissions on behalf of respondents
that nobody can be permitted to paralyse the functioning
of police or other State institutions in a name of public
protest cannot be rejected off hand because it is only a
corollary of the right to protest peacefully; proverbially**
B **the other side of the coin which corroborates the well
accepted principle that rights without duties tend to
degenerate into license for misuse of rights. In a given
case, the facts may lead to such conclusions. Hence
facts and circumstances in such cases need to be**
C **scrutinized carefully. [Para 12] [901-B-G]**

**2. In the present case also, the relevant facts are
required to be noticed in order to arrive at a conclusion
whether the petitioners' prayers deserve to be allowed or
not. The petitioners are ordinary persons with clean**
D **antecedents. The injuries caused to the petitioners in the
incident have not been denied as they are supported by
medical reports. So far as injuries to some of the police
officers are concerned, order dated 22.06.2013 passed by
the Vacation Judge (NE)/Additional Sessions Judge may**
E **be referred to. While granting bail to 11 applicants, the
said Judge had noted that the MLCs of five police
officials indicate that they have suffered from minor
injuries which were in the form of scratches and abrasion
only and the FIR does not indicate that the lady police**
F **officials were assaulted or any attempt to outrage their
modesty was made by the accused persons. [Para 13]
[901-G-H; 902-A-C]**

**3. A claim was made that unlawful acts of the
protestors had been recorded through videography**
G **which was available with the respondents, however, the
video footage shown to this Court revealed that none of
the protestors were carrying any arms or even brickbats
in course of the protest. The initial part of the incident
discloses lack of any bitterness ar y**
H **atmosphere. Thereafter, when copy c n**

from a distance but not made available to any one, the slogans increased and the tone could be perceived by some persons as irritating. Barring some protestors, rest were pushed out of the gate of police station without any resistance or any untoward incident. The crowd outside the gate apparently did not disperse. The last part of the video footage fleetingly shows use of lathis by the police men upon the protestors. Thereafter, the recording was stopped and appears to have been resumed after lapse of sometime to show some broken glass panes, brickbats in very limited number and some broken spectacles lying on the ground, a grim reminder of use of force. [Para 14] [902-D-G]

4. There is no dispute that petitioners have received injuries but according to counter affidavit, these were due to some of the protestors falling down on the vehicles parked along the walls of the compound and there was no lathi charge or any act of beating of the protestors. Such statement in paragraph 5 of the counter affidavit cannot be accepted in view of the last part of the video footage. A glimpse of action taken by the police is available in paragraph 8 of the counter affidavit wherein it is claimed that Police resorted to minimal use of force which was only enough to disperse a large violent crowd and safeguard the police personnel. No part of the video footage shows the crowd to be very large or indulging in any physical violence. Even if this version in the counter affidavit is accepted in part, one is left to wonder why the petitioners who had injuries on their bodies had to be arrested instead of allowing them to disperse with the crowd which was allegedly large and violent. It is also intriguing as to why the FIR bearing No.251/13 for rioting etc. was registered against the petitioners at 5.35 p.m. after eighteen persons were apprehended at 3.30 p.m. and not before their arrest if they had vandalized the

police station and caused damage to the public property. [Para 17] [903-F-H; 904-A-C]

5. The fact that the video footage recorded at the instance of the police does not show acts of rioting or any arms or brickbats in the hands of the protestors and the recording was stopped as soon as police started using lathis upon the protestor, make it clear, at least prima facie, that in the incident in question, peaceful protestors were subjected to beating by lathis etc. by the police force which included policemen from the concerned police station as well as force called from adjoining police station, P.S. Jyoti Nagar and P.S. Bhajanpura. The counter version of the respondents that the petitioners indulged in rioting and damaged public property is neither supported by photographs nor by the video footage. In that view of the matter, the whole incident of 19.06.2013 at Gokul Puri Police Station, District North-East, Delhi requires to be investigated/enquired by an independent agency or by a Special Investigation Team. [Para 18] [904-C-G]

6. So far as investigation of the FIR No. 251/13 is concerned, it has rightly been transferred from police station Gokal Puri to a Special Investigation Team. However that cannot take care of the petitioners' grievances that they have been subjected to excessive use of force and abuses etc. and that the force used was not at all justified and hence they have been deprived of their fundamental right to a life of dignity. In view of the prima facie findings, it is clear that the grievances of the petitioners require investigation by an authority having statutory jurisdiction in such matters. If the State had itself suggested names of the persons who could constitute Special Investigation Team for the purpose, the matter would have been different and this Court could have considered to direct for formation o[illegible] e

State by selecting persons from the names suggested by the parties. But in the absence of such option, the National Human Rights Commission is directed to enquire into the complaint of the petitioners regarding violation of their fundamental rights particularly one under Article 21 of the Constitution of India. Such direction is granted in view of Section 12(A) of the Protection of Human Rights Act, 1993. Under that Act the definition of "Human Rights" is large enough to include rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution. Consequential directions given by this Court. [Para 20] [905-E-H; 906-A-B]

ORIGINAL CIVIL WRIT JURISDICTION : Writ Petition (Civil) No. 446 of 2013.

Under Article 32 of the Constitution of India.

Shanti Bhushan, Rohit K. Singh, Kartik Seth, Rishikesh Kumar, Prashant Bhushan for the Petitioners.

Siddharth Luthra, ASG, Supriya Juneja, R. Nedumaran, R. Nandakumar for the Respondents.

The Judgment of the Court was delivered by

SHIVA KIRTI SINGH, J. 1. The petitioners claim to be young volunteers of 'Aam Aadmi Party' (AAP) engaged in selfless work for the improvement of democratic institutions of this country and also fight for justice. They have approached this Court under Article 32 of the Constitution of India seeking the following reliefs:

> "(a) Issue a writ of mandamus or any other writ or direction to order an independent investigation by a Special Investigation Team into the abovementioned incident of police atrocities which took place on 19.06.2013 at Gokul Puri Police Station against the petitioners and if such allegations are found correct, pass further consequential

> and necessary directions, including initiation of criminal prosecution as well as disciplinary proceedings against the police officers of the Delhi Police found involved and also against those senior police officers at whose behest this vindictive act of atrocity was done;
>
> (b) issue a writ of mandamus or any other writ or direction to award monetary compensation to the petitioners for their illegal arrest and torture by the Delhi Police which has resulted in gross violation of their fundamental rights to live with dignity as guaranteed under Article 21 of the Constitution of India;
>
> (c) pass such other and further order/s as this Hon'ble Court may deem fit and proper on the facts and in the circumstances of the case."

2. The incident of 19.06.2013 at Gokal Puri Police Station in Delhi which is mentioned in prayer no. (a) noted above, occurred in course of a protest by the volunteers of (AAP) at Gokal Puri Police Station since morning hours. The protestors wanted registration of an FIR in respect of an alleged occurrence of rape of a poor woman by two persons in Bhagirathi Vihar. Allegedly the police was reluctant to register the FIR and hence a number of volunteers including the petitioners joined the protest. The FIR was ultimately registered around 2.30 p.m. and the protestors were informed of the same. A demand was made for a copy of the FIR. According to respondents the copy could not be given to others because of the nature of the alleged crime which requires that name of the victim be not disclosed. According to petitioners the copy of the FIR was not given even to victim's husband. It is the case of the petitioners that when they were planning to wind up the protest, they were suddenly rounded up by a large number of policemen and mercilessly beaten by them. The manner of chase and beating by lathi gave an impression to the petitioners that the police action was not to disperse the petitioners but to teach them a lesson. e

police also used abusive language and told the protestors that they will be taught a lesson so that they do not indulge in such kind of protests in future. Initially, police arrested seventeen volunteers but three of them were let off as they were minor girls. Subsequently, petitioner Nos. 2 and 10 were also taken into custody and allegedly beaten in police custody although they claimed that they had come to the police station later only to enquire about the incident. The nineteen petitioners claim to have sustained serious injuries on head, back, arm and legs. One of them (petitioner no.17) has sustained fracture in lower ulna but he managed to run away.

3. According to the case of the petitioners the police had indulged in unlawful use of force and inflicted injuries before arrest and also during custody, leading to injuries to the petitioners; the arrest was unlawful which is sought to be justified by fabricated evidence for rioting etc.; by breaking window glasses and tearing of some papers in the police station. According to the petitioners a serious case was attempted to be made out through subsequent statement of one ASI of police, Ms. Sushila. There is no such incident mentioned in the FIR bearing no. 251/2013 dated 19.06.2013 registered at P.S. Gokul Puri and even before the learned Metropolitan Magistrate she had alleged that only her scarf (dupatta) was pulled by protestors. The petitioners have claimed that the Commissioner of police, Delhi, has made an incorrect statement that Delhi police has videos of protestors vandalizing the police station. To decide the case it is not necessary for this Court to delve deep into allegations made by the petitioners or those against them by the police which has lodged a criminal case of rioting etc. as noted above. This is because there is no prayer made in this writ petition seeking any kind of intervention in the investigation of police case registered against the petitioners. Even the first prayer made by the petitioners is to order an independent investigation by a Special Investigation Team (SIT) into the incident of 19.06.2013 to find out the truthfulness of allegations of police atrocities and

if such allegations are found right then further consequential orders be passed for criminal prosecution as well as disciplinary action against the concerned police officers. Hence, the issue before the Court is a limited one requiring a careful appraisal of relevant facts and circumstances for coming to a conclusion as to whether the petitioners have made out a case for issuing a direction to order an independent investigation into the alleged incident of 19.06.2013 at Gokal Puri Police Station, Delhi or not.

4. In this background a look at the counter affidavit on behalf of the respondents discloses that the version given by the police attempts to portray a picture that when the prosecutrix or the victim of alleged rape came to the police station along with her husband at about 9.00 a.m. on 19.06.2013, the S.H.O. immediately deputed a lady A.S.I., Ms. Sushila to investigate into the matter and a female counselor, Mrs. Dinesh Panchal from a local NGO was also called for the aid of prosecutrix. A Daily Diary entry to this effect bearing no.11-A was made at 9.10 a.m. and a statement of the victim was recorded by the lady A.S.I. in presence of counselor from the NGO. On that basis FIR No. 250/13 was registered under Section 376-D/506 of the Indian Penal Code at 10.05 a.m. and thereafter the victim was sent for medical examination to Guru Teg Bahadur Hospital, New Delhi. The fact of lodging of the FIR was conveyed to the protestors but still by 12.00 noon their number increased to 100-125 which included 20-25 women. A lady ASI was deputed to control the female protestors. Demand for getting a copy of FIR was declined by the S.H.O. with a view not to reveal the identity of the victim.

5. It is found that the counter version does not deny or even refer to the presence of husband of the victim and there is no disclosure of any reason as to why copy of the FIR was not supplied to the victim or her husband. Had that been done, the bone of contention between the rivals could have been totally taken care of.

6. According to the counter affidavit the protestors were all around the compound of the police station and had also entered the corridor thus blocking the entry and exit of the officials and obstructing them in performing their official duties. The protestors climbed the compound walls and shouted slogans. They abused the police officials and some of them pelted stones causing damage to building windows and vehicles. The police staff was trapped inside the police station being out-numbered by the large number of protestors. The violent acts of the crowd allegedly caused injuries to five police personnels. Their injury reports have been annexed as Annexure R.1 (colly). The lady A.S.I. engaged in controlling the women protestors was manhandled by the crowd and sustained injuries. To support the claim that protestors had entered the premises, blocked entry to the police station, pelted stones and damaged public property, some photographs have been brought on record as Annexure R.2 (colly).

7. Paragraph 5 of the counter affidavit is crucial as it relates to the most significant part of the incident in which injuries were caused to some of the petitioners leading to their arrest. Paragraph 5 runs as follows:-

> "5. As the crowd had become uncontrollable, the SHO, PS Gokul Puri reported the situation to the senior officers and asked for the deployment of additional police force from adjoining Police Stations, PS Jyoti Nagar and PS Bhajan Pura, to control the crowd. With the help of the additional force, efforts were made to disperse the crowd and help the officials trapped inside the Police Station Gokul Puri. Arrival of the additional force from the adjoining police stations created panic amongst the protestors and they started dispersing in various directions. Some of the protestors who had climbed the walls of the Police Station fell down on the vehicles parked by the wall and sustained injuries on their own. There was no lathi charge or any act

> of beating of the protestors as wrongly alleged by the Petitioners."

8. It has also been disclosed in the counter affidavit that till 3.30 p.m. eighteen persons were apprehended on the spot which included three minor girls, four women and eleven men. FIR was registered against the protestors bearing no.251/13 at 5.35 p.m. The three minor girls were let off at about 7.00 p.m. when their parents arrived. The remaining fifteen were however arrested. They were sent for medical examination to Ram Manohar Lohiya Hospital and then produced before the Duty Magistrate at 2.20 a.m. in the morning and then sent to Tihar jail. Petitioner No. 10-Narender Rawat, brother of minor petitioner no.1 Beenu Rawat and also petitioner no.4-Pushpa is claimed to have been arrested in the morning of 20.06.2013 because he had escaped on the previous date. Petitioner No.17 along with four other persons had also allegedly escaped and they were arrested on 21.08.2013.

9. In paragraph 8 of the counter affidavit a submission has been advanced that petitioners are trying to mislead this Court by making wrong allegations that police used excessive force against them. The defense in this paragraph is that the protestors had outnumbered and over run the police officers at police station Gokal Puri, obstructing them from performing their official duties and caused damage to public property on the pretext of helping a rape victim.

10. According to respondents, there was no lapse on behalf of the police to help the prosecutrix and the police resorted to the minimal use of force only enough to disperse the large violent crowd and safeguard the police personnel trapped inside the police station.

11. As indicated earlier, at the present stage when the criminal case is under investigation it will not be proper for this Court to finally decide any issue relating to that case. The pendency of investigation in that case not [illegible] rt

has to decide the limited issue whether petitioners have made out a case that their fundamental right to live with human dignity guaranteed by Article 21 of the Constitution of India has been invaded, atleast prima facie, so as to direct for an independent investigation/enquiry so that the perpetrators may not get away scot free if petitioners' case is found true.

12. In part III of the Constitution of India Article 21 enjoys special status. Right to life and Right to liberty are of historical importance. Rise of modern democratic state is attributable to a long drawn battle waged by ordinary people against the sovereign power. The law is now well settled that the State or its functionaries cannot deprive any person of his life which includes right to live with human dignity except in accordance with law. The maximum threat to such fundamental right is perceptible when any kind of protest or agitation is directed against the police force for reasons which are self-evident. Police is licensed to carry arms for protecting the people. This itself creates a situation where the power of arms may be misused under the mistaken belief in the absolutism of the police power or on account of lack of sensitivity to the democratic rights of the people to register peaceful protest, against wrongs, especially that of public functionaries. The submissions on behalf of respondents that nobody can be permitted to paralyse the functioning of police or other State institutions in a name of public protest can not be rejected off hand because it is only a corollary of the right to protest peacefully; proverbially the other side of the coin which corroborates the well accepted principle that rights without duties tend to degenerate into license for misuse of rights. In a given case, the facts may lead to such conclusions. Hence facts and circumstances in such cases need to be scrutinized carefully.

13. In the present case also the relevant facts require to be noticed in order to arrive at a conclusion whether the petitioners' prayers deserve to be allowed or not. The

petitioners are ordinary persons with clean antecedents. The injuries caused to the petitioners in the incident have not been denied as they are supported by medical reports. So far as injuries to some of the police officers are concerned, instead of forming our own opinion, we may only refer to the order dated 22.06.2013 passed by the Vacation Judge (NE)/Additional Sessions Judge contained in Annexure P.11. While granting bail to 11 applicants, in paragraph 6, the learned Judge had noted that the MLCs of five police officials indicate that they have suffered from minor injuries which were in the form of scratches and abrasion only and the FIR does not indicate that the lady police officials were assaulted or any attempt to outrage their modesty was made by the accused persons.

14. Since a claim was made that unlawful acts of the protestors had been recorded through videography which was available with the respondents, learned Additional Solicitor General Sidharth Luthra made arrangements for screening of the video tape for our perusal. The video footage shown to us revealed that none of the protestors were carrying any arms or even brickbats in course of the protest. The initial part of the incident discloses lack of any bitterness and almost a friendly atmosphere. Thereafter, when copy of the FIR was shown from a distance but not made available to any one, the slogans increased and the tone could be perceived by some persons as irritating. Barring some protestors rest were pushed out of the gate of police station without any resistance or any untoward incident. The crowd outside the gate apparently did not disperse. The last part of the video footage fleetingly shows use of lathis by the police men upon the protestors. Thereafter, the recording was stopped and appears to have been resumed after lapse of sometime to show some broken glass panes, brickbats in very limited number and some broken spectacles lying on the ground, a grim reminder of use of force.

15. Learned senior counsel for the petitioners Mr. Shanti Bhushan has relied upon some past i[illegible]e

relating to unfortunate death of a police constable in the course of demonstration against the gang rape to a paramedical student “Damini” in December, 2012, followed by another unfortunate case of a five years’ old victim “Gudiya” which led to protest by members of AAP and in course of the same petitioner no.1 was slapped by an Assistant Commissioner of Police of Delhi force which led to suspension of the said ACP. He also referred to some allegations against the erstwhile Delhi Police commissioner. On the basis of those incidents and allegation it was submitted that Delhi police cannot be relied for fair investigation in a case of present nature involving members of ‘AAP’ and therefore the Court should order for fair investigation by an independent agency.

16. On the other hand, Mr. Luthra submitted that police itself acted fairly and did not submit charge-sheet against any of the accused persons arrested for causing death of constable Subhash Tomar. He pointed out that the concerned ACP who had slapped petitioner No.1 was placed under suspension. According to him the allegations that the erstwhile Delhi Police Commissioner was close to a white collared criminal, has no substance and that matter cannot have any effect upon the investigation of the present incident.

17. In our considered view it is not necessary to examine the effect of earlier incidents for the purpose of deciding the present writ petition. There is no dispute that petitioners have received injuries but according to counter affidavit, these were due to some of the protestors falling down on the vehicles parked along the walls of the compound and there was no lathi charge or any act of beating of the protestors. Such statement in paragraph 5 of the counter affidavit cannot be accepted in view of the last part of the video footage already noted earlier. A glimpse of action taken by the police is available in paragraph 8 of the counter affidavit wherein it is claimed that Police resorted to minimal use of force which was only enough to disperse a large violent crowd and safeguard the police

personnel. No part of the video footage shows the crowd to be very large or indulging in any physical violence. Even if this version in the counter affidavit is accepted in part, one is left to wonder why the petitioners who had injuries on their bodies had to be arrested instead of allowing them to disperse with the crowd which was allegedly large and violent. It is also intriguing as to why the FIR bearing No.251/13 for rioting etc. was registered at 5.35 p.m. after eighteen persons were apprehended at 3.30 p.m. and not before their arrest if they had vandalized the police station and caused damage to the public property.

18. In the light of the aforesaid discussions and the fact that the video footage recorded at the instance of the police does not show acts of rioting or any arms or brickbats in the hands of the protestors and the recording was stopped as soon as police started using lathis upon the protestor, we are left with no option but to hold, at least prima facie, that in the incident in question, peaceful protestors were subjected to beating by lathis etc. by the police force which included policemen from the concerned police station as well as force called from adjoining police station, P.S. Jyoti Nagar and P.S. Bhajanpura. The counter version of the respondents that the petitioners indulged in rioting and damaged public property is neither supported by photographs contained in Annexure R.2 (colly) nor by the video footage shows to this Court. In that view of the matter, the whole incident of 19.06.2013 at Gokul Puri Police Station, District North-East, Delhi requires to be investigated/ enquired by an independent agency or by a Special Investigation Team. Considering the possibility of our arriving at this opinion we had requested learned counsel for the rival parties to provide us proposals containing names of some persons who could be entrusted with conducting investigation in the said incident. On behalf of the petitioners two names have been proposed which are as follows:

1. Sh. I.C.Dwivedi, IPS (RT … r

General of Police, Uttar Pradesh, Address: 9/26, Vishal Khand, Gomati Nagar, Lucknow.

2. Sh. N.Dilip Kumar, IPS (Retired) Special Commissioner Delhi Police also worked as Joint Commissioner of police (Vigilance) Delhi Police Worked in CBI for seven years Address: 16 A, Rajpura Road, Civil Lines, Delhi.

19. On the other hand, on behalf of the respondents only a letter addressed to Sh. Sidharth Luthra, leaned Additional Solicitor General along with copy of an order dated 31.10.2013 issued from the office of Commissioner of Police, Delhi, has been submitted to us to show that since during the course of hearing of this matter this Court had expressed the need for an impartial or fair investigation by some other competent setup, the Commissioner of Police Delhi has approved for formation of a Special Investigation Team headed by Sh. Bhisham Singh DCP/Crime to work under close supervision of Joint Commissioner of Police, Crime, Delhi.

20. So far as investigation of the FIR No. 251/13 is concerned, in our considered view it has rightly been transferred from police station Gokal Puri to a Special Investigation Team. However that can not take care of the petitioners' grievances that they have been subjected to excessive use of force and abuses etc. and that the force used was not at all justified and hence they have been deprived of their fundamental right to a life of dignity. In view of our prima facie findings noted above, we are of the view that the grievances of the petitioners require investigation by an authority having statutory jurisdiction in such matters. If the State had itself suggested names of the persons who could constitute Special Investigation Team for the purpose, the matter would have been different and we could have considered to direct for formation of such a team by the State by selecting persons from the names suggested by the parties. But in the absence of such option, we direct the National Human Rights Commission to enquire into the

complaint of the petitioners regarding violation of their fundamental rights particularly one under Article 21 of the Constitution of India. Such direction is granted in view of Section 12(A) of the Protection of Human Rights Act, 1993. Under that Act the definition of "Human Rights" is large enough to include rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution. In that view of the matter, the writ petition is disposed of with the following directions:-

(1) Investigation of FIR No.251/13, as per order of the Commissioner of Police, Delhi, dated 31.10.2013 shall be carried out by Special Investigation Team and not by the police officials of P.S. Gokul Puri.

(2) The complaint of the petitioners as made before this Court regarding violation of their fundamental right to life and liberty shall be enquired into by the National Human Rights Commission expeditiously. For that purpose the Commission may use its statutory powers including those under Sections 13 and 14 of the Protection of Human Rights Act, 1993.

(3) The Commission shall take further required steps and action as per law after concluding the enquiry/investigation so that persons(s) found guilty may be subjected to required penalty according to law, without undue delay.

21. The writ petition is allowed to the aforesaid extent.

B.B.B. Writ Petition allowed.

E.S.I.C. MEDICAL OFFICER’S ASSOCIATION
v.
E.S.I.C. & ANR.
(Special Leave Petition (Civil) No.35821 of 2013)

NOVEMBER 21, 2013

[K.S. RADHAKRISHNAN AND A.K. SIKRI, JJ.]

Industrial Disputes Act, 1947 – s.2(s) – A medical professional, whether a workman – Held: A medical professional, treating patients and diagnosing diseases cannot be termed as ‘workmen’ within meaning of s.2(s).

Words and Phrases – ‘Occupation’ and ‘Profession’ – Distinction between – Discussed.

The question for consideration in the present petition was whether medical doctors discharging functions of medical officers i.e. treating patients in Employees’ State Insurance Corporation’s dispensaries/hospitals are “workmen” within the meaning of expression contained in Section 2(s) of the Industrial Disputes Act, 1947.

Dismissing the petition, the Court

HELD: A medical professional, treating patients and diagnosing diseases, cannot be held to be a “workmen” within the meaning of Section 2(s) of the Industrial Disputes Act. Doctors’ profession is a noble profession and is mainly dedicated to serve the society, which demands professionalism and accountability. Distinction between occupation and profession is of paramount importance. An occupation is a principal activity related to job, work or calling that earns regular wages for a person and a profession, on the other hand, requires extensive training, study and mastery of the subject,

whether it is teaching students, providing legal advice or treating patients or diagnosing diseases. Persons performing such functions cannot be seen as a workman within the meaning of Section 2(s) of the Act. [Para 11] [913-B-D]

Muir Mills Unit of NTC (UP) Ltd. vs. Swayam Prakash Srivastava **(2007) 1 SCC 491: 2006 (9) Suppl. SCR 1028;** *Heavy Engineering Corporation Ltd. vs. Presiding Officer, Labour Court and Ors.* **(1996) 11 SCC 236: 1996 (8) Suppl. SCR 92;** *A. Sundarambal vs. Govt. of Goa, Daman and Diu* **(1988) 4 SCC 42: 1988 (1) Suppl. SCR 604 – relied on.**

Case Law reference:

1996 (8) Suppl. SCR 92	**relied on**	**Para 8**
2006 (9) Suppl. SCR 1028	**relied on**	**Para 11**
1988 (1) Suppl. SCR 604	**relied on**	**Para 11**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 35821 of 2013.

From the Judgment & Order dated 07.05.2013 of the High Court of Delhi at New Delhi in Writ Petition (C) No. 6760 of 2010.

Anil Kumar (for S.K. Verma) for the Petitioner.

The Judgment of the Court was delivered by

K.S. RADHAKRISHNAN, J. 1. Delay condoned.

2. We are, in this case, concerned with the question whether medical doctors discharging functions of medical officers i.e. treating patients in Employees’ State Insurance Corporation’s dispensaries/hospitals are “workmen” within the meaning of expression contained in Section 2(s) of the Industrial Disputes Act, 1947 (for short “ID Act”).

3. Petitioner is an Association of medical officers employed in the ESCI after the year 1974. The Association raised a claim for ESIC allowance of Rs.200/- per month on the ground that they were performing the same duties as those by doctors who are getting the said allowance and, therefore, could not be discriminated against. The Central Government referred the above dispute on 19.11.1992 for adjudication by the Central Government Industrial Tribunal, New Delhi (CGIT). CGIT in I.D. No.104 of 1992 answered the reference in favour of the Petitioner Association holding that the medical doctors discharging functions of medical officers are "workmen" within the meaning of Section 2(s) of the ID Act. The Tribunal also held that there was no material to show that the said medical doctors were employed in managerial or administrative capacity or in a professional capacity. Consequently, it was held that the officers could be defined as skilled workmen doing job of a skilled nature. Further, it was also observed that engagement of the medical doctors in intellectual activities of treating patients cannot take them out of the definition of the expression "workmen".

4. Aggrieved by the above-mentioned Award, the Corporation approached the Delhi High Court by filing Writ Petition No.6760 of 2010. The learned Single Judge of the Delhi High Court allowed the Writ Petition holding that the Tribunal was in error in holding that medical doctors fell within the expression "workmen" within the meaning of Section 2(s) of the ID Act.

5. Mr. Atul Kumar, learned counsel appearing for the Petitioner, submitted that the High Court was in error in holding that the members of the Petitioner Association are performing any managerial or supervisory functions. Further, it was pointed out that their job is of a skilled nature and hence they are workmen entitled to protection of ID Act. Further, it was also pointed out that non-grant of medical allowance to the medical doctors is discriminatory and violative or Article 14 of the

Constitution of India. Learned counsel also submitted that the High Court has committed error in placing reliance on the judgment of this Court in *Muir Mills Unit of NTC (UP) Ltd. V. Swayam Prakash Srivastava* [(2007) 1 SCC 491] since it was hit by principle of *casus omissus* and there was no discussion in the judgment about the nature of the duties of the medical officers.

6. We notice, after the formation of the ESIC in the year 1956, the Corporation was drawing services of medical doctors from other organizations on deputation and was making payment of deputation allowance at the rate of Rs.200/- per month to such deputationists. The Corporation in the year 1974 set up its own ESIC Medical Centre and under its regulations, the medical doctors recruited in the said medical centre were entitled to the same pay and allowances as admissible to medical doctors in the Central Government Health Services. Petitioner Association consists of medical officers employed by the ESIC after 1974. Members of Association also claimed allowance at the rate of Rs.200/- per month on the ground that they were performing the same duties as those doctors who were getting the said allowance and, therefore, could not be discriminated against. On merits, the claim was opposed by the Corporation stating that ESIC allowance was payable only to deputationists as it was a deputation allowance, whereas members of the Association have been directly recruited in the medical category of the Corporation.

7. We are in agreement with the views of the High Court that the members of the Association being not deputationists are not entitled to such allowance, but we are in this case concerned with a larger question as to whether medical doctors discharging functions in ESIC dispensaries/hospitals are workmen within the meaning of Section 2(s) of the ID Act.

8. We notice, the medical officers appointed in the various dispensaries/hospitals are entrusted with the task of examining and diagnosing patients and prescribi n

and they are basically and mainly engaged in professional and intellectual activities to treat patients. This Court in *Heavy Engineering Corporation Ltd. V. Presiding Officer, Labour Court & Ors.* [(1996) 11 SCC 236] examined the question as to whether General Duty Medical Officers Grade II were performing supervisory functions. In that case, the medical officer was appointed as General Duty Medical Officer Grade II by the Corporation and was posted in the First-Aid post for providing emergency medical services in case of accidents, etc. during the shifts. On termination of the services, an industrial dispute was raised by the medical officer that his services have been terminated in breach of Section 25-F of the Act. The Court observed that the duties of a doctor required that he performs supervisory functions in addition to treating the patients would mean that he had been employed in a supervisory capacity. Paragraph 12 of the judgment has some relevance and is extracted hereinbelow:-

> "12. The aforesaid facts, in our opinion, clearly go to show that Respondent 2 could not be regarded as a workman under Section 2(*s*) of the Act as he was working in a supervisory capacity. While it is no doubt true that Respondent 2, along with the other doctors, used to work in shifts nevertheless during the time when he was in the shift he was the sole person in-charge of the first-aid post. He had, under him male nurse, nursing attendant, sweeper and ambulance driver who would naturally be taking directions and orders from the in-charge of the first-aid post. These persons obviously could not act on their own and had to function in the manner as directed by Respondent 2, whenever he was on duty. They were, in other words, under the control and supervision of the respondent. When a doctor, like the respondent, discharges his duties of attending to the patients and, in addition thereto supervises the work of the persons subordinate to him, the only possible conclusion which can be arrived at is that the respondent cannot be held to be

> regarded as a workman under Section 2(*s*) of the Act."

9. Later, this Court in *Muir Mills* (supra) had occasion to consider whether a legal Assistant falls within the definition of "workman" under the U.P. Industrial Disputes Act, 1947. In that judgment in paras 38 to 40, this Court held as follows :-

> 38. Furthermore, if we draw a distinction between occupation and profession we can see that an *occupation* is a principal activity (job, work or calling) that earns money (regular wage or salary) for a person and a *profession* is an occupation that requires extensive training and the study and mastery of specialised knowledge and usually has a professional association, ethical code and process of certification or licensing. Classically, there were only three professions: ministry, medicine and law. These three professions each hold to a specific code of ethics and members are almost universally required to swear to some form of oath to uphold those ethics, therefore "professing" to a higher standard of accountability. Each of these professions also provides and requires extensive training in the meaning, value and importance of its particular oath in the practise of that profession.
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> 39. A member of a profession is termed a *professional*. However, *professional* is also used for the acceptance of payment for an activity. Also a *profession* can also refer to any activity from which one earns one's living, so in that sense sport is a profession.
>
> 40. Therefore, it is clear that Respondent 1 herein is a professional and never can a professional be termed as a workman under any law.

10. We may, in this respect, also refer to an earlier judgment of this Court in *A. Sundarambal v. Govt. of Goa, Daman & Diu* [(1988) 4 SCC 42], wherein this Court held that a teacher employed by an educational i[illegible]s

education (whether at primary, secondary, graduate or post-graduate level) cannot be called as a "workman" since imparting education which is the main function of a teacher, is in the nature of a noble mission or a noble vocation, which cannot be considered as skilled or unskilled manual work or supervisory, technical or clerical work.

11. We are of the view that a medical professional treating patients and diagnosing diseases cannot be held to be a "workmen" within the meaning of Section 2(s) of the ID Act. Doctors' profession is a noble profession and is mainly dedicated to serve the society, which demands professionalism and accountability. Distinction between occupation and profession is of paramount importance. An occupation is a principal activity related to job, work or calling that earns regular wages for a person and a profession, on the other hand, requires extensive training, study and mastery of the subject, whether it is teaching students, providing legal advice or treating patients or diagnosing diseases. Persons performing such functions cannot be seen as a workman within the meaning of Section 2(s) of the ID Act. We are of the view that the principle laid down by this Court in *A. Sundarambal*'s case (supra) and in *Muir Mills'*s case (supra) squarely applies to such professionals. That being the factual and legal position, we find no reasons to interfere with the judgment of the High Court. The SLP lacks merit and is dismissed accordingly.

K.K.T. SLP dismissed.

SARASWATHY
v.
BABU
(Criminal Appeal No. 1999 of 2013)

NOVEMBER 25, 2013

[SUDHANSU JYOTI MUKHOPADHAYA AND V. GOPALA GOWDA, JJ.]

Protection of Women from Domestic Violence Act, 2005 – ss.2(g) 3, 18, 19, 20 and 22 – Petition under – Order of court directing the husband to allow the wife to reside in the shared household – The order defied by the husband – Whether the act of the husband amounts to 'domestic violence' as defined under the Act – Held: The act of the husband comes squarely within the ambit of s.3 – In view of continued domestic violence by the husband against the wife, High Court made an apparent error in holding that the conduct of the parties prior to coming into force of the Act cannot be taken into consideration – The wife having been harassed, is entitled to protection orders and residence orders alongwith maintenance – In addition, she is also entitled for compensation and damages for injuries, including mental torture and emotional distress caused by the acts of domestic violence by the husband – Husband directed to pay compensation and damages to the extent of Rs.5 lakhs.

Words and Phrases – 'Domestic violence' – Meaning of, in the context of Protection of Women from Domestic Violence Act, 2005.

The appellant-wife of the respondent, filed petition seeking relief u/ss.18, 19, 20 and 22 of the Protection of Women from Domestic Violence Act, 2005. The Court directed the respondent to give her maintenance and also gave residence order in her matrimonial house directing

the police to give her protection in implementing the residence order. The respondent-husband, despite the order of the court, did not allow the appellant to reside in the shared household. In the contempt petition filed by the appellant, the respondent gave wrong address and mislead the High Court.

The High Court, by impugned order held that though the offending acts of the husband could be construed as offences under other enactments, it could not be construed as acts of domestic violence under the 2005 Act, until the Act came into force. Hence the present appeal.

Allowing the appeal, the Court

HELD: 1. Section 2 (g) of Protection of Women from Domestic Violence Act, 2005 states that "domestic violence" has the same meaning as assigned to it in Section 3 of the Act. Section 3 is the definition of domestic violence. Clause (iv) of Section 3 relates to "economic abuse" which includes prohibition or restriction to continued access to resources or facilities which the aggrieved person is entitled to use or enjoy by virtue of the domestic relationship including access to the shared household as evident from clause (c) of Section 3(iv). [Para 12] [927-C-D]

2. In the present case, in view of the fact that even after the order passed by the Subordinate Judge the respondent-husband did not allow the appellant-wife to reside in the shared household matrimonial house, there is a continuance of domestic violence committed by the respondent-husband against the appellant-wife. In view of such continued domestic violence, it is not necessary for the courts below to decide whether the domestic violence is committed prior to the coming into force of the Act and whether such act falls within the definition of the term 'Domestic Violence' as defined under Section 3 of the Act. [Para 13] [927-E-F]

3. The act of the respondent-husband squarely comes within the ambit of Section 3 of the Act which defines "domestic violence" in wide term. The High Court made an apparent error in holding that the conduct of the parties prior to the coming into force of the Act cannot be taken into consideration while passing an order. This is a case where the respondent-husband has not complied with the order and direction passed by the trial court and the appellate court. He also misleads the court by giving wrong statement before the High Court in the contempt petition filed by the appellant-wife. The appellant-wife having been harassed since 2000 is entitled for protection orders and residence orders under Section 18 and 19 of the Act along with the maintenance as allowed by the trial court under Section 20 (d) of the Act. Apart from these reliefs, she is also entitled for compensation and damages for the injuries, including mental torture and emotional distress, caused by the acts of domestic violence committed by the respondent-husband. Therefore, in addition to the reliefs granted by the courts below, the appellant-wife should be compensated by the respondent-husband. Hence, the respondent is directed to pay compensation and damages to the extent of Rs.5,00,000/- in favour of the appellant-wife. [Para 15] [928-C-G]

V.D. Bhanot vs. Savita Bhanot **(2012) 3 SCC 183: 2012 (1) SCR 867 – relied on.**

Case Law Reference:

2012 (1) SCR 867	**relied on**	**Para 14**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1999 of 2013.

From the Judgment & Order dated 13.12.2011 of the High Court of Madras in Crl. R.C. No. 1321 of 2010.

R. Balasubramanian, T. Harish Kumar for the Appellant.

S.D. Dwaraka Nath, Dr. Kailash Chand for the Respondent.

The Judgment of the Court was delivered by

SUDHANSU JYOTI MUKHOPADHAYA, J. 1. Leave granted. This appeal has been preferred by the appellant-wife against the judgment and order dated 13th December, 2011 passed by the High Court of Judicature at Madras. By the impugned judgment, the High Court dismissed the criminal revision case filed by the appellant and thus affirmed the order of First Appellate Court.

2. The pertinent facts of the case are as follows:

The parties to the present dispute are married to each other and the said marriage was solemnized on 17th February, 2000. According to the appellant, she brought 50 sovereign gold ornaments and 1 kg silver articles as stridhan also Rs.10,000/- was given to the respondent. After marriage the appellant lived in her matrimonial house at Padi, Chennai. After four months of the marriage, the respondent-husband and his family demanded more dowry in the form of cash and jewels. The appellant was not able to satisfy the said demand. Therefore, she was thrown out of her matrimonial house by the respondent and her in-laws. Another allegation of the appellant is that after sending out the appellant from her matrimonial house, the respondent-husband intended to marry again. On hearing such rumour, the appellant filed petition under Section 9 of the Hindu Marriage Act, 1955 (hereinafter referred to as, “the HM Act, 1955”) bearing no. H.M.O.P. No. 216 of 2001 before the Principal Subordinate Judge, Chengalpattu, Tamil Nadu for restitution of conjugal rights.

The respondent-husband on the other hand filed H.M.O.P. No. 123 of 2002 under Section 13(1) (ia) and (iv) of the HMA Act, 1955 before the Principal Subordinate Judge, Chengalpattu, Tamil Nadu for dissolution of marriage between the appellant and the respondent .

On 5th April, 2006, the learned Principal Subordinate Judge, Chengalpattu, Tamil Nadu dismissed the petition for dissolution of marriage filed by the respondent-husband and allowed the petition for restitution of conjugal rights filed by the appellant-wife with the condition that the appellant should not insist for setting up of a separate residence by leaving the matrimonial home of the respondent.

In the year 2008, the appellant filed Crl. M.P. No. 2421 of 2008 before learned XIII Metropolitan Magistrate, Egmore, Chennai against the respondent seeking relief under Section 19, 20 and 22 of the Protection of Women from Domestic Violence Act, 2005 (hereinafter referred to as, “the PWD Act, 2005”). The learned XIII Metropolitan Magistrate, Egmore, Chennai partly allowed the same and directed the respondent to give maintenance of Rs.2,000/- per month to the appellant to meet out her medical expenses, food, shelter and clothing expenses. The Magistrate Court’s held that the appellant is in domestic relationship with the respondent and the appellant being the wife of the respondent has a right to reside in the shared household. The officer in charge of the nearest Police Station was directed to give protection to the appellant for implementation of the residence orders and was also directed to assist in the implementation of the protection order.

The respondent-husband being aggrieved preferred Criminal Appeal No. 339 of 2008 before the Sessions Court (Vth Additional Judge) at Chennai.

In the meantime, as per the order passed by the XIII Metropolitan Magistrate, Egmore, Chennai the appellant-wife went to her matrimonial house for stayir t-husband house along with Protection Officer. However, the respondent did not obey the order of the Court and refused to allow the appellant-wife to enter the house and locked the door from outside and went out.

On 22nd December, 2008, the appellant filed a complaint against the respondent for not obeying the order of the learned XIII Metropolitan Magistrate, Egmore, Chennai and the same was registered in Ambatur T3 Korattur Police Station as FIR No. 947 of 2008 under Section 31,32 and 74 of the PWD Act, 2005. The case was committed to the learned XIII Metropolitan Magistrate, Egmore, Chennai and registered as Criminal Miscellaneous Petition No. 636 of 2011.

In the meantime, the Criminal Appeal No. 339 of 2008 filed by the respondent-husband was partly allowed by the Sessions Court (Vth Addl. Judge) at Chennai on 21st October, 2010. Sessions Courts by the said order set aside the order prohibiting the respondent-husband from committing acts of domestic violence as against the appellant-wife by not allowing her to live in the shared household and the order directing the respondent to reside in the house owned by respondent's mother and upheld the order granting maintenance of Rs.2,000/- per month in favour of the appellant-wife by the respondent-husband.

3. Aggrieved by the aforesaid order, the appellant-wife filed Crl. R.C. No. 1321 of 2010 before the High Court. A criminal miscellaneous petition no.1 of 2010 was also filed in the said revision application. On 23rd December, 2010, the High Court granted an interim stay to the above order passed by the learned Sessions Court (Vth Addl. Judge) at Chennai.

4. In the meantime, while the matter was pending before the High Court, the learned XIII Metropolitan Magistrate, Egmore, Chennai passed an order on 24th February, 2011 in Crl. Misc. Petition No. 636 of 2011 (arising out of FIR No. 947 of 2008) and directed the SHO, Ambatur T3 Korattur Police

Station to break the door of the respondent's house in the presence of the Revenue Inspector and make accommodation for the appellant with further direction to the SHO to inquire about the belongings in the respondent's house in presence of the family members of the respondent with further direction to submit the report to the respondent as well as the Protection Officer. The respondent-husband thereafter filed a petition for vacating the order of stay dated 23rd December, 2010 and vide order dated 9th March, 2011 the High Court vacated the order of stay and made it clear that appellant-wife can go and reside with her husband in his rental residence at Guduvancherry**.** As the order aforesaid was not complied with by the respondent-husband the appellant-wife filed Contempt Petition No. 958 of 2011 against the respondent-husband for wantonly disobeying the order dated 9th March, 2011 passed by the High Court.

5. The High Court closed the contempt petition vide order dated 21st July, 2011 with following observation:

> *"In view of the categorical submission made by the Ld. Counsel for the respondent as well as the statement made by the respondent herein by appearing before this court and stating that the respondent undertakes not to prevent the contempt petitioner from entering inside the premises at Door No. 80, Karpagambal Nagar, Nadivaram, Guduvancherry, Chennai and the contempt petitioner also agreed to occupy and stay in the above said premises from 01.08.2011, the contempt petition is hereby closed."*

6. Thereafter the appellant made representation before Sub Inspector of Police, Guduvancherry and stated that the respondent-husband has given false address and in order to comply with the court's order, the appellant went to the address and on enquiry came to know that the address was a bogus one. The appellant thereby submitted a c... d the police to enquire from the responde... al

facts so as to ensure that the court's order is executed in its letter and spirit.

7. When the matter was pending before the Police, the High Court decided the criminal miscellaneous case filed by the appellant and held that although the offending acts of the respondent could be construed as offences under other enactments it could not be construed as acts of domestic violence under the PWD Act, 2005 until the Act came into force. The High Court dismissed the revisional application.

8. From the bare perusal of the impugned judgment passed by the High Court, we find that the High Court framed the following question:

> *"**4.** The primary question that arises for consideration is whether acts committed prior to the coming into force of the Protection of Women from Domestic Violence Act, 2005 and which fall within the definition of the term 'Domestic Violence' as informed in the Act could form the basis of an action."*

9. The High Court after taking into consideration the stand taken by the parties held as follows:

> "***5.** This court would first concern itself with whether acts which now constitute domestic violence but committed prior to the coming into force of the Act would form a basis of an action thereunder. With due respect to the authorities above cited, this court would inform that the fundamental issue stands unaddressed. The Act cam into force on 2005. It cannot be disputed that several wrongful actions which might have amounted to offences such as cruelty and demand for dowry cannot have taken the description of "Domestic violence" till such time the act came into force. In other words the offending acts could have been construed as offences under other enactments but could not have been construed as acts of 'Domestic Violence' until the act came into force. Therefore, what was not 'Domestic violence' as defined in the Act till the Act came into force could not have formed the basis of an action. Ignorance of law is no excuse but the application of this maxim on any date prior to the coming into force of the Act could only have imputed knowledge of offence as subsisted prior to coming into force of the Act. It is true that it is only violation of orders passed under the Act which are made punishable. But those very orders could be passed only in the face of acts of domestic violence. What constituted domestic violence was not known until the passage of the act and could not have formed the basis of a complaint of commission of 'Domestic violence'."*

10. From the judgment passed by the Trial Court (XIII Metropolitan Magistrate, Egmore, Chennai dated 5th December, 2008) we find that the appellant filed petition against her husband Babu seeking relief under Sections 18, 19, 20 and 22 under the PWD Act, 2005. Sections 18, 19, 20 and 22 read as follows:

> ***"18. Protection orders.-****The Magistrate may, after giving the aggrieved person and the respondent an opportunity of being heard and on being prima facie satisfied that domestic violence has taken place or is likely to take place, pass a protection order in favour of the aggrieved person and prohibit the respondent from-*
>
> *(a) committing any act of domestic violence;*
>
> *(b) aiding or abetting in the commission of acts of domestic violence;*
>
> *(c) entering the place of employment of the aggrieved person or, if the person aggrieved is a child, its school or any other place frequented by the aggrieved person;*
>
> *(d) attempting to communicate in* *r,*

with the aggrieved person, including personal, oral or written or electronic or telephonic contact;

(e) alienating any assets, operating bank lockers or bank accounts used or held or enjoyed by both the parties, jointly by the aggrieved person and the respondent or singly by the respondent, including her stridhan or any other property held either jointly by the parties or separately by them without the leave of the Magistrate;

(f) causing violence to the dependants, other relatives or any person who give the aggrieved person assistance from domestic violence;

(g) committing any other act as specified in the protection order.

19. Residence orders.-(*1) While disposing of an application under sub-section (1) of section 12, the Magistrate may, on being satisfied that domestic violence has taken place, pass a residence order –*

(a) restraining the respondent from dispossessing or in any other manner disturbing the possession of the aggrieved person from the shared household, whether or not the respondent has a legal or equitable interest in the shared household;

(b) directing the respondent to remove himself from the shared household;

(c) restraining the respondent or any of his relatives from entering any portion of the shared household in which the aggrieved person resides;

(d) restraining the respondent from alienating or disposing off the shared household or encumbering the same;

(e) restraining the respondent from renouncing his

rights in the shared household except with the leave of the Magistrate; or

(f) directing the respondent to secure same level of alternate accommodation for the aggrieved person as enjoyed by her in the shared household or to pay rent for the same, if the circumstances so require:

Provided that no order under clause (b) shall be passed against any person who is a woman.

(2) The Magistrate may impose any additional conditions or pass any other direction which he may deem reasonably necessary to protect or to provide for the safety of the aggrieved person or any child of such aggrieved person.

(3) The Magistrate may require from the respondent to execute a bond, with or without sureties, for preventing the commission of domestic violence.

(4) An order under sub-section (3) shall be deemed to be an order under Chapter VIII of the Code of Criminal Procedure, 1973 (2 of 1974) and shall be dealt with accordingly.

(5) While passing an order under sub-section (1), sub-section (2) or sub-section (3), the court may also pass an order directing the officer in charge of the nearest police station to give protection to the aggrieved person or to assist her or the person making an application on her behalf in the implementation of the order.

(6) While making an order under sub-section (1), the Magistrate may impose on the respondent obligations relating to the discharge of rent and other payments, having regard to the financial needs and resources of the parties.

(7) The Magistrate may direct the officer in-charge of the police station in whose jurisdiction the Magistrate has been approached to assist in the implementation of the protection order.

(8) The Magistrate may direct the respondent to return to the possession of the aggrieved person her stridhan or any other property or valuable security to which she is entitled to.

20. Monetary reliefs.*-(1) While disposing of an application under sub-section (1) of section 12, the Magistrate may direct the respondent to pay monetary relief to meet the expenses incurred and losses suffered by the aggrieved person and any child of the aggrieved person as a result of the domestic violence and such relief may include, but not limited to,-*

(a) the loss of earnings;

(b) the medical expenses;

(c) the loss caused due to the destruction, damage or removal of any property from the control of the aggrieved person; and

(d) the maintenance for the aggrieved person as well as her children, if any, including an order under or in addition to an order of maintenance under section 125 of the Code of Criminal Procedure, 1973(2 of 1974) or any other law for the time being in force.

(2) The monetary relief granted under this section shall be adequate, fair and reasonable and consistent with the standard of living to which the aggrieved person is accustomed.

(3) The Magistrate shall have the power to order an appropriate lump sum payment or monthly payments of

maintenance, as the nature and circumstances of the case may require.

(4) The Magistrate shall send a copy of the order for monetary relief made under sub-section (1) to the parties to the application and to the in-charge of the police station within the local limits of whose jurisdiction the respondent resides.

(5) The respondent shall pay the monetary relief granted to the aggrieved person within the period specified in the order under sub-section (1).

(6) Upon the failure on the part of the respondent to make payment in terms of the order under sub-section (1), the Magistrate may direct the employer or a debtor of the respondent, to directly pay to the aggrieved person or to deposit with the court a portion of the wages or salaries or debt due to or accrued to the credit of the respondent, which amount may be adjusted towards the monetary relief payable by the respondent.

22. Compensation orders.*-In addition to other reliefs as may be granted under this Act, the Magistrate may on an application being made by the aggrieved person, pass an order directing the respondent to pay compensation and damages for the injuries, including mental torture and emotional distress, caused by the acts of domestic violence committed by that respondent."*

11. The Trial Court having noticed the provisions of PWD Act, 2005 and the fact that the appellant-wife was prevented by the respondent-husband to enter the matrimonial house even after the order passed by the Subordinate Judge, granted protection under Section 18 with further direction to the respondent-husband under Section 19 to allow the appellant-wife to enter in the shared household and not to disturb the possession of the appellant-wife and t of

Rs.2,000/- per month to meet her medical expenses, food and other expenses. However, no compensation or damages was granted in favour of the appellant-wife.

Notices were issued on the respondent but inspite of service, no affidavit has been filed by the respondent denying the averments made in the petition.

12. Section 2 (g) of PWD Act, 2005 states that "domestic violence" has the same meaning as assigned to it in Section 3 of PWD Act, 2005. Section 3 is the definition of domestic violence. Clause (iv) of Section 3 relates to "economic abuse" which includes prohibition or restriction to continued access to resources or facilities which the aggrieved person is entitled to use or enjoy by virtue of the domestic relationship including access to the shared household as evident from clause (c) of Section 3(iv).

13. In the present case, in view of the fact that even after the order passed by the Subordinate Judge the respondent-husband has not allowed the appellant-wife to reside in the shared household matrimonial house, we hold that there is a continuance of domestic violence committed by the respondent-husband against the appellant-wife. In view of the such continued domestic violence, it is not necessary for the courts below to decide whether the domestic violence is committed prior to the coming into force of the Protection of Women from Domestic Violence Act, 2005 and whether such act falls within the definition of the term 'Domestic Violence' as defined under Section 3 of the PWD Act, 2005.

14. The other issue that whether the conduct of the parties even prior to the commencement of the PWD Act, 2005 could be taken into consideration while passing an order under Sections 18, 19 and 20 fell for consideration before this Court in *V.D. Bhanot v. Savita Bhanot* (2012) 3 SCC 183. In the said case, this Court held as follows:

> "**12.** We agree with the view expressed by the High Court that in looking into a complaint under Section 12 of the PWD Act, 2005, the conduct of the parties even prior to the coming into force of the PWD Act, could be taken into consideration while passing an order under Section 18, 19 and 20 thereof. In our view, the Delhi High Court has also rightly held that even if a wife, who had shared a household in the past, but was no longer doing so when the Act came into force, would still be entitled to the protection of the PWD Act, 2005,"

15. We are of the view that the act of the respondent-husband squarely comes within the ambit of Section 3 of the PWD Act, 2005, which defines "domestic violence" in wide term. The High Court made an apparent error in holding that the conduct of the parties prior to the coming into force PWD Act, 2005 cannot be taken into consideration while passing an order. This is a case where the respondent-husband has not complied with the order and direction passed by the Trial Court and the Appellate Court. He also misleads the Court by giving wrong statement before the High Court in the contempt petition filed by the appellant-wife. The appellant-wife having being harassed since 2000 is entitled for protection orders and residence orders under Section 18 and 19 of the PWD, Act, 2005 along with the maintenance as allowed by the Trial Court under Section 20 (d) of the PWD, Act, 2005. Apart from these reliefs, she is also entitled for compensation and damages for the injuries, including mental torture and emotional distress, caused by the acts of domestic violence committed by the respondent-husband. Therefore, in addition to the reliefs granted by the courts below, we are of the view that the appellant-wife should be compensated by the respondent-husband. Hence, the respondent is hereby directed to pay compensation and damages to the extent of Rs.5,00,000/- in favour of the appellant-wife.

16. The order passed by the High

A a direction to the respondent-husband to comply with the orders and directions passed by the courts below with regard to residence and maintenance within three months. The respondent-husband is further directed to pay a sum of Rs.5,00,000/- in favour of the appellant-wife within six months
B from the date of this order. The appeal is allowed with aforesaid observations and directions. However, there shall be no separate order as to costs.

K.K.T. Appeal allowed.

A STATE OF GUJARAT
v.
GIRISH RADHAKRISHNAN VARDE
(Criminal Appeal No. 1996/2013)

B NOVEMBER 25, 2013

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

Code of Criminal Procedure, 1973 – Chapters XII, XIV and XV; ss.154 and 190 –Case lodged by way of complaint
C *before the Magistrate [complaint case u/s.190 CrPC] and case registered on basis of FIR u/s.154 CrPC before the police – Distinction between – High Court upheld order passed by Addl. District & Sessions Judge, who had set aside the order of Magistrate whereby he had permitted the*
D *complainant/ informant to add additional Sections of IPC into the charge-sheet submitted after police investigation on a FIR registered u/s.154 CrPC – Propriety – Held: The Magistrate permitted addition of sections after submission of charge-sheet missing out that the instant matter did not arise out of*
E *a complaint case lodged before the Magistrate u/s.190 CrPC but arose out of a police report/FIR in a Police Station based on FIR registered u/s.154 CrPC – However, the Additional District & Sessions Judge and the High Court ought to have specified the correct course of action to be adopted by the*
F *Magistrate and the complainant/ prosecution party, failure of which got the matter enmeshed into this litigation impeding the trial – The fall out of the order of the High Court is that the prosecution represented by the appellant-State of Gujarat might be rendered remedy less – Although, the High Court*
G *may be correct in observing that the Trial Court was not precluded from modifying the charges by including or excluding the sections at the appropriate stage during trial, it was duty bound in the interest of justice and fairplay to specify in clear terms that the Trial Court would permit and consider*

H

the plea of addition of sections at the stage of framing of charge u/s.211 CrPC since the matter emerged out of a police case and not a complaint case before the Magistrate in which event the Magistrate could exercise greater judicial discretion – Liberty granted by Supreme Court to appellant-State to raise all questions relating to additions of the Sections on the basis of the FIR and material collected during investigation at the time of framing of charges by the Trial Court.

The High Court, by the impugned judgment, upheld the order passed by the Addl. District & Sessions Judge, who had set aside the order of the Chief Judicial Magistrate by which he had permitted the complainant to add Sections 364, 394 and 398 of IPC into the chargesheet which was submitted after police investigation.

The principal question which arose for determination in the instant appeal was whether the Magistrate could be permitted to allow the complainant/ informant to add additional sections of the IPC into the chargesheet after the same was submitted by the police on completion of investigation of the police case based on a FIR registered under Section 154 Cr.P.C.

Disposing of the appeal, the Court

HELD: 1. In the instant case, the entire dispute revolves around the procedural wrangle and the correct course to be adopted by the trial court while taking cognizance but it appears that the distinction between a case lodged by way of a complaint before the magistrate commonly referred to as complaint case under Section 190 of the Cr.P.C. and a case registered on the basis of a first information report under Section 154 of the Cr.P.C. before the police, seems to have been missed out, meaning thereby that the distinction between the procedure prescribed under Chapter XII of the Cr.P.C. to

be adopted in a case based on police report and the procedure prescribed under Chapter XIV and Chapter XV for cases based on a complaint case lodged before the magistrate has clearly been overlooked or lost sight of. [Para 11] [940-B-E]

2. The scheme underlying Cr.P.C. clearly reveals that anyone who wants to give information of an offence may either approach the Magistrate or the officer in charge of a Police Station. If the offence complained of is a non-cognizable one, the Police Officer can either direct the complainant to approach the Magistrate or he may obtain permission of the Magistrate and investigate the offence. Similarly anyone can approach the Magistrate with a complaint and even if the offence disclosed is a serious one, the Magistrate is competent to take cognizance of the offence and initiate proceedings. It is open to the Magistrate but not obligatory upon him to direct investigation by police. Thus two agencies have been set up for taking offences to the court. [Para 11] [941-C-E]

3. The Cr.P.C. has clearly engrafted the two channels delineating the powers of the magistrate to conduct an enquiry in a complaint case and police investigation based on the basis of a case registered at a police station where the investigating authorities of the police conducts investigation under Chapter XII and there is absolutely no ambiguity in regard to these procedures. [Para 15] [943-G-H]

4. In spite of this unambiguous course of action to be adopted in a case based on police report under Chapter XII and a magisterial complaint under Chapter XIV and XV, when it comes to application of the provisions of the Cr.P.C. in a given case, the affected parties appear to be bogged down often into a confused state of affairs as it has happened in the instant matter since the magisterial powers which i[illegible] e

based on a complaint before the magistrate and the police powers based on a police report/FIR has been allowed to overlap and the two separate course of actions are sought to be clubbed which is not the correct procedure as it is not in consonance with the provisions of the Cr.P.C. If a case is registered under Section 154 Cr.P.C. by the police based on the FIR and the chargesheet is submitted after investigation, the correct stage as to which sections would apply on the basis of the FIR and the material collected during investigation culminating into the chargesheet, would be determined only at the time of framing of charge before the appropriate trial court. In the alternative, if the case arises out of a complaint lodged before the Magistrate, then the procedure laid down under Sections 190 and 200 of the Cr. P.C. clearly shall have to be followed. [Para 16] [944-A-E]

5. Since the instant case is based on the FIR lodged before the police, the correct stage for addition or subtraction of the Sections will have to be determined at the time of framing of charge. But the High Court in the impugned judgment and order has not assigned reasons with accuracy and clarity for doing so and has made a casual observation by recording that the Trial Court at the appropriate stage will have the power to determine as to which provision is to be applied before the matter is finally sent for trial. The fall out of the Order of the High Court is that the prosecution represented by the appellant - State of Gujarat might be rendered remedy less as setting aside of the order of the Magistrate is likely to give rise to a situation where the prosecution would be left with no remedy for rectification or appreciation of the plea as to whether inclusion or exclusion of additional charges could be permitted. In fact, while upholding the order of the Additional District & Sessions Judge, the High Court has further overlooked the fact that the Additional District

& Sessions Judge before whom revision was filed against the order of the Chief Judicial Magistrate, could have allowed the revision on the ground of erroneous exercise of jurisdiction by the Chief Judicial Magistrate who permitted to add three more Sections into the chargesheet. But the Additional District & Sessions Judge instead of doing so has straightway quashed the order passed by the Magistrate instead of confining itself to consideration of the question regarding error of jurisdiction and laying down the correct course to be adopted by the magistrate. In fact, the correct course of action should have been laid down by the High Court as also the Additional District & Sessions Judge by permitting the appellant – State of Gujarat to raise the question of addition of charges at the time of framing of charge under Section 228 of the Cr. P.C. and should not have passed a blanket order setting aside the order of the Magistrate without laying down the correct course of action to be adopted by the affected parties with the result that three orders came to be passed by the Chief Judicial Magistrate, Additional District & Sessions Judge and the Single Judge of the High Court, yet it could not resolve the controversy by highlighting the appropriate course of action to be adopted by the prosecution-State of Gujarat as also the magistrate which permitted addition of sections after submission of chargesheet missing out that the matter did not arise out of a complaint case lodged before the magistrate but a case which arose out of a police report/FIR in a Police Station. [Para 17] [944-F-H; 945-A-G]

6. Although this Court does not approve of the order of the Chief Judicial magistrate who permitted addition of three Sections into the chargesheet after the chargesheet was submitted, the Additional District & Sessions Judge and the High Court ought to have specified the correct course of acti y

A **the magistrate and the complainant/prosecution party, failure of which got the matter enmeshed into this litigation impeding the trial. [Para 18] [945-G-H; 946-A-B]**

7. The order of the High Court is clarified to the extent that the appellant State of Gujarat shall be at liberty to
B **raise all questions relating to additions of the Sections on the basis of the FIR and material collected during investigation at the time of framing of charges by the Trial Court since the matter arises out of a police case based on the FIR registered under Section 154 of Cr. P.C. and**
C **not a complaint case lodged before the Magistrate under Section 190 of the Cr. P.C. Thus, the High Court although may be correct in observing in the impugned order that the Trial Court was not precluded from modifying the charges by including or excluding the sections at the**
D **appropriate stage during trial, it was duty bound in the interest of justice and fairplay to specify in clear terms that the Trial Court would permit and consider the plea of addition of sections at the stage of framing of charge under Section 211 of Cr. P.C. since the matter emerged**
E **out of a police case and not a complaint case before the Magistrate in which event the Magistrate could exercise greater judicial discretion. [Para 19] [946-B-E]**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1996 of 2013.

F

From the Judgment & Order dated 08.04.2011 of the High Court of Gujarat at Ahmedabad in Special Criminal Appeal No. 2477 of 2010.

Shamik Sanjanwala, Hemantika Wahi, Jesal for the
G Appellant.

Doongar Singh, Rishabh Sancheti, T. Mahipal for the Respodent.

The Judgment of the Court was delivered by

H **GYAN SUDHA MISRA, J.** 1. Leave granted.

A 2. This appeal by special leave which was heard at the admission stage itself, is directed against the judgment and order dated 8.4.2011 passed by the High Court of Gujarat at Ahmedabad in Special Criminal Application No.2477/2010 whereby the learned single Judge was pleased to dismiss the
B application filed by the appellant-State of Gujarat and thus upheld the order passed by the learned Addl. District & Sessions Judge, Deesa who had set aside the order of the Chief Judicial Magistrate by which he had permitted the complainant to add Sections 364, 394 and 398 of the Indian
C Penal Code ('IPC' for short) into the chargesheet which was submitted after police investigation.

3. The principal question which arises for determination in the instant appeal is whether the learned magistrate by virtue of the powers conferred upon him under Chapter XV of the
D Code of Criminal Procedure 1973 (for short 'Cr.P.C.') under the Heading of "Complaints to Magistrate" can be permitted to allow the complainant/ informant to add additional sections of the IPC into the chargesheet after the same was submitted by the police on completion of investigation of the police case
E based on a first information report registered under Section 154 Cr.P.C.

4. In order to appreciate and determine the controversy, it may be relevant to relate the factual background of the matter which disclose that on 27.3.2009 a first information report
F came to be registered with Deesa City Police Station being I. Cr.59/09 for the offences punishable under Sections 365, 387, 511, 386, 34, 120-B and 506(2) of the IPC and under Section 25 (1) (A) of the Arms Act, 1959. The FIR disclosed that the informant/complainant-Deepakkumar Dhirajlal Thakkar resident
G of Deesa Taluka was sitting at the temple of Sai Baba against whom a conspiracy was hatched by the accused No.1/ respondent along with other accused persons as a result of which the respondent along with accused persons came towards the complainant in one Alto Car bearing registration
H No. GJ-1 - HP-1 and rushed towards ... h

countrymade pistol/revolver. On reaching there, the respondent pointed the pistol towards the complainant and demanded money from him. Before the victim-complainant could understand anything with respect to the demand made or could have realised the nature of the situation, the respondent – accused along with the other accused persons caught hold of the complainant and tried to kidnap him. In an instant reaction to this well-planned and deliberated conspiracy hatched by the respondent for robbing and kidnapping the complainant, the complainant raised an alarm as a consequence of which the people standing nearby immediately rushed to the spot of crime. Looking at the assembly of people, the accused persons immediately sat in the car and fled from the scene of occurrence. This was not the first time when such offence was committed by the respondent against the complainant but on a prior occasion also, the respondent had extorted Rs.50,000/- from the complainant by putting the complainant under fear of death. However, the FIR which was registered included sections referred to hereinbefore but failed to include Sections 364, 394 and 398 of the IPC which should have been included as per the prosecution.

5. After the police investigation was complete on the basis of the FIR registered and a chargesheet was submitted by the police before the learned Magistrate, Deesa which included Sections 365, 511, 387, 386, 34, 120-B and 506 (2) as also under Section 25(1) (A) of the Arms Act, the complainant noticed that despite the fact that the respondent-accused robbed Rs.50,000/- from the complainant on one previous occasion and this time again attempted to rob and kidnap the complainant, the offences punishable under Section 364, 394 and 398 of IPC were not included in the chargesheet which was filed against respondent and other accused persons. In order to rectify the said error the complainant submitted an application before the learned Magistrate, Deesa for adding other Sections 364, 394 and 398 of the I.P.C. who after hearing the parties was pleased to allow the application bearing

No.1754/2009 and permitted further additions of Sections 364, 394 and 398 of IPC into the chargesheet.

6. The respondent-accused feeling aggrieved and dissatisfied with the aforesaid order permitting inclusion and addition of sections into the chargesheet, preferred criminal revision before the Additional District & Sessions Judge, Deesa who was pleased to quash and set aside the order dated 7.8.2010 passed by the learned IIIrd Addl. Chief Judicial Magistrate, Deesa and thus allowed the civil revision by order dated 23.9.2010.

7. Since the State of Gujarat was prosecuting the matter, it felt aggrieved of the order passed by the Additional District & Sessions Judge who was pleased to quash the order of the CJM permitting addition of the sections to the chargesheet and hence filed a Special Criminal Application No. 2477/2010 before the High Court of Gujarat.

8. The High Court of Gujarat vide its impugned judgment and order was pleased to uphold the order dated 23.9.2010 passed by the Additional District & Sessions Judge, Deesa which according to the appellant is illegal and perverse as the learned Additional District & Sessions Judge did not assign any cogent and convincing reason while setting aside the order of the Chief Judicial Magistrate who had permitted the addition of three sections of the IPC into the chargesheet before committing the matter for trial.

9. The appellant-State of Gujarat while assailing the judgment and order of the High Court had submitted that the magistrates have been conferred with wide powers to take cognizance of an offence not only when he receives information about the commission of offence from a third person but also where he has knowledge or even suspicion that the offence has been committed. Elaborating this submission, it was further contended that there is no embargo on the powers of the magistrate to entertain a complaint en[illegible]V

of the Cr.P.C. and when on receiving complaint, the magistrate applies his mind for the purpose of proceeding under Section 200 and the succeeding sections in Chapter XV of the Cr.P.C., the magistrate is said to have taken cognizance of the offence within the meaning of Section 190 of the Cr.P.C. It was still further added that the magistrate can even take cognizance on information received by a 3rd party and thus there are no fetter or embargo on the powers of the magistrate when he thinks it proper to include more sections on the basis of the complaint lodged for conducting the trial of the accused and it is open to the magistrate to take cognizance of the offence under Section 190 (1) (c) on the ground that after having due regard to the final report and the police records placed before him if he has reason to suspect that an offence has been committed, it is open to the magistrate to take cognizance of the offence under Section 190 (1) (c). Therefore, if the magistrate found that there were prima facie material against the respondent/accused for the other offences also under Sections 364, 394 and 398 of the IPC, the same were rightly added by the learned magistrate after taking conscious notice of the materials available on record for permitting those sections to be added into the chargesheet.

10. The counsel for the respondent however negatived the contentions and relied upon the reasonings assigned by the High Court which was pleased to uphold the order of the Additional District & Sessions Judge which had set aside the order of the III Addl. Chief Judicial Magistrate, Deesa who had permitted the three sections to be included which were not included at the time of the filing of the chargesheet. The learned single Judge of the High Court however approved the setting aside of the order of the magistrate permitting additional sections into the chargesheet as it took the view that if the trial Judge noticed that some of the sections of the IPC were not referred to in the chargesheet and during trial, the trial court comes to the conclusion that any other offence under the provisions of the IPC is made out, then the trial court is not

precluded and has all the powers to pass appropriate order for adding the sections. Therefore, the trial court had committed a grave error in allowing the application of the complainant by permitting the additions of the three sections of the IPC into the chargesheet after the same was submitted.

11. While analysing the controversy raised in this appeal, it is clearly obvious that the entire dispute revolves around the procedural wrangle and the correct course to be adopted by the trial court while taking cognizance but in the entire process it appears that the distinction between a case lodged by way of a complaint before the magistrate commonly referred to as complaint case under Section 190 of the Cr.P.C. and a case registered on the basis of a first information report under Section 154 of the Cr.P.C. before the police, seems to have been missed out, meaning thereby that the distinction between the procedure prescribed under Chapter XII of the Cr.P.C. to be adopted in a case based on police report and the procedure prescribed under Chapter XIV and Chapter XV for cases based on a complaint case lodged before the magistrate has clearly been overlooked or lost sight of. It may be relevant to record at this stage that the term 'complaint' has been defined in the Cr.P.C. and it means the allegations made orally or in writing to a magistrate, with a view to taking action under the Code due to the fact that some person, whether known or unknown, has committed an offence but does not include a police report lodged under Section 154 Cr.P.C. Section 190(1) of the Cr.P.C. contains the provision for cognizance of offences by the Magistrates and it provides three ways by which such cognizance can be taken which are reproduced hereunder:-

(a) Upon receiving a complaint of facts which constitute such offence;

(b) upon a police report in writing of such facts—that is, facts constituting the offence—made by any police officer;

(c) upon information received from any person other than a police officer or upon the Magistrate's own knowledge or suspicion that such offence has been committed.

An examination of these provisions makes it clear that when a Magistrate takes cognizance of an offence upon receiving a complaint of facts which constitute such offence, a case is instituted in the Magistrate's Court and such a case is one instituted on a complaint. Again, when a Magistrate takes cognizance of any offence upon a report in writing of such. facts made by any police officer it is a case instituted in the Magistrate's court on a police report. The scheme underlying Cr.P.C. clearly reveals that anyone who wants to give information of an offence may either approach the Magistrate or the officer in charge of a Police Station. If the offence complained of is a non-cognizable one, the Police Officer can either direct the complainant to approach the Magistrate or he may obtain permission of the Magistrate and investigate the offence. Similarly anyone can approach the Magistrate with a complaint and even if the offence disclosed is a serious one, the Magistrate is competent to take cognizance of the offence and initiate proceedings. It is open to the Magistrate but not obligatory upon him to direct investigation by police. Thus two agencies have been set up for taking offences to the court.

12. But the instant matter arises out of a case which is based on a police report as a first information report had been lodged before the police at Deesa Police Station under Section 154 of the Cr.P.C. and, therefore, the investigation was conducted by the police authorities in terms of procedure prescribed under Chapter XII of the Cr.P.C. and thereafter chargesheet was submitted. At this stage, the Chief Judicial Magistrate after submission of the chargesheet appears to have entertained an application of the complainant for addition of three other sections into the chargesheet, completely missing that if it were a complaint case lodged by the complainant

before the magistrate under Section 190 (a) of the Cr.P.C., obviously the magistrate had full authority and jurisdiction to conduct enquiry into the matter and if at any stage of the enquiry, the magistrate thought it appropriate that other additional sections also were fit to be included, the magistrate obviously would not be precluded from adding them after which the process of cognizance would be taken by the magistrate and then the matter would be committed for trial before the appropriate court.

13. But if a case is registered by the police based on the FIR registered at the Police Station under Section 154 Cr.P.C. and not by way of a complaint under Section 190 (a) of the Cr.P.C. before the magistrate, obviously the magisterial enquiry cannot be held in regard to the FIR which had been registered as it is the investigating agency of the police which alone is legally entitled to conduct the investigation and, thereafter, submit the chargesheet unless of course a complaint before the magistrate is also lodged where the procedure prescribed for complaint cases would be applicable. In a police case, however after submission of the chargesheet, the matter goes to the magistrate for forming an opinion as to whether it is a fit case for taking cognizance and committing the matter for trial in a case which is lodged before the police by way of FIR and the magistrate cannot exclude or include any section into the chargesheet after investigation has been completed and chargesheet has been submitted by the police.

14. The question, therefore, emerges as to whether the complainant/informant/prosecution would be precluded from seeking a remedy if the investigating authorities have failed in their duty by not including all the sections of IPC on which offence can be held to have been made out in spite of the facts disclosed in the FIR. The answer obviously has to be in the negative as the prosecution cannot be allowed to suffer prejudice by ignoring exclusion of the sections which constitute the offence if the investigating autho n whatsoever have failed to include al e

chargesheet based on the FIR on which investigation had been conducted. But then a further question arises as to whether this lacunae can be allowed to be filled in by the magistrate before whom the matter comes up for taking cognizance after submission of the chargesheet and as already stated, the magistrate in a case which is based on a police report cannot add or substract sections at the time of taking cognizance as the same would be permissible by the trial court only at the time of framing of charge under section 216, 218 or under section 228 of the Cr.P.C. as the case may be which means that after submission of the chargesheet it will be open for the prosecution to contend before the appropriate trial court at the stage of framing of charge to establish that on the given state of facts the appropriate sections which according to the prosecution should be framed can be allowed to be framed. Simultaneously, the accused also has the liberty at this stage to submit whether the charge under a particular provision should be framed or not and this is the appropriate forum in a case based on police report to determine whether the charge can be framed and a particular section can be added or removed depending upon the material collected during investigation as also the facts disclosed in the FIR and the chargesheet.

15. In the alternative, if a case is based on a complaint lodged before the magistrate under Section 190 or 202 Cr.P.C., the magistrate has been conferred with full authority and jurisdiction to conduct an enquiry into the complaint and thereafter arrive at a conclusion whether cognizance is fit to be taken on the basis of the sections mentioned in the complaint or further sections were to be added or substracted. The Cr.P.C. has clearly engrafted the two channels delineating the powers of the magistrate to conduct an enquiry in a complaint case and police investigation based on the basis of a case registered at a police station where the investigating authorities of the police conducts investigation under Chapter XII and there is absolutely no ambiguity in regard to these procedures.

16. In spite of this unambiguous course of action to be adopted in a case based on police report under Chapter XII and a magisterial complaint under Chapter XIV and XV, when it comes to application of the provisions of the Cr.P.C. in a given case, the affected parties appear to be bogged down often into a confused state of affairs as it has happened in the instant matter since the magisterial powers which is to deal with a case based on a complaint before the magistrate and the police powers based on a police report/FIR has been allowed to overlap and the two separate course of actions are sought to be clubbed which is not the correct procedure as it is not in consonance with the provisions of the Cr.P.C. The affected parties have to apprise themselves that if a case is registered under Section 154 Cr.P.C. by the police based on the FIR and the chargesheet is submitted after investigation, obviously the correct stage as to which sections would apply on the basis of the FIR and the material collected during investigation culminating into the chargesheet, would be determined only at the time framing of charge before the appropriate trial court. In the alternative, if the case arises out of a complaint lodged before the Magistrate, then the procedure laid down under Sections 190 and 200 of the Cr. P.C. clearly shall have to be followed.

17. Since the instant case is based on the FIR lodged before the police, the correct stage for addition or substraction of the Sections will have to be determined at the time of framing of charge. But the learned single Judge of the High Court in the impugned judgment and order has not assigned reasons with accuracy and clarity for doing so and has made a casual observation by recording that the Trial Court at the appropriate stage will have the power to determine as to which provision is to be applied before the matter is finally sent for trial. The fall out of the Order of the High Court is that the prosecution represented by the appellant -State of Gujarat might be rendered remedy less as setting aside of the order of the Magistrate is likely to give rise to a e

prosecution would be left with no remedy for rectification or appreciation of the plea as to whether inclusion or exclusion of additional charges could be permitted. In fact, while upholding the order of the learned Additional District & Sessions Judge, the High Court has further overlooked the fact that the Additional District & Sessions Judge before whom revision was filed against the order of the Chief Judicial Magistrate, could have allowed the revision on the ground of erroneous exercise of jurisdiction by the Chief Judicial Magistrate who permitted to add three more Sections into the chargesheet. But the Additional District & Sessions Judge instead of doing so has straightway quashed the order passed by the Magistrate instead of confining itself to consideration of the question regarding error of jurisdiction and laying down the correct course to be adopted by the magistrate. In fact, the correct course of action should have been laid down by the High Court as also the learned Additional District & Sessions Judge by permitting the appellant – State of Gujarat to raise the question of addition of charges at the time of framing of charge under Section 228 of the Cr. P.C. and should not have passed a blanket order setting aside the order of the Magistrate without laying down the correct course of action to be adopted by the affected parties with the result that three orders came to be passed by the Chief Judicial Magistrate, Additional District & Sessions Judge and the learned Single Judge of the High Court, yet it could not resolve the controversy by highlighting the appropriate course of action to be adopted by the prosecution-State of Gujarat as also the magistrate which permitted addition of sections after submission of chargesheet missing out that the matter did not arise out of a complaint case lodged before the magistrate but a case which arose out of a police report/ FIR in a Police Station.

18. As a consequence of the aforesaid analysis, we although do not approve of the order of the Chief Judicial magistrate who permitted addition of three Sections into the chargesheet after the chargesheet was submitted, we are

further of the view that the Additional District & Sessions Judge and the High Court ought to have specified the correct course of action to be adopted by the magistrate and the complainant/ prosecution party, failure of which got the matter enmeshed into this litigation impeding the trial.

19. We, therefore, dispose of this appeal by observing and clarifying the order of the High Court to the extent that the appellant State of Gujarat shall be at liberty to raise all questions relating to additions of the Sections on the basis of the FIR and material collected during investigation at the time of framing of charges by the Trial Court since the matter arises out of a police case based on the FIR registered under Section 154 of Cr. P.C. and not a complaint case lodged before the Magistrate under Section 190 of the Cr. P.C. Thus, the High Court although may be correct in observing in the impugned order that the Trial Court was not precluded from modifying the charges by including or excluding the sections at the appropriate stage during trial, it was duty bound in the interest of justice and fairplay to specify in clear terms that the Trial Court would permit and consider the plea of addition of sections at the stage of framing of charge under Section 211 of Cr. P.C. since the matter emerged out of a police case and not a complaint case before the Magistrate in which event the Magistrate could exercise greater judicial discretion. Ordered accordingly.

B.B.B. Appeal disposed of.

MADHU @ MADHURANATHA & ANR.
v.
STATE OF KARNATAKA
(Criminal Appeal Nos.1357-1358 of 2011)

NOVEMBER 28, 2013

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

Evidence – Circumstantial evidence – Appreciation of – Prosecution case that with the motive of committing robbery, the three accused-appellants murdered the son of PW-22, robbed him, chopped off his head and buried the trunk of his body and threw the head and the weapon of offence in the river – On consideration of circumstantial evidence, both the courts below reached to a conclusion that the appellants had committed the crime – Conviction of appellants u/ss.364, 302, 201 r/w s.34 alongwith death sentence – Challenge to – Held: Conviction can be based solely on circumstantial evidence – On facts, no reason to interfere with the concurrent findings of fact arrived at by the Courts below– Conviction upheld – However, the facts and circumstances involved do not meet the requirement of rarest of rare cases and it is not a fit case where the death sentence awarded to the appellants should be affirmed – The ends of justice would meet if they are awarded the sentence of 30 years without remission – Penal Code, 1860 – ss.364, 302, 201 r/w s.34.

Evidence – Discrepancies in depositions of witnesses – Appreciation of – Held: While appreciating the evidence of a witness, minor discrepancies on trivial matters which do not affect the core of the prosecution case must not prompt the court to reject the evidence in its entirety – The court is not supposed to give undue importance to omissions, contradictions and discrepancies which do not go to the heart of the matter, and shake the basic version of the prosecution witness.

Evidence – Last seen together theory – Held: In cases where the accused was last seen with the deceased victim (last seen-together theory) just before the incident, it becomes the duty of the accused to explain the circumstances under which the death of the victim occurred.

Witness – Police witness – Appreciation of – Held: No prohibition to the effect that a policeman cannot be a witness or that his deposition cannot be relied upon if it inspires confidence.

Code of Criminal Procedure, 1973 – s.174 – Inquest report – Held: Neither the inquest report nor the post-mortem report can be termed as basic or substantive evidence – Any discrepancy occurring therein cannot be termed as fatal or suspicious circumstance which would warrant benefit of doubt to the accused.

Code of Criminal Procedure, 1973 – s.313 – Examination under – Obligation of the accused – Held: It is obligatory on the part of the accused while being examined u/s.313 CrPC, to furnish some explanation with respect to the incriminating circumstances associated with him – The court must take note of such explanation even in a case of circumstantial evidence, to decide whether or not the chain of circumstances is complete.

Sentence / Sentencing – Death sentence – When warranted – Held: The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability – Life imprisonment is the rule and death sentence is an exception – The balance sheet of aggravating and mitigating circumstances has to be drawn up – The condition of providing special reasons for awarding death penalty is not to be construed linguistically but it is to satisfy the basic features of a reasoning supporting and making award of death penalty unquestionable – The circumstances and the manner of committing the crime should be such th... al *conscience of the court to the extent that the only and inevitable conclusion should be awarding of death penalty.*

The prosecution case was that with the motive of committing robbery, the three accused-appellants murdered the son of PW-22, robbed him, chopped off his head and buried the trunk of his body and threw the head and the weapon of offence in the river. The prosecution relied upon circumstantial evidence to prove its case. PW-11 deposed about the motive and produced cash amounting to Rs. 39000/- and a mobile phone along with its SIM purchased from the total cash of Rs. 50000/- deposited by A-1 with him. A-1 made 0extra-judicial confession before PW-13, requesting PW-13 to save him and on his advice, surrendered before the police. A-3 made voluntary disclosure about the location of the dead body wherefrom, the dead body was exhumed. PW-1 identified the trunk of the dead body. The D.N.A. report confirmed the body to be that of the deceased/son of PW-22. The Post Mortem Report and the manner in which the body was found irrefutably point to a homicidal death. A-2 was arrested from the house of PW-10 who produced two articles and a gold chain-MO5 before the police left by A-2. PW-1 identified the said gold chain to be that of the deceased. Rs. 1,01,000/- was recovered from the house of A-1 while Rs. 2,02,700/- was recovered from the house of A-2 concealed in the cattle shed which is unexplained and un-accounted. Mobile set MO14 recovered from A-3 was identified by PW-1 as that of the deceased. The deceased was last seen in the company of the accused persons as deposed by PW-4 who was acquainted with the deceased as well as the accused persons.

The Trial Court convicted the appellants under Sections 364, 302, 201 read with Section 34 IPC and sentenced them to death under Section 302 r/w 34 IPC

and lesser sentences under the other charging Sections. The High Court affirmed the conviction and sentence of the appellants.

In the instant appeals, the appellants challenged their conviction on various grounds and further contended that under no circumstance they could have been awarded the death sentence. The appellants *inter alia* contended that there were discrepancies and contradictions in the depositions of the witnesses; that in some of the recoveries, though a large number of people were available, but only police personnel were made recovery witnesses; and that the provisions of Sections 174 and 176(3) Cr.P.C. had not been complied with and the body had been exhumed by the Investigating Officer without the permission of the Executive Magistrate.

Disposing of the appeals, the Court

HELD: 1. It has consistently been held that conviction can be based solely on circumstantial evidence. The prosecution's case must stand or fall on its own legs and cannot derive any strength from the weakness of the defence put up by the accused. However, a false defence may be called into aid only to lend assurance to the court where various links in the chain of circumstantial evidence are complete in themselves. The circumstances from which the conclusion of guilt is to be drawn should be fully established. The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable or point to any other hypothesis except that the accused is guilty. The circumstances should be of a conclusive nature and tendency. The evidence produced by the prosecution should be of such a nature that it makes the conviction of the accused sustainable. In the instant case, both the courts below reached to a e

appellants had committed the crime. There is no reason to interfere with such concurrent finding of fact. [Paras 6, 7] [964-C-F, G]

Sharad Birdhichand Sarda v. State of Maharashtra **AIR 1984 SC 1622: 1985 (1) SCR 88;** *State of Uttar Pradesh v. Satish* **AIR 2005 SC 1000: 2005 (2) SCR 1132;** *Paramjeet Singh @ Pamma v. State of Uttarakhand* **AIR 2011 SC 200: 2010 (11) SCR 1064 – relied on.**

2. It is a settled legal proposition that while appreciating the evidence of a witness, minor discrepancies on trivial matters which do not affect the core of the case of the prosecution must not prompt the court to reject the evidence in its entirety. Therefore, irrelevant details which do not in any way corrode the credibility of a witness should be ignored. The court has to examine whether evidence read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the court to scrutinize the evidence, more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witnesses and whether the earlier evaluation of the evidence is shaken, so as to render it unworthy of belief. Thus, the court is not supposed to give undue importance to omissions, contradictions and discrepancies which do not go to the heart of the matter, and shake the basic version of the prosecution witness. [Para 9] [965-B-E]

Rohtash Kumar v. State of Haryana **JT 2013 (8) SC 181;** *State of U.P. v. M.K. Anthony* **AIR 1985 SC 48: 1985 (1) SCC 505;** *State rep. by Inspector of Police v. Saravanan & Anr.* **AIR 2009 SC 152: 2008 (14) SCR 405;** *Vijay @ Chinee v. State of M.P.* **(2010) 8 SCC 191: 2010 (8) SCR 1150 – relied on.**

3. The term 'witness' means a person who is capable of providing information by way of deposing as regards relevant facts, via an oral statement, or a statement in writing, made or given in Court, or otherwise. A witness is normally considered to be independent unless he springs from sources which are likely to be tainted and this usually means that the said witness has cause to bear such enmity against the accused so as to implicate him falsely. In view of the above, there can be no prohibition to the effect that a policeman cannot be a witness or that his deposition cannot be relied upon if it inspires confidence. [Paras 10, 11] [965-H; 966-A]

Pradeep Narayan Madgaonkar & Ors. v. State of Maharashtra **AIR 1995 SC 1930: 1995 (4) SCC 255;** *Paras Ram v. State of Haryana* **AIR 1993 SC 1212: 1992 (2) Suppl. SCR 55;** *Balbir Singh v. State* **(1996) 11 SCC 139: 1996 (7) Suppl. SCR 50;** *Kalpnath Rai v. State (Through CBI)* **AIR 1998 SC 201: 1997 (8) SCC 732;** *M. Prabhulal v. Assistant Director, Directorate of Revenue Intelligence* **AIR 2003 SC 4311: 2003 (3) Suppl. SCR 958;** *Ravinderan v. Superintendent of Customs* **AIR 2007 SC 2040: 2007 (6) SCC 410 and** *Laxmibai (dead) Thr. L.Rs. & Anr. v. Bhagwantbuva (dead) Thr. L.Rs. & Ors.* **AIR 2013 SC 1204: 2013 (1) SCR 632 – relied on.**

4. Sub-section (1) of Section 174 Cr.P.C. only puts an obligation on the part of the IO to intimate the Executive Magistrate empowered to hold inquest but there is nothing in law which provides that investigation cannot be carried out without his permission in writing or in his absence. Even otherwise, the provision stands qualified "unless otherwise directed by any rule prescribed by the State Government, or by any general or special order of the District or Sub-divisional Magistrate." The object of the inquest proceeding is merely to ascertain whether a person has died under unnatural c n

unnatural death and if so, what is the cause of death. More so, the inquest report is not a piece of substantive evidence and can be utilised only for contradicting the witnesses to the inquest examined during the trial. Neither the inquest report nor the post-mortem report can be termed as basic or substantive evidence and thus, any discrepancy occurring therein cannot be termed as fatal or suspicious circumstance which would warrant benefit of doubt to the accused. [Para 13] [967-H; 968-A-D]

Pooda Narayan & Ors. v. State of A.P. **AIR 1975 SC 1252: 1975 (0) Suppl. SCR 84;** *Rameshwar Dayal & Ors. v. State of U.P.* **AIR 1978 SC 1558: 1978 (3) SCR 59;** *Kuldeep Singh v. State of Punjab* **AIR 1992 SC 1944: 1992 (3) Suppl. SCC 1;** *George & Ors. v. State of Kerala & Anr.* **AIR 1998 SC 1376: 1998 (2) SCR 303;** *Suresh Rai & Ors. v. State of Bihar* **AIR 2000 SC 2207: 2000 (2) SCR 796;** *Munshi Prasad & Ors. v. State of Bihar* **AIR 2001 SC 3031: 2001 (4) Suppl. SCR 25 – relied on.**

5. So far as the provisions of Section 176 Cr.P.C. are concerned, the said provisions are attracted when a person dies in police custody and there is suspicion that death had been caused by the police itself. In other eventualities also, as provided in Section 176 Cr.P.C., the Magistrate may hold the enquiry. Even if the submission of the appellants is considered to have some substance it will not tilt the balance in their favour. It is a settled legal proposition that evidence collected even by improper or illegal means is admissible if it is relevant and its genuineness stands proved. However, the court may be cautious while scrutinizing such evidence. In such a fact-situation, it may be considered a case of procedural lapse on the part of the Investigating Officer and it should not be discarded unless the appellant satisfies the court that any prejudice has been caused to him. [Para 14] [968-F-H; 969-A]

Umesh Kumar v. State of Andhra Pradesh **JT 2013 (12) SC 213;** *Pooran Mal v. Director of Inspection, Income-Tax, New Delhi & Ors.* **AIR 1974 SC 348: 1974 (2) SCR 704 – relied on.**

6. A number of witnesses have deposed of seeing the deceased in the company of the appellants before the incident. In cases where the accused was last seen with the deceased victim (last seen-together theory) just before the incident, it becomes the duty of the accused to explain the circumstances under which the death of the victim occurred. [Para 15] [969-C-D]

Nika Ram v. State of Himachal Pradesh **AIR 1972 SC 2077: 1973 (1) SCR 428;** *Ganeshlal v. State of Maharashtra* **(1992) 3 SCC 106: 1992 (2) SCR 502 – relied on.**

7. It is obligatory on the part of the accused while being examined under Section 313 Cr.P.C., to furnish some explanation with respect to the incriminating circumstances associated with him, and the court must take note of such explanation even in a case of circumstantial evidence, to decide whether or not the chain of circumstances is complete. [Para 16] [969-D-E]

Musheer Khan @ Badshah Khan & Anr. v. State of Madhya Pradesh **AIR 2010 SC 762: 2010 (2) SCR 119 – relied on.**

8. If the findings of the High Court regarding PW.13 and that of the Trial Court in respect of PW.11 are read together, none of them has disbelieved either of the witnesses. Therefore, there is no force in the submissions advanced by the appellants that one of the said witnesses had been disbelieved by the Trial Court and another by the High Court and thus, none of them could be relied upon. The courts below opined that even if evidence of one of them is esch[illegible]f

another is enough to lend support to the prosecution case. [Para 17] [970-C-D]

9. However, the facts of the case did not warrant death penalty. The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability. Before opting for the death penalty the circumstances of the offender are also required to be taken into consideration along with the circumstances of the crime for the reason that life imprisonment is the rule and death sentence is an exception. The penalty of death sentence may be warranted only in a case where the court comes to the conclusion that imposition of life imprisonment is totally inadequate having regard to the relevant circumstances of the crime. The balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so, the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and mitigating circumstances before the option is exercised. The condition of providing special reasons for awarding death penalty is not to be construed linguistically but it is to satisfy the basic features of a reasoning supporting and making award of death penalty unquestionable. The circumstances and the manner of committing the crime should be such that it pricks the judicial conscience of the court to the extent that the only and inevitable conclusion should be awarding of death penalty. The facts and circumstances involved in the instant case do not meet the requirement of rarest of rare cases and it is not a fit case where the death sentence awarded to the appellants should be affirmed. The ends of justice would meet if they are awarded the sentence of 30 years without remission. [Paras 18, 20] [970-E-H; 972-C, E]

Bachan Singh v. State of Punjab **AIR 1980 SC 898: 1980 (2) SCC 684;** *Machhi Singh v. State of Punjab* **AIR 1983 SC**

957: 1983 (3) SCR 413; *Devender Pal Singh v. State of NCT of Delhi* **AIR 2002 SC 1661: 2002 (2) SCR 767;** *State of Maharashtra v. Goraksha Ambaji Adsul* **AIR 2011 SC 2689: 2011 (9) SCR 41;** *Neel Kumar v. State of Haryana* **(2012) 5 SCC 766: 2012 (5) SCR 696 ;** *Haresh Mohandas Rajput v. State of Maharashtra* **(2011) 12 SCC 56: 2011 (14) SCR 921;** *Swamy Shraddanand (2) @ Murali Manohar Mishra v. State of Karnataka* **(2008) 13 SCC 767: 2008 (11) SCR 93;** *State of Uttar Pradesh v. Sanjay Kumar* **(2012) 8 SCC 537: 2012 (7) SCR 359;** *Gurvail Singh @ Gala v. State of Punjab* **(2013) 2 SCC 713: 2013 (1) SCR 783 – relied on.**

Case Law Reference:

1985 (1) SCR 88	**relied on**	**Para 6**
2005 (2) SCR 1132	**relied on**	**Para 6**
2010 (11) SCR 1064	**relied on**	**Para 6**
JT 2013 (8) SC 181	**relied on**	**Para 9**
1985 (1) SCC 505	**relied on**	**Para 9**
2008 (14) SCR 405	**relied on**	**Para 9**
2010 (8) SCR 1150	**relied on**	**Para 9**
1995 (4) SCC 255	**relied on**	**Para 10**
1992 (2) Suppl. SCR 55	**relied on**	**Para 10**
1996 (7) Suppl. SCR 50	**relied on**	**Para 10**
1997 (8) SCC 732	**relied on**	**Para 10**
2003 (3) Suppl. SCR 958	**relied on**	**Para 10**
2007 (6) SCC 410	**relied on**	**Para 10**
2013 (1) SCR 632	**relied on**	**Para 12**
1975 (0) Suppl. SCR 84	**relied on**	**Para 13**

1978 (3) SCR 59	**relied on**	**Para 13**
1992 (3) Suppl. SCC 1	**relied on**	**Para 13**
1998 (2) SCR 303	**relied on**	**Para 13**
2000 (2) SCR 796	**relied on**	**Para 13**
2001 (4) Suppl. SCR 25	**relied on**	**Para 13**
JT 2013 (12) SC 213	**relied on**	**Para 14**
1974 (2) SCR 704	**relied on**	**Para 14**
1973 (1) SCR 428	**relied on**	**Para 15**
1992 (2) SCR 502	**relied on**	**Para 15**
2010 (2) SCR 119	**relied on**	**Para 15**
1980 (2) SCC 684	**relied on**	**Para 18**
1983 (3) SCR 413	**relied on**	**Para 18**
2002 (2) SCR 767	**relied on**	**Para 18**
2011 (9) SCR 41	**relied on**	**Para 18**
2012 (5) SCR 696	**relied on**	**Para 18**
2011 (14) SCR 921	**relied on**	**Para 18**
2008 (11) SCR 93	**relied on**	**Para 20**
2012 (7) SCR 359	**relied on**	**Para 20**
2013 (1) SCR 783	**relied on**	**Para 20**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1357-1358 of 2011.

From the Judgment & Order dated 08.09.2010 of the High Court of Karnataka at Bangalore in Criminal Appeal Nos. 833 and 864 of 2008.

WITH

Crl. A. No. 109 of 2013.

N.D.B., Raju Bharathi Raju, N. Ganpathy, Amit Kumar, Ankit Rajgarhia, Rituraj Kumar for the Appellants.

V.N. Raghupathy, Varun Thakur for the Respondent.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J.1. These criminal appeals have been preferred against the impugned judgment and order dated 8.9.2010, passed by the High Court of Karnataka at Bangalore in Criminal Appeal Nos.833, 855 and 864 of 2008 by which the High Court has affirmed the death sentence and confirmed the judgment and orders of the learned District & Sessions Judge dated 11/17.7.2008, passed in Sessions Case No.152 of 2005 with certain observation about the charging Sections of the Indian Penal Code 1860 (hereinafter referred to as 'IPC') by which and whereunder the appellants have been convicted under Sections 364/302/201 r/w Section 34 IPC and for the offences punishable under Section 364 r/w Section 34 IPC, sentenced to undergo RI for 7 years and a fine of Rs.25,000/- each and in default of payment of fine to undergo a further imprisonment for a period of 18 months. They have been further convicted under Section 201 r/w Section 34 IPC and sentenced to undergo RI for 5 years and a fine of Rs.10,000/- each and in default to undergo further RI for a period of 12 months. All the three appellants have been further convicted under Section 302 r/w Section 34 IPC and awarded death penalty.

2. Facts and circumstances giving rise to these appeals are that:

A. Madhusudhan, deceased had gone from Anandpura to Sagar on being asked by his uncle Prahlad (PW.1) to collect the outstanding dues in respect of sale and purchase of ginger from K.B. Sreenath (PW.2) and K.S. Kiran (PW.12). As Madhusudhan did not turn up, Prahlad (PW.1) got worried and contacted K.B. Sreenath (PW.2) and K.S. Kiran (PW.12) to find out the whereabouts of Madhusudhan ... h

(PW.2) and K.S. Kiran (PW.12) informed Prahlad (PW.1) that Madhusudhan had collected Rs.2,50,000/- and Rs.1,50,000/- respectively from them at about 12.30 P.M. and left for Anandpura. Prahlad (PW.1) contacted all his relatives and friends to find out the whereabouts of Madhusudhan but all in vain.

B. K.B. Sreenath (PW.2) and K.S. Kiran (PW.12) filed a complaint FIR No. 148/2005 (Ex.P-84) in the Police Station, Sagar against unnamed persons suspecting that Madhusudhan had been kidnapped. In the meanwhile there were rumors in Anandpura that the appellants had looted the money and killed Madhusudhan as some persons i.e. Nagesh (PW.4); Sirajuddin (PW.5); Nagendra (PW.3); and Chandrashekar (PW.6) had come forward and informed that they had seen Madhusudhan, deceased in the company of appellants on 8.8.2005 at 12.45 P.M.

C. In view of this, an FIR was lodged on 11.8.2005 against the appellants and one Lakshmeesha under Section 365 r/w Section 34 IPC at Police Station Anandpura. The Police tried to trace Madhusudhan as well as the appellants. It came to the knowledge of the investigating agency that the deceased was seen in the company of the appellants in a Maruti van bearing Registration No.KA-15-3112 on which “Kadala Muttu” had been written on the back side. Thus, the Investigating Officer tried to search for the said vehicle and came to know that it belonged to Jayanna @ P. Aya (A.3).

D. The location of mobile phone of Jayanna @ P. Aya (A.3) was put on surveillance/watch and thereby he was arrested on 12.8.2005 at Anandpura and on the same day Rafiq @ Munna (A.2) was arrested by a separate team of police at Bangalore from the house of Felix D’Costa (PW.10). Madhuranatha (A.1) surrendered before the police on the same day. They made certain voluntary statements, on the basis whereof, recoveries were made. Jayanna @ P. Aya (A.3) took

the police and others persons (recovery witnesses) to the forest area and pointed out to a place wherefrom the dead body was exhumated. Only the trunk of the body was found as the head had been chopped off and thrown in the nearby Nandi river. Prahlad (PW.1), Srinivasa (PW.15), Shivananda (PW.16), Devaraja (PW.17) and K. Keshavamurthy (PW.22) witnessed the said recovery and identified the corpse. However, in spite of the efforts made by the police, the head could not be recovered. Immediately thereafter recovery of most of the looted amount had been made from the appellants. A mobile phone belonging to Jayanna @ P. Aya (A.3) purchased from the loot amount was also recovered. A gold ring belonging to the deceased was given to the Investigating Officer by Felix D’Costa (PW.10) from whose house Rafiq (A.2) had been arrested in Bangalore.

E. After completing the investigation, chargesheet was filed against the appellants and trial commenced.

F. In the court Nagesh (PW.4) and Chandrashekar (PW.6) corroborated the prosecution case to the extent that they had seen the deceased in the company of all the three appellants on 8.8.2005 at about 12.45 P.M. Pranesh (PW.11) and Sadananda (PW.13) supported the case of extra-judicial confession as made by Madhuranatha (A.1) before (PW.11). A.1 had also approached PW.13 for help to contact the police and disclosed that he had committed the murder of Madhusudhan alongwith Rafiq (A.2) and Jayanna @ P. Aya (A.3).

G. Recovery of the dead body was supported by Shivananda (PW.16) and Devaraja (PW.17). K.B. Sreenath (PW.2) and K.S. Kiran (PW.12) had supported the prosecution case deposing about payment of money to Madhusudhan on 8.8.2005 at about 12.45 P.M. to the tune of Rs.4,00,000/-. The issue of motive was proved by Prahlad (PW.1), K.B. Sreenath (PW.2), Felix D’Costa (PW.10), Pranesh (PW.11), K.S. Kiran (PW.12) and Sadananda (PW.13). [illegible] s identified and the evidence in respect of recovery of the dead body was given by PWs.1 and 22. The same stood affirmed by the report of the DNA test. The Investigating Officer Bhaskar Rai (PW.47) proved all the recoveries and furnished the details as to how the investigation was carried out and how the arrest of the appellants was made.

H. On the basis of the above, the Trial Court convicted and sentenced the appellants under Sections 364, 302, 201 read with Section 34 IPC. No conviction was made under Sections 120A or B IPC.

I. Aggrieved, the appellants preferred appeals before the High Court which have been dismissed by the impugned judgment and order with respect to death sentences while maintaining the other sentences as well. However, the court made a passing observation that the charge should have been framed under Section 364A IPC instead of Section 302 IPC.

Hence, these appeal.

3. Mr. N.D.B. Raju and Mr. Amit Kumar, learned counsel appearing for the appellants have agitated all the issues which had been raised on behalf of the appellants before the Trial Court as well as before the High Court and have taken us through the evidence recorded before the Trial Court. According to them there is nothing on record to show that the death of the deceased was homicidal or he was even abducted by the appellants, what to talk of causing death of deceased Madhusudhan. In the absence of any material on record to prove that his head was chopped off by any of the appellants, their conviction is bad, particularly in view of the fact that there is no evidence to show that the appellants had buried the lower portion of the corpse in the forest and threw the head in the flowing river. More so, the High Court had taken a view that the conviction under particular provisions of IPC by the Trial Court was not justified, meaning thereby that the Trial Court did not frame the charges properly. Even the money shown to have

been recovered from the appellants had been planted and not actually recovered. Most of the witnesses examined by the prosecution are relatives of the deceased. There are material contradictions in the deposition of the witnesses and a large number of witnesses to some of the recoveries have been withheld. Only the police personnel have been made the recovery witnesses though large number of persons had gathered and were available for being made the recovery witnesses. The video prepared at the time of exhumation of the dead body was not presented in the Trial Court and that Jayanna (A.3) on whose behest it is alleged that the dead body was recovered is not shown in the photographs taken at the time of exhumation. One of the alleged witnesses of recovery i.e. Pranesh (PW.11) had been dis-believed by the Trial Court and another witness i.e. Sadananda (PW.13) has been dis-believed by the High Court. They are the witnesses of extra-judicial confession as well. In such a fact-situation, none of the said witnesses are trustworthy. Under no circumstance the appellants could have been awarded the death sentence. Thus, the appeals deserve to be allowed.

4. On the contrary, learned counsel appearing for the State had opposed the appeals contending that the Investigating Officer was not asked in cross-examination any of the question raised before this Court for the first time, either in respect of the videography prepared at the time of exhumation or about the absence of Jayanna (A.3) in the photographs taken at that time. Law does not prohibit making the police personnel as recovery witnesses and most of the discrepancies raised by the appellants are of trivial nature which do not materially affect the merit of the case. Thus, in view of the above, the appeals are liable to be dismissed.

5. We are of the considered opinion that both the courts below have taken into consideration the evidence and appreciated the same meticulously. The prosecution has relied on the following circumstances to prove

I. The motive of the offence was robbery and in pursuance to which the accused persons murdered the deceased, robbed him, chopped off the head and buried the trunk of the body. The head and the weapon of offence were thrown in Nandi River.

II. PW-11 deposed about the motive and produced cash amounting to Rs. 39000/- and a mobile phone along with its SIM purchased from the total cash of Rs. 50000/- deposited by A-1 with him.

III. A-1 made an extra-judicial confession before PW-13, requesting PW-13 to save him and on his advice, surrendered before the police.

IV. Voluntary disclosure by A-3 about the location of the dead body and wherefrom, the dead body was exhumed.

V. PW-1 identified the trunk of the dead body from the tattoo. The D.N.A. report confirmed the body to be that of the deceased/son of PW-22.

VI. The Post Mortem Report and the manner in which the body was found irrefutably point to a homicidal death.

VII. A-2 was arrested from the house of PW-10 who had produced two worthless articles and a gold chain-MO5 before the police left by A-2. PW-1 had identified the said gold chain to be that of the deceased.

VIII. Recovery of Rs. 1,01,000/- from the house of A-1 and Rs. 2,02,700/- from the house of A-2 concealed in the cattle shed which is un-explained and un-accounted.

IX. Recovery of a mobile set MO14 from A-3 identified

by PW-1 as that of the deceased.

X. Last seen circumstance of the deceased being in the company of the accused persons on 8.8.2005 around 12:30 PM as deposed by PW-4 who is acquainted with the deceased as well as the accused persons.

6. This Court has dealt with the case of circumstantial evidence time and again. It has consistently been held that a conviction can be based solely on circumstantial evidence. The prosecution's case must stand or fall on its own legs and cannot derive any strength from the weakness of the defence put up by the accused. However, a false defence may be called into aid only to lend assurance to the court where various links in the chain of circumstantial evidence are complete in themselves. The circumstances from which the conclusion of guilt is to be drawn should be fully established. The facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable or point to any other hypothesis except that the accused is guilty. The circumstances should be of a conclusive nature and tendency. The evidence produced by the prosecution should be of such a nature that it makes the conviction of the accused sustainable.

(Vide: *Sharad Birdhichand Sarda v. State of Maharashtra,* AIR 1984 SC 1622; *State of Uttar Pradesh v. Satish,* AIR 2005 SC 1000; and *Paramjeet Singh @ Pamma v. State of Uttarakhand,* AIR 2011 SC 200).

7. Both the courts below have dismissed the aforesaid circumstances in light of the aforesaid legal propositions and reached to a conclusion that the appellants had committed the crime. We do not see any reason to interfere with such concurrent finding of fact.

8. It has been canvassed on behal [illegible] at

there are discrepancies and contradictions in the depositions of witnesses like the timings when deceased was seen last with the appellants and the distances of places etc. do not tally. Thus, their evidence cannot be relied upon.

9. In *Rohtash Kumar v. State of Haryana,* JT 2013 (8) SC 181, this Court considered the issue of discrepancies in the depositions. It is a settled legal proposition that while appreciating the evidence of a witness, minor discrepancies on trivial matters which do not affect the core of the case of the prosecution must not prompt the court to reject the evidence in its entirety. Therefore, irrelevant details which do not in any way corrode the credibility of a witness should be ignored. The court has to examine whether evidence read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the court to scrutinize the evidence, more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witnesses and whether the earlier evaluation of the evidence is shaken, so as to render it unworthy of belief. Thus, the court is not supposed to give undue importance to omissions, contradictions and discrepancies which do not go to the heart of the matter, and shake the basic version of the prosecution witness.

A similar view has been re-iterated in *State of U.P. v. M.K. Anthony,* AIR 1985 SC 48; *State rep. by Inspector of Police v. Saravanan & Anr.,* AIR 2009 SC 152; and *Vijay @ Chinee v. State of M.P.,* (2010) 8 SCC 191.

10. Learned counsel for the appellants has vehemently argued that in some of the recoveries, though a large number of people were available, but only police personnel were made recovery witnesses. Thus, the whole prosecution case becomes doubtful.

The term 'witness' means a person who is capable of

providing information by way of deposing as regards relevant facts, via an oral statement, or a statement in writing, made or given in Court, or otherwise.

In *Pradeep Narayan Madgaonkar & Ors. v. State of Maharashtra,* AIR 1995 SC 1930, this Court dealt with the issue of the requirement of the examination of an independent witness, and whether the evidence of a police witness requires corroboration. The Court held that though the same must be subject to strict scrutiny, however, the evidence of police officials cannot be discarded merely on the ground that they belong to the police force and are either interested in the investigation or in the prosecution. However, as far as possible the corroboration of their evidence on material particulars should be sought.

(See also: *Paras Ram v. State of Haryana,* AIR 1993 SC 1212; *Balbir Singh v. State,* (1996) 11 SCC 139; *Kalpnath Rai v. State (Through CBI),* AIR 1998 SC 201; *M. Prabhulal v. Assistant Director, Directorate of Revenue Intelligence,* AIR 2003 SC 4311; and *Ravinderan v. Superintendent of Customs,* AIR 2007 SC 2040).

11. Thus, a witness is normally considered to be independent unless he springs from sources which are likely to be tainted and this usually means that the said witness has cause to bear such enmity against the accused so as to implicate him falsely. In view of the above, there can be no prohibition to the effect that a policeman cannot be a witness or that his deposition cannot be relied upon if it inspires confidence.

12. This Court in *Laxmibai (dead) Thr. L.Rs. & Anr. v. Bhagwantbuva (dead) Thr. L.Rs. & Ors.,* AIR 2013 SC 1204 examined a similar issue and held:

"Furthermore, there cannot be any dispute with respect to the settled legal proposition, that if e any doubt as regards the correctness of the statement of a witness, the said witness must be given an opportunity to explain his statement by drawing his attention to that part of it, which has been objected to by the other party, as being untrue. Without this, it is not possible to impeach his credibility. Such a law has been advanced in view of the statutory provisions enshrined in Section 138 of the Evidence Act, 1872, which enable the opposite party to cross-examine a witness as regards information tendered in evidence by him during his initial examination in chief, and the scope of this provision stands enlarged by Section 146 of the Evidence Act, which permits a witness to be questioned, inter-alia, in order to test his veracity. Thereafter, the unchallenged part of his evidence is to be relied upon, for the reason that it is impossible for the witness to explain or elaborate upon any doubts as regards the same, in the absence of questions put to him with respect to the circumstances which indicate that the version of events provided by him, is not fit to be believed, and the witness himself, is unworthy of credit. Thus, if a party intends to impeach a witness, he must provide adequate opportunity to the witness in the witness box, to give a full and proper explanation. The same is essential to ensure fair play and fairness in dealing with witnesses. (See: *Khem Chand v. State of Himachal Pradesh,* AIR 1994 SC 226; *State of U.P. v. Nahar Singh (dead) & Ors.,* AIR 1998 SC 1328; *Rajinder Pershad (Dead) by L.Rs. v. Darshana Devi (Smt.),* AIR 2001 SC 3207; and *Sunil Kumar & Anr. v. State of Rajasthan,* AIR 2005 SC 1096)".

13. It has been canvassed on behalf of the appellants that the provisions of Sections 174 and 176(3) Cr.P.C. had not been complied with and the body had been exhumed by the IO without the permission of the Executive Magistrate and therefore, the investigation had not been conducted in accordance with law. Sub-section (1) of Section 174 Cr.P.C.

only puts an obligation on the part of the IO to intimate the Executive Magistrate empowered to hold inquest but there is nothing in law which provides that investigation cannot be carried out without his permission in writing or in his absence. Even otherwise, the provision stands qualified "unless otherwise directed by any rule prescribed by the State Government, or by any general or special order of the District or Sub-divisional Magistrate." The object of the inquest proceeding is merely to ascertain whether a person has died under unnatural circumstances or an unnatural death and if so, what is the cause of death. More so, the inquest report is not a piece of substantive evidence and can be utilised only for contradicting the witnesses to the inquest examined during the trial. Neither the inquest report nor the post-mortem report can be termed as basic or substantive evidence and thus, any discrepancy occurring therein cannot be termed as fatal or suspicious circumstance which would warrant benefit of doubt to the accused.

(Vide: *Pooda Narayan & Ors. v. State of A.P.,* AIR 1975 SC 1252; *Rameshwar Dayal & Ors. v. State of U.P.,* AIR 1978 SC 1558; *Kuldeep Singh v. State of Punjab,* AIR 1992 SC 1944; *George & Ors. v. State of Kerala & Anr.,* AIR 1998 SC 1376; *Suresh Rai & Ors. v. State of Bihar,* AIR 2000 SC 2207; and *Munshi Prasad & Ors. v. State of Bihar,* AIR 2001 SC 3031).

14. So far as the provisions of Section 176 Cr.P.C. are concerned, the said provisions are attracted when a person dies in police custody and there is suspicion that death had been caused by the police itself. In other eventualities also, as provided in Section 176 Cr.P.C., the Magistrate may hold the enquiry. Even if the submission of the appellants is considered to have some substance it will not tilt the balance in their favour. It is a settled legal proposition that evidence collected even by improper or illegal means is admissible if it is relevant and its genuineness stands proved. Howev[illegible]e cautious while scrutinizing such evid[illegible]t-

situation, it may be considered a case of procedural lapse on the part of the Investigating Officer and it should not be discarded unless the appellant satisfies the court that any prejudice has been caused to him.

(Vide: *Umesh Kumar v. State of Andhra Pradesh,* JT 2013 (12) SC 213; and *Pooran Mal v. Director of Inspection, Income-Tax, New Delhi & Ors.,* AIR 1974 SC 348).

15. A number of witnesses have deposed of seeing the deceased in the company of the appellants before the incident. In cases where the accused was last seen with the deceased victim (last seen-together theory) just before the incident, it becomes the duty of the accused to explain the circumstances under which the death of the victim occurred. (Vide: *Nika Ram v. State of Himachal Pradesh,* AIR 1972 SC 2077; and *Ganeshlal v. State of Maharashtra,* (1992) 3 SCC 106).

16. It is obligatory on the part of the accused while being examined under Section 313 Cr.P.C., to furnish some explanation with respect to the incriminating circumstances associated with him, and the court must take note of such explanation even in a case of circumstantial evidence, to decide whether or not the chain of circumstances is complete. [Vide: *Musheer Khan @ Badshah Khan & Anr. v. State of Madhya Pradesh,* AIR 2010 SC 762; and *Dr. Sunil Clifford Daniel* (supra)].

17. The High Court regarding Sadananda (PW.13) has observed as under:

> "It may be that PW11 may appear as accomplice but nonetheless the evidence of PW13 clinchingly establish the extra-judicial confession of A1. The analysis of the above evidence would clinchingly establish the guilt of A1 to A3. Therefore, the order of conviction is sound and proper."

Similarly, the Trial Court in respect of PW.11 observed as under:

> "Even if the extra-judicial confession said to have been made by the first accused before PW.13 is eschewed, the statement made before PW.11 shows that immediately after the incident the first accused Madhuranatha who had earlier sought the assistance of PW.11 for the same crime has met him in his house during night and handed over Rs.50,000/- for safe custody and also requested him not to disclose it to any one."

If the aforesaid findings of the courts below are read together, none of them has disbelieved either of the witnesses. Therefore, we do not find any force in the submissions advanced by learned counsel for the appellants that one of the said witnesses had been disbelieved by the Trial Court and another by the High Court and thus, none of them could be relied upon. The courts below opined that even if evidence of one of them is eschewed, deposition of another is enough to lend support to the prosecution case.

18. However, the facts of the case did not warrant death penalty.

The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability. Before opting for the death penalty the circumstances of the offender are also required to be taken into consideration along with the circumstances of the crime for the reason that life imprisonment is the rule and death sentence is an exception. The penalty of death sentence may be warranted only in a case where the court comes to the conclusion that imposition of life imprisonment is totally inadequate having regard to the relevant circumstances of the crime. The balance sheet of aggravating and mitigating circumstances has to be drawn up and in doing so, the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and mitigating circumstances before the option is exercised. The condition of providing special reasons for awarding death penalty is not to be construed linguistically but it is to satisfy the basic features of a reasoning supporting and making award of death penalty unquestionable. The circumstances and the manner of committing the crime should be such that it pricks the judicial conscience of the court to the extent that the only and inevitable conclusion should be awarding of death penalty. (Vide: *Bachan Singh v. State of Punjab,* AIR 1980 SC 898; *Machhi Singh v. State of Punjab,* AIR 1983 SC 957; *Devender Pal Singh v. State of NCT of Delhi,* AIR 2002 SC 1661; *State of Maharashtra v. Goraksha Ambaji Adsul,* AIR 2011 SC 2689; and *Neel Kumar v. State of Haryana,* (2012) 5 SCC 766).

19. In *Haresh Mohandas Rajput v. State of Maharashtra,* (2011) 12 SCC 56, this court held as under:

> "*20*. 'The rarest of the rare case' comes when a convict would be a menace and threat to the harmonious and peaceful coexistence of the society. The crime may be heinous or brutal but may not be in the category of 'the rarest of the rare case'. There must be no reason to believe that the accused cannot be reformed or rehabilitated and that he is likely to continue criminal acts of violence as would constitute a continuing threat to the society. The accused may be a menace to the society and would continue to be so, threatening its peaceful and harmonious coexistence. The manner in which the crime is committed must be such that it may result in intense and extreme indignation of the community and shock the collective conscience of the society. Where an accused does not act on any spur-of-the-moment provocation and indulges himself in a deliberately planned crime and meticulously executes it, the death sentence may be the most appropriate punishment for such a ghastly crime. The death sentence may be warranted where the victims are innocent children and helpless women. Thus, in case the crime is committed in a most cruel and inhuman manner which is an extremely brutal, grotesque, diabolical, revolting and dastardly manner, where his act affects the entire moral fibre of the society e.g. crime committed for power or political ambition or indulging in organised criminal activities, death sentence should be awarded."

20. The facts and circumstances involved in the instant case do not meet the requirement of rarest of rare cases as explained hereinabove and we are of the considered view that it is not a fit case where the death sentence awarded to the appellants should be affirmed. Considering the current trend in view of the judgment of this Court in *Swamy Shraddanand (2) @ Murali Manohar Mishra v. State of Karnataka,* (2008) 13 SCC 767 which has subsequently been followed by this Court as is evident from the judgments in *State of Uttar Pradesh v. Sanjay Kumar,* (2012) 8 SCC 537; and *Gurvail Singh @ Gala v. State of Punjab,* (2013) 2 SCC 713, we are of the considered opinion that ends of justice would meet if they are awarded the sentence of 30 years without remission.

21. With the aforesaid modification, the appeals stand disposed of.

B.B.B. Appeals disposed of.

STATE OF RAJASTHAN
v.
SHAMBHU KEWAT AND ANOTHER
(Criminal Appeal No. 2018 of 2013)

NOVEMBER 28, 2013

[K. S. RADHAKRISHNAN AND A. K. SIKRI, JJ.]

Penal Code, 1860 – s.307 – Conviction under, by trial court – In appeal, the offence compounded by High Court on the basis of compromise between parties on account of monetary compensation paid to the victim – Held: Offence u/ s.307 is non-compoundable – High Court compounded the offence by over-looking the 'nature and gravity of the crime' and 'the societal impact' – It accepted the compromise between parties without application of mind and wrongly took the view that it was a crime against 'an individual' and not 'the society at large' – Settlement by monetary compensation would not wipe off the crime against the accused – Taking of levient view on serious offences, would defeat the objective of the criminal justice system – Matter remitted to High Court to decide the appeal on merit – Code of Criminal Procedure, 1973 – s.320 – Administration of Criminal Justice.

Code of Criminal Procedure, 1973 – ss.320 and 482 – Power under –Distinction between – Discussed.

The trial court convicted the accused u/s. 307 r/w. s.34 IPC. In appeal, High Court, on the request of the victim and accused parties to compound the offence, acquitted the accused, holding that it was a case where the fight between the parties had occurred on the spur and heat of the moment and the assault was a crime 'against an individual', rather than 'against the society at large. Hence the present appeal.

Allowing the appeal and remitting the matter to High Court, the Court

HELD: 1.1. Criminal law is designed as a mechanism for achieving social control and its purpose is the regulation of conduct and activities within the society. Provisions such as s.307 IPC are not meant, just to protect the individual, but the society as a whole. High Court was not right in thinking that it was only an injury to the person and since the accused persons had received the monetary compensation and settled the matter, the crime as against them was wiped off. Criminal justice system has a larger objective to achieve, that is safety and protection of the people at large and it would be a lesson not only to the offender, but to the individuals at large so that such crimes would not be committed by any one and money would not be a substitute for the crime committed against the society. Taking a lenient view on a serious offence like the present, will leave a wrong impression about the criminal justice system and will encourage further criminal acts, which will endanger the peaceful co-existence and welfare of the society at large. [Para 15] [984-C-F]

1.2. In the instant case, the trial Court held that the accused persons, with common intention, went to the shop of the injured on the day of the incident, armed with iron rod and a strip of iron and, in furtherance of their common intention, had caused serious injuries on the body of the injured, of which injury number 4 was on his head, which was of a serious nature. PW5, the doctor stated that injury no. 4 was "grievous and fatal for life". PW8, who had conducted the operation on injuries of the injured as a Neuro Surgeon also fully supported the opinion expressed by PW 5. The gravity of the injuries was also taken note of by the trial court and it had awarded the sentence of 10 years rig nt

A **for the offence punishable under Section 307 IPC. The High Court completely overlooked the various principles regarding the scope and ambit of ss.482 and 320 Cr.P.C., and has committed a mistake in taking the view that, the injuries were caused on the body of the injured in a fight**
B **occurred at the spur and the heat of the moment. While exercising the power under Section 482, must have "due regard to the nature and gravity of the crime" and "the societal impact". Both these aspects were completely overlooked by the High Court. The High Court in a**
C **cursory manner, without application of mind, blindly accepted the statement of the parties that they had settled their disputes and differences and took the view that it was a crime against "an individual", rather than against "the society at large". [Paras 12-14] [983-B-H; 984-A]**

D

1.3. The High Court was carried away by the settlement and has not examined the matter on merits, hence, the High Court is directed to take back the appeal to its file and decide the appeal on merits. [Para 16] [984-
E **G-H]**

Gian Singh vs. State of Punjab and Anr. **(2012) 10 SCC 303 2012 (8) SCR 753 – relied on.**

Ishwar Singh vs. State of M.P. **(2008) 15 SCC 667: 2008**
F **(14) SCR 574;** *Gulab Das and Ors. vs. State of Madhya Pradesh* **(2011) 10 SCC 765: 2011 (13) SCR 177;** *Rajendra Harakchand Bhandari and Ors. vs. State of Maharashtra and Anr.* **(2011) 13 SCC 311 – distinguished.**

G **2.1. Quashing of offence or criminal proceedings on the ground of settlement between an offender and the victim is not the same thing as compounding of offences. The power of compounding of offences conferred on a Court under Section 320 CrPC is materially different from**
H **the power conferred under Section 482 for quashing of**

A **criminal proceedings by the High Court. In compounding of offences, power of a criminal court is circumscribed by the provisions contained in Section 320 CrPC and the Court is guided solely and squarely thereby, while, on the other hand, the formation of opinion by the High Court**
B **for quashing a criminal proceeding or criminal complaint under Section 482 CrPC is guided by the material on record as to whether the ends of justice would justify such exercise of power, although the ultimate consequence may be acquittal or dismissal of indictment.**
C **[Para 8] [981-C-E]**

2.2. The power of the High Court in quashing a criminal proceeding or FIR or complaint in exercise of its inherent jurisdiction is distinct and different from the power given to a criminal court for compounding the
D **offences under Section 320 CrPC. The inherent power is of wide plentitude with no statutory limitation but it has to be exercised in accordance with the guidelines engrafted in such power, namely, (i) to secure the ends of justice, or (ii) to prevent abuse of the process of any**
E **court. While exercising the power of compounding the offence, the court must have due regard to the nature and gravity of the crime. [Para 9] [981-F-H]**

Case Law Reference

F

2012 (8) SCR 753	**relied on**	**Para 6**
2008 (14) SCR 574	**distinguished**	**Para 10**
2011 (13) SCR 177	**distinguished**	**Para 10**
(2011) 13 SCC 311	**distinguished**	**Para 11**

G CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 2018 of 2013.

From the Judgment & Order dated 12.12.2011 of the High Court of Rajasthan at Jaipur in SBCRA No. 825 of 2009.

H Irshad Ahmad for the Appellant.

Vipin Kumar (for Rameshwar Prasad Goyal) for the Respondents.

The Judgment of the Court was delivered by

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

2. Respondents herein were charge-sheeted for the offences punishable under Sections 307, 323, 325, 427 read with Section 34 IPC. They were tried before the Court of Additional Sessions Judge, Fast Track No. 1, Kota, Rajasthan. From the side of the prosecution, PWs 1 to 5 were examined and Exh. P1- P12 were produced. From the side of defence, second accused was examined as DW1. The Sessions Court, after hearing the parties and considering the oral and documentary evidence, found the accused persons guilty of the offence punishable under Section 307 read with Section 34 IPC, but acquitted them of the rest of the charges, vide its order dated 9.7.2009. Later, the accused persons were heard on sentence, and they stated that they are not habitual criminals and are aged 26 and 28 years, respectively. Further, it was pointed out that they are poor labourers married and have children. Further, it was also pointed out that the injuries were caused due to sudden provocation, and were not pre-meditated. After hearing the accused and the prosecution, the trial Court, on sentence, passed the following order:

> "Heard both the parties. On the basis of the above arguments, perused the case file. Though no criminal record has been produced by the Prosecution against the accused, nor has any arguments about the habitual criminal, however, from the evidence came on file, this fact has been established that accused Banwari and Shambhu had been taking the goods on credit from the complainant Abdul Rashid, also on the day of incident, had come to take goods on credit and due to arrears of money, he had refused to give the goods on credit. Then they again came back at the place of incident. Thereafter about 10 minutes

> both came with iron rod and a strip of iron like sword in a planned manner, and both together made a murderous attack on Abdul Rashid. By causing fatal injury on the head after fracture of piece of bone of head of Abdul Rashid, went inside the brain. The doctor performed the surgery and taken out. Thereafter it cannot be said that the accused has injured in ignorance, suddenly on instigation and cause the said injury to Abdul Rashid and for committing the act by them, they have no intention or purpose for committing such act. Case under Section 307 IPC has been proved against the accused beyond doubt. Therefore in this situation lenient view cannot be adopted against the accused. The Hon'ble Supreme Court has shown this intent in several cases that if the leniency is given to the accused, then the criminal people in the society will be encouraged. The accused had without any reason has injured the complainant sitting in his shop. This has been witnessed by other people of the society sitting in shop. Adopting lenient view with the accused, faith of the other people of the society will go from justice. In such situation, as per the direction given by the Hon'ble Supreme Court, the accused are punished as under:
>
> ORDER OF SENTENCE:
>
> Therefore accused Shambhu son of Babu Lal and accused Banwari lal son of Babu Lal Kevat, residents of Iqbal Chowk, Sakatpura, Kota are declared acquitted from the charge under Section 427 IPC and both the accused are convicted and are sentenced for 10-10 (Ten-Ten) years rigorous imprisonment and fine of Rs.5000-5000/- (Rupees five thousand only) for the charge under Section 307 read with Section 34 IPC. In the event of committing default in the payment of fine will face additional simple imprisonment of 3-3 months. The period spent in police/ judicial custody by the accused will be adjusted in the period of original sentence under th[illegible]n

428 Cr.P.C. Warrant of sentence be prepared. Recovered property in the case, iron road and strip of iron like sword be destroyed after expiry of limitation of appeal as per directions. Copy of the judgment be supplied to the accused free of cost."

3. Aggrieved by the order of conviction and sentence, the accused persons approached the High Court by filing S.B. Criminal Appeal No. 825 of 2009. When the appeal came up for hearing, on 16.11.2011, the complainant, Abdul Rashid who was present in the court, stated that he and the accused persons had entered into a compromise and, based on that compromise, he had received the compensation amount from the accused persons for the injuries caused to him. Consequently, it was pointed out that he did not wish to pursue the appeal. Learned counsel appearing for the complainant submitted before the High Court that since the parties had buried the differences and since offence committed was 'against an individual', rather than 'against the State', no fruitful purpose would be served by keeping the accused persons behind the bars, and hence, it was requested that the case be compounded and the appeal be allowed.

4. We have examined the reasons stated by the High Court for acceding to that request. The High Court examined the scope of Sections 482 and 320 CrPC and expressed the view that there are certain similarities and differences between compounding and quashing a case on the basis of compromise and hence, quashing of a criminal proceeding upon a compromise is well within the discretionary power of the Court. It also opined that while the power under Section 320 CrPC is cribbed, cabined and confined, the power under Section 482 CrPC is vast, unparallel and paramount. On facts the High Court opined that it was a case where the fight between the parties had occurred on the spur and heat of the moment and the assault was more a crime 'against an individual', rather than 'against the society at large'. The High Court held as follows:

"In the present case, the fight occurred at the spur of the moment in the heat of the moment. According to the prosecution, both the sides were verbally fighting when alleged, the appellants struck Abdul Rashid (PW-3). The assault was more a crime against an individual than against the society at large. Admittedly, both the parties have entered into a compromise. They have resolved their differences. Thus, it would be in the interest of justice to allow the appeal."

5. The High Court felt that since the parties had entered into a compromise and resolved their disputes and differences, it would be in the interest of justice to allow the appeal. Consequently, the appeal was allowed and the accused persons were acquitted of the offence under Sections 307 read with 34 IPC. Aggrieved by the same, this appeal has been preferred.

6. Learned counsel appearing for the State submitted that the High Court has completely misread and misunderstood the various principles laid down by this Court in *Gian Singh v. State of Punjab and another* (2012) 10 SCC regarding the scope and ambit of Sections 482 and 320 CrPC as well as the powers conferred on the criminal Court to quash criminal proceedings involved in a non-compoundable offence, in view of the compromise arrived at between the parties. The various guidelines laid down by this Court were also overlooked. Learned counsel also submitted that the High Court has also committed an error in holding that the offence which has been proved was merely an offence against an individual, rather than against the State. Learned counsel submitted that the Sessions Court had correctly noticed the nature of injuries and rightly came to the conclusion that the accused had committed injuries not due to sudden provocation, but it was a premeditated incident and that the trial Court has rightly awarded the sentence of 10 years rigorous imprisonment for the offence punishable under Section 307 IPC.

7. Learned counsel appearing for the respondents, on the other hand, contended that the parties had entered into a compromise and, on the basis of the compromise, the accused persons paid a substantial amount to the complainant for the injuries caused to him and taking note of the fact that the alleged crime was committed on the spur of the moment without pre-meditation, the High Court was justified in compounding the offence and acquitting the accused persons.

8. We may point out that in *Gian Singh* (supra), this Court has held that quashing of offence or criminal proceedings on the ground of settlement between an offender and the victim is not the same thing as compounding of offences. This Court also held that the power of compounding of offences conferred on a Court under Section 320 CrPC is materially different from the power conferred under Section 482 for quashing of criminal proceedings by the High Court. In compounding of offences, power of a criminal court is circumscribed by the provisions contained in Section 320 CrPC and the Court is guided solely and squarely thereby, while, on the other hand, the formation of opinion by the High Court for quashing a criminal proceeding or criminal complaint under Section 482 CrPC is guided by the material on record as to whether the ends of justice would justify such exercise of power, although the ultimate consequence may be acquittal or dismissal of indictment.

9. The Court also opined that the power of the High Court in quashing a criminal proceeding or FIR or complaint in exercise of its inherent jurisdiction is distinct and different from the power given to a criminal court for compounding the offences under Section 320 CrPC. This Court further opined that the inherent power is of wide plentitude with no statutory limitation but it has to be exercised in accordance with the guidelines engrafted in such power, namely, (i) to secure the ends of justice, or (ii) to prevent abuse of the process of any court. This Court also cautioned that while exercising the power of compounding the offence, the court must have due regard to the nature and gravity of the crime.

10. We notice, in this case, admittedly, the offence committed under Section 307 IPC is not compoundable. In *Ishwar Singh v. State of M.P.* (2008) 15 SCC 667, the accused was alleged to have committed an offence punishable under Section 307 IPC and, with reference to Section 320 CrPC, it was held that Section 307 was not a compoundable offence and there was express bar in Section 320 that no offence shall be compounded if it is not compoundable under the Code. In *Gulab Das and others v. State of Madhya Pradesh* (2011) 10 SCC 765, a different note was struck by this Court, but certain reasons for compounding the offence under Section 307 IPC were stated. In that case, this Court noticed that the incident had taken place in the year 1994 and the parties were related to each other. Both the accused persons, at the time of the incident, were in their 20's. Further, it was also noticed that a cross case was registered against the complainant also in which he was convicted and sentenced. Further, it was also noticed that the accused persons had also undergone certain period of sentence. The case which was settled between the parties, involved offences punishable under Section 325 read with Section 34 and also under Section 323 IPC. It was in such circumstances that the Court felt that the settlement arrived at between the parties was a sensible once so as to give quietus to the controversy. The Court while upholding the conviction, reduced the sentence awarded to the accused to the period they had already undergone.

11. In *Rajendra Harakchand Bhandari and others v. State of Maharashtra and another* (2011) 13 SCC 311, this Court had an occasion to consider the question whether an offence under Section 307 IPC could be compounded in terms of the compromise reached at between the parties. It was categorically held that the offence under Section 307 IPC is not compoundable in terms of Section 320(9) CrPC and that compounding of such an offence was out of question. Further, taking note of the fact that the incident had occurred in the year 1991 and it was almost 20 years sin e

accused persons were agriculturists by occupation and had no previous criminal background and there had been reconciliation among the parties, the Court held that the ends of justice would be met if the substantive sentence awarded to the accused be reduced to the period already undergone.

12. We find, in this case, such a situation does not arise. In the instant case, the incident had occurred on 30.10.2008. The trial Court held that the accused persons, with common intention, went to the shop of the injured Abdul Rashid on that day armed with iron rod and a strip of iron and, in furtherance of their common intention, had caused serious injuries on the body of Abdul Rashid, of which injury number 4 was on his head, which was of a serious nature.

13. Dr. Rakesh Sharma, PW5, had stated that out of the injuries caused to Abdul Rashid, injury no. 4 was an injury on the head and that injury was “grievous and fatal for life”. PW8, Dr. Uday Bhomik, also opined that a grievous injury was caused on the head of Abdul Rashid. Dr. Uday conducted the operation on injuries of Abdul Rashid as a Neuro Surgeon and fully supported the opinion expressed by PW 5 Dr. Rakesh Sharma that injury no. 4 was “grievous and fatal for life”.

14. We notice that the gravity of the injuries was taken note of by the Sessions Court and it had awarded the sentence of 10 years rigorous imprisonment for the offence punishable under Section 307 IPC, but not by the High Court. The High Court has completely overlooked the various principles laid down by this Court in *Gian Singh* (supra), and has committed a mistake in taking the view that, the injuries were caused on the body of Abdul Rashid in a fight occurred at the spur and the heat of the moment. It has been categorically held by this Court in *Gian Singh* (supra) that the Court, while exercising the power under Section 482, must have “due regard to the nature and gravity of the crime” and “the societal impact”. Both these aspects were completely overlooked by the High Court. The High Court in a cursory manner, without application of mind,

blindly accepted the statement of the parties that they had settled their disputes and differences and took the view that it was a crime against “an individual”, rather than against “the society at large”.

15. We are not prepared to say that the crime alleged to have been committed by the accused persons was a crime against an individual, on the other hand it was a crime against the society at large. Criminal law is designed as a mechanism for achieving social control and its purpose is the regulation of conduct and activities within the society. Why Section 307 IPC is held to be non-compoundable, because the Code has identified which conduct should be brought within the ambit of non-compoundable offences. Such provisions are not meant, just to protect the individual, but the society as a whole. High Court was not right in thinking that it was only an injury to the person and since the accused persons had received the monetary compensation and settled the matter, the crime as against them was wiped off. Criminal justice system has a larger objective to achieve, that is safety and protection of the people at large and it would be a lesson not only to the offender, but to the individuals at large so that such crimes would not be committed by any one and money would not be a substitute for the crime committed against the society. Taking a lenient view on a serious offence like the present, will leave a wrong impression about the criminal justice system and will encourage further criminal acts, which will endanger the peaceful co-existence and welfare of the society at large.

16. We are, therefore, inclined to allow this appeal and set aside the judgment of the High Court. The High Court was carried away by the settlement and has not examined the matter on merits, hence, we are inclined to direct the High Court to take back the appeal to its file and decide the appeal on merits. Let the High Court dispose of the appeal within six months. Ordered accordingly.

K.K.T. l.

SASIDHAR REDDY SURA
v.
THE STATE OF ANDHRA PRADESH & ORS.
(Civil Appeal No. 10836 of 2013)

DECEMBER 05, 2013

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

Judicial Service – A.P. State Judicial Services – Appointment – To the post of District and Sessions Judge (Entry Level) – Eligibility – Absence of minimum age qualification – Effect – Appellant, though included in select list, not appointed as he had not completed 35 years of age at the time when the advertisement inviting applications for the post in question had been published – Justification – Held: Not justified – In the instant case, the relevant Rules provide only for the maximum age limit but do not say anything with regard to the minimum age of a candidate to be selected to the post in question – Though Justice Shetty Commission had expressed its view in its report that only after completion of 35 years of age, a person should be appointed as a District and Sessions Judge but the said recommendation has not been incorporated in the Rules framed by the High Court for giving appointment to the post in question – In the circumstances, the appellant, who had not completed 35 years of age at the relevant time could not have been denied appointment to the post in question simply because of his being under age as per the recommendations of the Justice Shetty Commission especially when there is no provision in the Rules that a candidate must have completed 35 years of age for being appointed to the post of a District and Sessions Judge – High Court erred in giving undue weightage to recommendations made by the Justice Shetty Commission, especially when the Rules did not provide for any minimum age for appointment to the post in question – Moreover, even

Article 233 of the Constitution is also silent about the minimum age for being appointed as a District judge – Andhra Pradesh State Judicial Service Rules, 2007 – Clause V – Constitution of India, 1950 – Article 233.

In pursuance of advertisement published by the High Court of Andhra Pradesh inviting applications for appointment to posts of District and Sessions Judges (Entry Level) in the A.P. State Judicial Service, the appellant applied for the said post. He took the written examination and also appeared in the oral interview. Though the appellant found his name in the select list, he was not appointed to the post in question for the reason that he had not completed 35 years of age at the time when he had submitted his application or at the time when the advertisement had been issued and also for the reason that he had not completed seven years standing at the bar as an advocate.

As the appellant was not appointed to the post in question, he filed Writ Petition before the High Court. The High Court held that though the appellant had completed seven years as an advocate, he had not attained the age of 35 years at the time when the advertisement had been issued and therefore, the appellant was not eligible to be appointed to the post in question and hence, the present appeal.

Disposing of the appeals, the Court

HELD: 1. The relevant provisions pertaining to eligibility for being appointed to the post of District Judges have been incorporated in clause V of the Andhra Pradesh State Judicial Service Rules, 2007. Upon perusal of the above clause, it is very clear that for being appointed to the post in question, an advocate should have at least seven years of standing at the bar and he should not have completed 45 years of age in the [illegible] **e**

Notification inviting applications for such an appointment is published in the Andhra Pradesh Gazette. The said clause does not provide for any minimum age and therefore, it is very clear that the Rules provide only for the maximum age limit but not for any minimum age. Thus, the concept of 'minimum age' for being appointed to the post in question is not incorporated in the Rules. The said concept, with regard to the minimum age, has been brought only from the report of the Justice Shetty Commission. For the reasons recorded in the report of the Commission, the Commission was of the view that the post of a District and Sessions Judge, being an important post, which not only requires integrity and intelligence but also requires maturity, the Commission was of the view that a person not having completed 35 years of age should not be appointed to the said post. It is pertinent to note that this was merely a recommendation or suggestion made by the Commission. The recommendation or suggestion, if not supported by the Rules, cannot be implemented. In the instant case, the Rules are silent with regard to the minimum age. It only speaks about the maximum age. In the circumstances, one cannot read provisions incorporated in the report of the Commission into the Rules. The Rules are statutory and framed under the provisions of Article 309 of the Constitution of India. If the recommendations made by the Commission and the statutory Rules are at variance, the provisions incorporated in the Recruitment Rules have to be followed. [Paras 17, 18 and 19] [994-G; 995-D-H; 996-A-C]

1.2. In the instant case, the Rules do not say anything with regard to the minimum age of a candidate to be selected to the post in question whereas the Commission had expressed its view in its report that only after completion of 35 years of age a person should be appointed as a District and Sessions Judge but the said recommendation has not been incorporated in the Rules

framed by the High Court for giving appointment to the post in question. [Para 20] [996-E-F]

1.3. In the aforestated circumstances, the appellant, who had not completed 35 years of age at the relevant time could not have been denied the appointment to the post in question simply because of his being under age as per the recommendations of the Commission especially when there is no provision in the Rules that a candidate must have completed 35 years of age for being appointed to the post of a District and Sessions Judge. [Para 21] [996-F-G]

1.4. The High Court was in error while giving undue weightage to the recommendations made by the Commission, especially when the Rules do not provide for any minimum age for the appointment to the post in question. Moreover, even Article 233 of the Constitution of India is also silent about the minimum age for being appointed as a district judge. [Para 22] [996-H; 997-A-B]

Syed T.A. Naqshbandi & Ors. v. State of Jammu & Kashmir and Ors. **(2003) 9 SCC 592: 2003 (1) Suppl. SCR 114 – relied on.**

Rakhi Ray & Ors. v. High Court of Delhi & Ors. **(2010) 2 SCC 637: 2010 (2) SCR 239 – referred to.**

2. It is directed that the appellant shall be appointed to the post in question with effect from the date on which he ought to have been appointed, however, he shall not be paid salary for the period during which he has not worked as a District and Sessions Judge. The appellant shall also be placed at appropriate place in the seniority list of the District Judges after considering his position in the merit list. [Para 23] [997-C-D]

Case Law Reference:

2003 (1) Suppl. SCR 114	**relied on**	**Para 6**
2010 (2) SCR 239	**referred to**	**Para 9**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 10836 of 2013.

From the Judgment & Order dated 17.07.2012 of the High Court of A.P. at Hyderabad in WP No. 34683 of 2011.

WITH

Civil Appeal No. 10837 of 2013.

Mohan Parasaran, ASG, R. Basant, L. Nageswara Rao, B. Adinarayana Rao, Basava Prabhu S. Patil, P.P. Rao, Y. Raja Gopala Rao, K. Parameshwar, Sudha Gupta, G. Ramakrishna Prasad, Suyodhan Byrapaneni, Mohd, Wasay Khan, Filza Moonis, Lawyer's Knit & Co., K. Swami, Nikhil Swami, Prabha Swami, Mahalakshmi Pavani, Akshat Kulshreshta, S. Manish, Meghna, Anshuman Ashok, P.S. Tripathi, Sridhar Potaraju, G. Gangmei, Nisha Pandey, Mahalakshmi Balaji & Co., P. Vinay Kumar, Gunnam Venkateswara Rao, G.N. Reddy, Debojit Borkakati, Bala Shivudu M., G. Ramakrishna Prasad, Tatini Basu, B. Subrahmanya Prasad, Anirudh Sanganeria, Venkatakrishna Kunduru, Debjoyti Basu, Dr. K. Lakshmi Narasimha, S. Udaya Kumar Sagar, Bina Madhavan, Praseena E. Joseph, Shivendra Singh, Sinha Shrey Nikhilesh, Santosh Mishra, K. Parameshwar, Vinay Kumar, C.S.N. Mohan Rao, Y. Raja Gopala Rao for the appearing parties.

The Judgment of the Court was delivered by

ANIL R. DAVE, J. 1. Leave granted.

2. The appellant, a candidate who aspired to be a District and Sessions Judge, has filed this Appeal challenging the validity of the Judgment and Order dated 17th July, 2012

delivered by the High Court of Andhra Pradesh in Writ Petition No. 34683 of 2011.

3. The grievance which had been ventilated by the appellant before the High Court was that he had not been appointed to the post of District and Sessions Judge. In pursuance of an advertisement, dated 19th August, 2010 published by the High Court of Andhra Pradesh inviting applications for appointment to 18 (eighteen) posts of District and Sessions Judges (Entry Level) in the A.P. State Judicial Service, the appellant had applied for the said post. He had taken the written examination and also appeared in the oral interview and he had found his name in the select list. Though the appellant found his name in the select list, he was not appointed to the post in question for the reason that he had not completed 35 years of age at the time when he had submitted his application or at the time when the advertisement had been issued and also for the reason that he had not completed seven years standing at the bar as an advocate.

4. As the appellant had not been appointed to the post in question, he had filed the aforestated Writ Petition before the High Court of Andhra Pradesh. While deciding the Writ Petition, the High Court had come to a conclusion that though the appellant had completed seven years as an advocate, he had not attained the age of 35 years at the time when the advertisement had been issued i.e. on 19th August, 2010 and therefore, the appellant was not eligible to be appointed to the post in question. Thus, on one count the petition filed by the appellant had failed and therefore, by filing this appeal the appellant has approached this Court contending that it was not necessary for him to have completed 35 years of age for being appointed to the post of the District and Sessions Judge (Entry Level) in the A.P. Judicial Service.

5. The learned counsel appearing for the appellant had submitted that it was not necessary for the appellant to have

completed the age of 35 years for being appointed to the post in question as there is no provision in the Andhra Pradesh State Judicial Service Rules, 2007 (hereinafter referred to as the 'Rules') to the effect that the candidate, to be appointed to the post in question, must have completed 35 years of age. He had submitted that the High Court committed an error by coming to the conclusion that simply because the Justice Shetty Commission (hereinafter referred to as 'the Commission') had recommended that a person who has completed 35 years of age should only be appointed as a District and Sessions Judge, the High Court, on an erroneous ground decided not to appoint the appellant to the post in question. According to him the Commission had merely made certain suggestions with regard to appointment of deserving candidates in judiciary so as to see that the judiciary becomes stronger. In an effort to enhance the standard of judges and judiciary, the Commission headed by Justice Shetty had been appointed and certain recommendations had been made by the said Commission. The said recommendations, according to the learned counsel appearing for the appellant, were merely recommendatory in nature and by no stretch of imagination, the said suggestions could have been accepted unless they were supported by relevant recruitment rules. Ultimately he had also submitted that if the recruitment rules are at variance with the recommendations of the Commission, the recruitment rules are to be followed and not the recommendations made by the Commission.

6. The learned counsel had relied upon certain judgments so as to buttress his submissions. He had relied upon the judgment delivered in the case of *Syed T.A. Naqshbandi & Ors. v. State of Jammu & Kashmir and Ors.* (2003) 9 SCC 592. He had drawn our attention to para 8 of the said judgment which reads as under:

> "…The conditions of service of members of any service for that matter is governed by statutory rules and orders, lawfully made in the absence of rules to cover the area which has not been specifically covered by such rules, and so long they are not replaced or amended in the manner known to law, it would be futile for anyone to claim for those existing rules/orders being ignored yielding place to certain policy decisions taken even to alter, amend or modify them. Alive to this indisputable position of law only, this Court observed at Para 38, that " we are aware that it will become necessary for service and other rules to be amended so as to implement this judgment". Consequently, the High Court could not be found fault with for considering the matters in question in the light of the Jammu and Kashmir Higher Judicial Service Rules, 1983 and the Jammu and Kashmir District and Sessions Judges (Selection Grade Post) Rules, 1968 as well as the criteria formulated by the High Court…."

7. The aforestated observations made by this Court clearly state that till the existing recruitment rules are amended, suggestions made by the Commission should not be taken into account. The learned counsel had submitted that the Rules governing provisions with regard to recruitment of a District and Sessions Judge did not incorporate any restriction with regard to minimum age for being appointed as a District and Sessions Judge and therefore, the recommendation made by the Commission with regard to minimum age could not have been a reason for not giving appointment to the appellant. He had drawn our attention to the contents of the advertisement which pertain to qualifications and age of the candidate for appointment to the post of a District and Sessions Judge. The relevant portion of the advertisement reads as under:

> " **Qualifications and age** : The applicant for the above said post should be (a) an advocate of not less than seven years standing at the Bar (b) must not have completed 45 years of age on the first day of August, 2010 (relaxation by three years in the upper age limit in respect of persons belonging to the Scheduled Castes

and Backward Classes) and (c) of sound health and active habits and free from any body defect or infirmity which render him/her until for such appoint."

8. The aforestated portion of the Advertisement merely states that a candidate must not have completed 45 years of age on the 1st day of August, 2010 and the appellant had not completed 45 years of age as on 1st August, 2010. The Advertisement as well as the Rules do not say anything with regard to minimum age of a candidate and therefore, the concept of minimum age being brought in by the High Court was erroneous and thus, the view expressed by the High Court cannot be accepted.

9. He had further submitted that the aforestated judgment delivered in the case of *Syed T.A. Naqshbandi's case (supra) had been followed by this court in the case of Rakhi Ray & Ors. v. High Court of Delhi & Ors*. [(2010) 2 SCC 637].

10. The learned counsel had also drawn our attention to the provisions of Article 233 of the Constitution of India, which deals with appointment to the post of a District and Sessions Judge. The said Article reads as under:

"**Article 233**:**Appointment of district judges**

(1) Appointments of persons to be, and the posting and promotion of, district judges in any State shall be made by the Governor of the State in consultation with the High Court exercising jurisdiction in relation to such State

(2) A person not already in the service of the Union or of the State shall only be eligible to be appointed a district judge if he has been for not less than seven years an advocate or a pleader and is recommended by the High Court for appointment."

11. The learned counsel had submitted that there is no provision with regard to minimum age in the aforestated Article

and therefore, the High Court was in error in rejecting the petition filed by the appellant on the ground that the appellant had not attained the age of 35 years at the time of publication of the advertisement.

12. For the aforestated reasons, the learned counsel had submitted that the view expressed by the High Court is erroneous and therefore, this Appeal should be allowed and directions should be given that the appellant be appointed as a District and Sessions Judge forthwith with retrospective effect and should also be paid salary from the date on which he ought to have been appointed.

13. On the other hand, the learned counsel appearing for the High Court had fairly submitted that though there was a recommendation by the Commission with regard to fixing of minimum age for being appointed as a District and Sessions Judge, the Rules governing appointment to the post in question did not make any provision with regard to minimum age.

14. The learned counsel appearing for the other selected candidates also made similar submissions.

15. We have heard the learned counsel at length and have also perused the judgments referred to by the learned counsel and the impugned judgment.

16. Upon hearing the learned counsel and looking at the relevant provisions governing appointment to the post of a District and Sessions Judge (Entry Level) in the A.P. Judicial Service, we are not persuaded to agree with the view expressed by the High Court.

17. The relevant provisions pertaining to eligibility for being appointed to the post of District Judges have been incorporated in clause V of the Rules, which read as follows:

"1. **District Judges** : A person to be appointed to the category of District Judges by direc :

a. An advocate of not less than seven years standing at the Bar

b. A person, who has not completed forty five years or age on the month in which the notification inviting applications for such appointment is published in the Andhra Pradesh Gazette.

c. A person of sound health and active habits and free from any bodily defect or infirmity, which tender him, unfit for such appointment.

Provided that the upper age limit in respect or persons belonging to the Scheduled Castes; the Scheduled Tribes and Backward Classes is relaxable by three years."

18. Upon perusal of the above clause, it is very clear that for being appointed to the post in question, an advocate should have at least seven years of standing at the bar and he should not have completed 45 years of age in the month in which the Notification inviting applications for such an appointment is published in the Andhra Pradesh Gazette. The said clause does not provide for any minimum age and therefore, it is very clear that the Rules provide only for the maximum age limit but not for any minimum age. Thus, the concept of 'minimum age' for being appointed to the post in question is not incorporated in the Rules.

19. The said concept, with regard to the minimum age, has been brought only from the report of the Commission. For the reasons recorded in the report of the Commission, the Commission was of the view that the post of a District and Sessions Judge, being an important post, which not only requires integrity and intelligence but also requires maturity, the Commission was of the view that a person not having completed 35 years of age should not be appointed to the said post. It is pertinent to note that this was merely a

recommendation or suggestion made by the Commission. The recommendation or suggestion, if not supported by the Rules, cannot be implemented. In the instant case, the Rules are silent with regard to the minimum age. It only speaks about the maximum age. In the circumstances, one cannot read provisions incorporated in the report of the Commission into the Rules. The Rules are statutory and framed under the provisions of Article 309 of the Constitution of India. In our opinion, if the recommendations made by the Commission and the statutory Rules are at variance, the provisions incorporated in the Recruitment Rules have to be followed. It is pertinent to note that when such a question had been raised before this Court, in the case of *Syed T.A. Naqshbandi's* case (supra), this Court had also observed that till relevant recruitment rules are suitably amended so as to incorporate the recommendations made by the Commission, provisions of the statutory rules must be followed.

20. In the instant case, the Rules do not say anything with regard to the minimum age of a candidate to be selected to the post in question whereas the Commission had expressed its view in its report that only after completion of 35 years of age a person should be appointed as a District and Sessions Judge but the said recommendation has not been incorporated in the Rules framed by the High Court for giving appointment to the post in question.

21. In the aforestated circumstances, the appellant, who had not completed 35 years of age at the relevant time could not have been denied the appointment to the post in question simply because of his being under age as per the recommendations of the Commission especially when there is no provision in the Rules that a candidate must have completed 35 years of age for being appointed to the post of a District and Sessions Judge.

22. In our opinion, the High Court was in error while giving undue weightage to the recommen e

Commission, especially when the Rules do not provide for any minimum age for the appointment to the post in question. Moreover, even Article 233 of the Constitution of India is also silent about the minimum age for being appointed as a district judge.

23. For the aforestated reasons, we are in agreement with the submissions made by the learned counsel appearing for the appellant and therefore, we quash the impugned judgment so far as it pertains to the present appellant and we direct that the appellant shall be appointed to the post in question with effect from the date on which he ought to have been appointed, however, he shall not be paid salary for the period during which he has not worked as a District and Sessions Judge. The appellant shall also be placed at appropriate place in the seniority list of the District Judges after considering his position in the merit list. We are sure that the respondent- High Court as well as the State shall do the needful for giving an appointment to the appellant at an early date.

24. The appeal stands disposed of as allowed with no order as to costs.

C.A.No. 10837/2013

(Arising out of SLP(C) No.24313/2012)

1. Leave granted.

2. As the appellant had been desirous of being appointed as a District and Sessions Judge (Entry Level) in the A.P. State Judicial Services, she had applied for the post in question. She had been selected for the post in question and her name was included in the select list at no.16.

3. The selection of the appellant had been challenged by some candidates by filing W.P.No.894 of 2012 in the High Court of Andhra Pradesh on the ground that the appellant had not secured minimum required marks in the interview and she

had not attained 35 years of age at the time of publication of the advertisement and therefore, she could not have been selected. The aforestated petition was allowed but it was allowed only on the ground of age limit of the appellant. The High Court was of the view that as the requirement of minimum marks had been done away with by virtue of an amendment made to Rule 6(4) & (10) of the A.P. State Judicial Service Rules, 2007 vide G.O. Ms. No.132, dated 16.11.2011, it was not necessary for the appellant to secure minimum marks in the interview for being eligible for appointment.

4. Thus, the appellant was not appointed only for the reason that she had not completed 35 years of age at the time when the advertisement inviting applications for the post in question had been published.

5. By virtue of an order passed in C.A.No.10836 of 2013 arising out of SLP(C) No.23171 of 2012, this Court has already held that there is no minimum age qualification for being appointed to the post in question and therefore, in our opinion, the appellant could not have been denied appointment to the post in question on the ground that she had not completed 35 years of age at the time when the advertisement had been published.

6. For the reasons recorded in C.A.No.10836 of 2013 arising out of SLP(C) No.23171 of 2012, the present appeal is allowed and it is directed that the High Court as well as the respondent-State will do the needful for giving appointment to the appellant with retrospective effect i.e. from the date on which she ought to have been appointed, however, she shall not be paid salary for the period during which she has not worked as a District & Sessions Judge. We are sure that the respondents would do the needful for the appointment of the appellant at an early date.

7. The appeal is allowed with no order as to costs.

B.B.B.

BHARAT SANCHAR NIGAM LIMITED
v.
TELECOM REGULATORY AUTHORITY OF INDIA AND OTHERS
(Civil Appeal No. 5253 of 2010)

DECEMBER 6, 2013

[G.S. SINGHVI, DR. B.S. CHAUHAN AND FAKKIR MOHAMED IBRAHIM KALIFULLA, JJ.]

Telecom Regulatory Authority of India Act, 1997:

s.36 – Power of Telecom Regulatory Authority of India (Authority) to frame regulations – Held: Under sub-s. (1) of s.36, the Authority can make regulations to carry out the purposes of the Act specified in various provisions of the Act including ss.11, 12 and 13 — The Authority can make regulations which may empower it to issue directions of general character applicable to service providers and others and it cannot be said that by making regulations u/s 36(1) , the Authority has encroached upon the field occupied by s.12(4) and 13 — Power vested in the Authority u/s 36(1) to make regulations is wide and pervasive — Exercise of this power is only subject to the provisions of the Act and the Rules framed u/s 35 thereof — It is not controlled or limited by s.36(2) or ss.11, 12 and 13 — There is nothing in the language of s.36(2) from which it can be inferred that provisions contained therein control the exercise of power by Authority u/s 36(1) or that s.36(2) restricts the scope of s.36(1) — It is settled law that if power is conferred upon an authority/body to make subordinate legislation in general terms, the particularization of topics is merely illustrative and does not limit the scope of general power – Interpretation of Statutes — Delegated legislation – Doctrine of occupied field.

ss. 33, 36 and 37 — Power of Authority to frame

regulations – Held: The power u/s 36 is legislative –This power is non-delegable — By virtue of s.37, regulations made under the Act are placed on par with the rules which can be framed by Central Government u/s 35 and being in the nature of subordinate legislation, rules and regulations have to be laid before both the Houses of Parliament which can annul or modify the same — Thus, regulations framed by Authority can be made ineffective or modified by Parliament and by no other body – Delegated legislation.

s.14(b)(as amended by Amendment Act, 2000) – Judicial review of regulations framed by Authority – Held: In exercise of the power vested in TDSAT u/s 14(b), it does not have the jurisdiction to entertain the challenge to the regulations framed by the Authority u/s 36 — The amendment is intended to vest original jurisdiction of the Authority in TDSAT and the same is achieved by s. 14(a) — The appellate jurisdiction exercisable by High Court is also vested in TDSAT by virtue of s.14(b) – Since High Court while hearing appeal did not have the power of judicial review of subordinate legislation, the transferee adjudicatory forum, i.e., TDSAT cannot exercise that power u/s 14(b) — Telecom Regulatory Authority of India (Amendment) Act, 2000.

In the instant appeals, a two Judge Bench made a reference to the larger Bench for determination of certain substantial questions of law of public importance. When the matters were listed before the three-Judge Bench, counsel for the parties agreed that a preliminary issue relating to jurisdiction of the Telecom Disputes Settlement Appellate Tribunal (TDSAT) to entertain challenge to the regulations framed by the Telecom Regulatory Authority of India (Authority) may be decided first. Therefore, the question for consideration before the Court was: Whether in exercise of the power vested in it u/s 14(b) of the Act, TDSAT has the jurisdiction to entertain challenge to the regulations framed by the Authority

Answering the reference, the Court

HELD:1.1. Under the Telecom Regulatory Authority of India Act, 1997 (un-amended Act), the Telecom Regulatory Authority of India had three types of functions, namely, recommendatory functions, regulatory functions and adjudicatory functions. With a view to overcome the difficulties experienced in the implementation of the Act, certain amendments were brought by the Telecom Regulatory Authority of India (Amendment5) Act, 2000. One of the important features of the Amendment Act was the establishment of a Tribunal known as the Telecom Disputes Settlement and Appellate Tribunal (TDSAT). [Para 20 and 26] [1044-G; 1045-A-B; 1079-E; 1080-E; 1081-C]

1.2. After the amendment of 2000, the Authority can either suo motu or on a request from the licensor make recommendations on the subjects enumerated in s.11(1)(a)(i) to (viii). Under s.11 (1)(b), the authority is required to perform nine functions enumerated in clauses (i) to (ix) thereof. In these clauses, different terms like 'ensure', 'fix', 'regulate' and 'lay down' have been used. The use of the term 'ensure' implies that the Authority can issue directions on the particular subject. For effective discharge of functions under various clauses of s. 11(1)(b), the authority can frame appropriate regulations. The term 'regulate' contained in sub-clause (iv) shows that for facilitating arrangement amongst service providers for sharing their revenue derived from providing telecommunication services, the Authority can either issue directions or make regulations. [para 27] [1081-E-G]

1.3. The term 'regulate' is elastic enough to include the power to issue directions or to make regulations and the mere fact that the expression "as may be provided in the regulations" appearing in clauses (vii) and (viii) of s.11(1)(b) has not been used in other clauses of that sub-

section does not mean that the regulations cannot be framed u/s 36(1) on the subjects specified in clauses (i) to (vi) of s. 11(1)(b). In fact, by framing regulations u/s 36, the Authority can facilitate the exercise of functions under various clauses of s.11(1)(b) including clauses (i) to (vi). [para 35] [1087-G-H; 1088-A-B]

V.S. Rice & Oil Mills v. State of A.P. **1964 SCR 456 = AIR 1964 SC 1781;** *State of Tamil Nadu v. Hind Stone* **1981 (2) SCR 742 = (1981) 2 SCC 205;** *K. Ramanathan v. State of Tamil Nadu* **1985 (2) SCR 1028 = (1985) 2 SCC 116;** *Jiyajeerao Cotton Mills Ltd. v. M.P. Electricity Board* **1988 (2) Suppl. SCR 978 = 1989 Supp (2) SCC 52;** *Deepak Theatre v. State of Punjab* **1991 (3) Suppl. SCR 242 = 1992 Supp (1) SCC 684;** *Quarry Owners' Association v. State of Bihar* **2000 (2) Suppl. SCR 211 = (2000) 8 SCC 655;** *U.P. Coop. Cane Unions Federation v. West U.P. Sugar Mills Association* **2004 (2) Suppl. SCR 238 = (2004) 5 SCC 430– referred to.**

Webster's *Third New International Dictionary,* **Vol. II, p. 1913 and** *Shorter Oxford Dictionary,* **Vol. II, 3rd Edn., p. 1784 – referred to.**

1.4. Under sub-s. (1) of s.36, the Authority can make regulations to carry out the purposes of the Act specified in various provisions of the Act including ss.11, 12 and 13. The exercise of power u/s 36(1) is hedged with the condition that the regulations must be consistent with the Act and the Rules made thereunder. There is no other restriction on the power of the Authority to make regulations. In terms of s.37, the regulations are required to be laid before Parliament which can either approve, modify or annul the same. Section 36(2), which begins with the words "without prejudice to the generality of the power under sub-s. (1)" specifies various topics on which regulations can be made by the Auth[...] topics relate to meetings of the Aut[...]e

to be followed at such meetings, the transaction of business at the meetings and the register to be maintained by the Authority. The remaining two topics specified in Clauses (e) and (f) of s. 36(2) are directly referable to s.11(1)(b)(viii) and 11(1)(c). These are substantive functions of the Authority. However, there is nothing in the language of s.36(2) from which it can be inferred that the provisions contained therein control the exercise of power by the Authority u/s 36(1) or that s.36(2) restricts the scope of s.36(1). [para 36] [1088-B-F]

1.5. It is settled law that if power is conferred upon an authority/body to make subordinate legislation in general terms, the particularization of topics is merely illustrative and does not limit the scope of general power. [para 37] [1088-G]

Afzal Ullah v. State of Uttar Pradesh **1964 (4) SCR 991;** *Rohtak Hissar District Electricity Supply Company Ltd. v. State of Uttar Pradesh and others* **1966 SCR 863 = AIR 1966 SC 1471;** *Santosh Kumar Jain v. State* **1951 SCR 303 =AIR 1951 SC 201;** *D.K. Trivedi and Sons v. State of Gujarat* **1986 SCR 479 1986 (Supp) SCC 20;** *Academy of Nutrition Improvement v. Union of India* **2011 (8) SCR 680 = (2011) 8 SCC 274 – relied on.**

Emperor v. Sibnath Banerji **AIR 1942 PC 156 – referred to.**

1.6. Section 11(1)(b)(iv) specifically postulates making of regulations for discharging the functions specified in those clauses. Section 11(2), which contains non-obstante clause vis-à-vis the Indian Telegraph Act, 1885, lays down that the Authority may, from time to time, by order notify the rates at which the telecommunication services within or outside India shall be provided under the Act subject to the limitation specified in s.11(3). Under s.12(1), the Authority is empowered to issue order and

call upon any service provider to furnish such information or explanation relating to its affair or appoint one or more persons to make an inquiry in relation to the affairs of any service provider and direct inspection of the books of account or other documents of any service provider. Sections 12(4) and 13 of the Act are only enabling provisions. This is evinced from the expressions "shall have the power" used in s.12(4) and "The Authority may" used in s.13. [para 43] [1096-C-G]

1.7. In terms of s.12(4), the Authority can issue such directions to service providers, as it may consider necessary, for proper functioning by service providers. Section 13 lays down that the Authority may for discharge of its functions u/s 11(1), issue such directions to the service providers, as it may consider necessary. The scope of this provision is limited by the proviso, which lays down that no direction u/s 12(4) or s.13 shall be issued except on matters specified in s.11(1)(b). [para 43] [1096-G-H; 1097-A]

1.8. It is, thus, clear that the Authority, in discharge of its functions, can issue directions to the service providers.The Act speaks of many players like the licensors and users, who do not come within the ambit of the term "service provider". If the Authority has to discharge its functions qua the licensors or users, then it will have to use powers under provisions other than ss.12(4) and 13. [para 43] [1097-A-B]

1.9. Therefore, in exercise of power u/s 36(1), the Authority can make regulations which may empower it to issue directions of general character applicable to service providers and others and it cannot be said that by making regulations u/s 36(1) the Authority has encroached upon the field occupied by s.12(4) and 13 of the Act. [para 43] [1097-C-D]

1.10. A plain reading of the language of s.33 makes it clear that the Authority can, by general or special order, delegate to any member or officer of the Authority or any other person such of its powers and functions under the Act except the power to settle disputes under Chapter IV or make regulations u/s 36. This means that the power to make regulations u/s 36 is non-delegable. The reason for excluding s. 36 from the purview of s.33 is that the power u/s 36 is legislative as opposed to administrative. By virtue of s.37, the regulations made under the Act are placed on par with the rules which can be framed by the Central Government u/s 35 and being in the nature of subordinate legislations, the rules and regulations have to be laid before both the Houses of Parliament which can annul or modify the same. Thus, the regulations framed by the Authority can be made ineffective or modified by Parliament and by no other body. [para 44] [1097-D-G]

1.11. This Court, therefore, holds that the power vested in the Authority u/s 36(1) to make regulations is wide and pervasive. The exercise of this power is only subject to the provisions of the Act and the Rules framed u/s 35 thereof. There is no other limitation on the exercise of power by the Authority u/s 36(1). It is not controlled or limited by s.36(2) or ss.11, 12 and 13. [para 45] [1098-A-B]

2.1. Under the un-amended s.14(1), the Authority could decide disputes among service providers and between service providers and a group of consumers. In terms of s.14(2) (unamended), the bench constituted by the Chairperson of the Authority could exercise powers and authority which were exercisable earlier by the civil court on technical compatibility and inter-connections between service providers, revenue sharing arrangements between different service providers, quality of telecommunication services and interest of consumers. However, the disputes specified in clauses

(a), (b) and (c) of s.14(2) could not be decided by the bench constituted by the Chairperson. [para 49] [1100-F-H; 1101-A]

2.2. Since the mechanism provided for settlement of disputes u/s 14 of the unamended Act was not satisfactory, Parliament substituted that section and facilitated establishment of an independent adjudicatory body known as TDSAT. Clause (a) of amended s.14 confers jurisdiction upon TDSAT to adjudicate any dispute between a licensor and licensee, between two or more service providers and between a service provider and a group of consumers. Three exceptions to the adjudicatory power of TDSAT relate to the cases: which are subject to the jurisdiction of Monopolies and Restrictive Trade Practices Commission, the complaint of an individual consumer which could be maintained under the consumer forums established under the Consumer Protection Act, 1986 and dispute between Telegraph Authority and any other person referred to in s.7B(1) of the Indian Telegraph Act, 1885. In terms of clause (b) of s. 14 (amended), TDSAT is empowered to hear and dispose of appeal against any direction, decision or order of the Authority. Section 14A(1) provides for making of an application to TDSAT for adjudication of any dispute referred to in s.14(a). Section 14A(2) and (3) provides for filing an appeal against any direction, decision or order made by the Authority and also prescribes the period of limitation. [para 50] [1101-B-F]

2.3. The primary objective of the 2000 amendment was to separate adjudicatory functions of the Authority from its administrative and legislative functions and ward off the criticism that the one who is empowered to make regulations and issue directions or pass orders is clothed with the power to decide legality thereof. The word 'direction' used in s.14(b) is referable to ss.12(4) and 13. The word 'order' is referable to s... e

word 'decision' has been used in s.14-A(2) and (7). This is because the proviso to s.14-M postulates limited adjudicatory function of the Authority in respect of the disputes being adjudicated under Chapter IV before the 2000 amendment. This proviso was incorporated in s.14-M to avoid a hiatus between the coming into force of the 2000 amendment and the establishment of TDSAT. [para 51] [1102-C-E]

2.4. None of the words used in s.14(b) have anything to do with adjudication of disputes. Before the 2000 Amendment, the applications were required to be filed u/s 15 which also contained detailed procedure for deciding the same. While sub-s. (2) of s.15 used the word 'orders', sub-ss. (3) and (4) thereof used the word 'decision'. In terms of sub-s. (5), the orders and directions of the Authority were treated as binding on the service providers, Government and all other persons concerned. Section 18 provided for an appeal against any decision or order of the Authority. Such an appeal could be filed before the High Court. [para 52] [1102-F-H]

2.5. The amendment made in 2000 is intended to vest the original jurisdiction of the Authority in TDSAT and the same is achieved by s. 14(a). The appellate jurisdiction exercisable by the High Court is also vested in TDSAT by virtue of s.14(b). Section 14-N provides for transfer to all appeals pending before the High Court to TDSAT and in terms of Clause (b) of sub-s. (2), TDSAT was required to proceed to deal with the appeal from the stage which was reached before such transfer or from any earlier stage or de novo as considered appropriate by it. [para 52] [1102-H; 1103-A-B]

2.6. Since the High Court while hearing appeal did not have the power of judicial review of subordinate legislation, the transferee adjudicatory forum, i.e., TDSAT cannot exercise that power u/s 14(b). [para 52] [1103-C]

Cellular Operators Association of India v. Union of India **2002 (5) Suppl. SCR 222 = (2003) 3 SCC 186;** *Union of India v. TATA Teleservices (Maharashtra) Ltd.* **2007 (9) SCR 285 = (2007) 7 SCC 517;. – held inapplicable.**

L. Chandra Kumar v. Union of India **1997 (2) SCR 1186 = (1997) 3 SCC 261- distinguished**

2.7. In *PTC India Ltd***.**, the Constitution Bench has held that a regulation u/s 178 of the Electricity Act, 2003 is made under the authority of delegated legislation and consequently its validity can be tested only in judicial review proceedings before the courts and not by way of appeal before the Appellate Tribunal. [para 58 and 60] [1108-F-G; 1114-C-D]**

***PTC India Ltd. v. Central Electricity Regulatory Commission,* **(2010) 4 SCC 603 – followed.**

Narinder Chand Hem Raj v. Lt. Governor, H.P. **(1971) 2 SCC 747 and** *Indian Express Newspapers (Bombay) (P) Ltd. v. Union of India* **1985 (2) SCR 287 = (1985) 1 SCC 641 - referred to**

Union of India v. Madras Bar Association **2010 (6) SCR 857 = (2010) 11 SCC 1;** *State of Gujarat v. Gujarat Revenue Tribunal Bar Association* **2012 (10) SCR 816 = (2012) 10 SCC 353: 2012 (10) SCALE 285 – held inapplicable.**

2.8. In *BPL Mobile Cellular Ltd**.**, the word 'directions' used in s.29 of the Act was interpreted to include orders and regulations in the context of the factual matrix of that case but the same cannot be read as laying down a proposition of law that the words 'direction', 'decision' or 'order' used in s.14(b) would include regulation framed under s.36, which are in the nature of subordinate legislation. [para 57] [1108-E-F]**

******Telecom Regulatory Authority of India v. BPL Mobile Cellular Ltd.* **CA No. 6743 – distinguished.**

2.9. This Court, therefore, holds that in exercise of the power vested in it u/s 14(b) of the Act, TDSAT does not have the jurisdiction to entertain the challenge to the regulations framed by the Authority u/s 36 of the Act. [para 64] [1118-H; 1119-A]

2.10. It is made clear that the aggrieved person shall be free to challenge the validity of the regulations framed u/s 36 of the Act by filing appropriate petition before the High Court. [para 65] [1119-B]

Hotel & Restaurant Association v. Star India ***(P) Ltd.*** **2006 (9) Suppl. SCR 602 = (2006) 13 SCC 753,** *Union of India v. Association of Unified Telecom Service Providers of India* **2011(14) SCR 657 = (2011) 10 SCC 543;** *Delhi Science Forum vs. Union of India* **(1996) 2 SCC 405;** *MTNL v. TRAI* **AIR 2000 (Delhi) 208;** *Clariant International Limited v. Security Exchange Board* **2004 (3) Suppl. SCR 843 = (2004) 8 SCC 524, and** *West Bengal Electivity Regulatory Commission v. CESC Ltd* **(2002) 8 SCC 715 – cited.**

Case Law Reference:

AIR 2000 (Delhi) 208	**cited**	**para 13.3**
2004 (3) Suppl. SCR 843	**cited**	**para 13.3**
2002 (5) Suppl. SCR 222	**held inapplicable**	**Para 13.3**
(2002) 8 SCC 715	**cited**	**para 13.3**
(1996) 2 SCC 405	**cited**	**para 17**
1964 SCR 456	**referred to**	**para 28**
1981 (2) SCR 742	**referred to**	**para 29**
1985 (2) SCR 1028	**referred to**	**para 30**
1988 (2) Suppl. SCR 978	**referred to**	**para 31**
1991 (3) Suppl. SCR 242	**referred to**	**para 32**
2000 (2) Suppl. SCR 211	**referred to**	**para 33**
2004 (2) Suppl. SCR 238	**referred to**	**para 34**
AIR 1942 PC 156	**referred to**	**para 37**
1964 (4) SCR 991	**relied on**	**para 38**
1966 SCR 863	**relied on**	**para 39**
1951 SCR 303	**relied on**	**para 40**
1986 SCR 479	**relied on**	**para 41**
2011 (8) SCR 680	**relied on**	**para 42**
1997 (2) SCR 1186	**distinguished**	**Para 47**
(2010) 4 SCC 603	**followed**	**para 47**
2006 (9) Suppl. SCR 602	**cited**	**para 48**
2011 (14) SCR 657	**cited**	**para 48**
2010 (6) SCR 857	**held inapplicable**	**para 48**
2007 (9) SCR 285	**held inapplicable**	**Para 54**
CA No. 6743	**distinguished**	**para 56**
(1971) 2 SCC 747	**referred to**	**para 59**
1985 (2) SCR 287	**referred to**	**para 59**
2012 (10) SCR 816	**held inapplicable**	**para 63**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5253 of 2010.

From the Judgment & Order dated 28.05.2010 of the Telecom Disputes Settlement and Appellate Tribunal (TDSAT) at New Delhi in Appeal No. 4 of 2007.

WITH

Civil Appeal Nos. 951-952, 3298, 3299, 4529, 5834-5836, 5837 and 6049 of 2005, 802, 2731, 2794 and 3504 of 2006, 4965-4966 of 2007, 177 and 598-599 of 2008, 5184, 5873, 6068, 6255, D28298 and T.C. No. 39 of 2010, Civil Appeal No. 271-281 of 2011.

R.F. Nariman, SG, Rakesh Khanna, ASG, Ramji Srinivasan, Rakesh Dwivedi, Dr. A.M. Singhvi, Mukul Rohatgi, Maneesha Dhir, Ritesh Kumar, Siddharth Patnaik, Amit Singh, Siddarth Tyagi, Debopama Roy, K.P.S. Kohli, Manjul Bajpai, Shashwat Bajpai, Bina Gupta, Abhay A. Jena, Nakul Mohta, Kawaljit Singh Bhatia, Vivek Paul Orien, E.C. Agrawala, Madhu Sikri, Manali Singhal, Santosh Sachin, Abhijat P. Medh, Monika Singhal, Prakhar Nishant, Mohit Auluck, Rajiv Mehta, Priyanka Das, Manu Aggarwal, Sanjay Kapur, Anmol Chandan, Ashmi Mohan, Abhinav Mukerji, Gopal Jain, Navin Chawla, Abhishek Kr. Jha, Devan Khanna, Ravi Sikri, Ayushya Kumar, Gargi Khanna, Aditi Tripathi, Rachana Joshi Issar, Amreen Rasool for the appearing parties.

The Judgment of the Court was delivered by

G.S. SINGHVI, J. 1. By an order dated 6.2.2007 passed in Civil Appeal No. 3298 of 2005 – Telecom Regulatory Authority of India (Authority) v. Bharat Sanchar Nigam Limited (BSNL) and connected matters, a two Judge Bench made a reference to the larger Bench for determination of the following substantial questions of law of public importance:

1. Whether in the event of any inconsistency between the terms and conditions of the licenses issued under Section 4 of the Indian Telegraph Act, 1885 and the provisions of the Telecom Regulatory Authority of India Act, 1997 (for short, 'the Act'), the provisions of the Act would prevail in view of the purpose and object for which the Act has been

passed, i.e., for ensuring rapid development of telecommunications in the country incorporating the most modern technology and, at the same time, protecting the interests of the consumers and the service providers?

2. Whether Authority has powers to fix the terms and conditions of inter connectivity between service providers, in respect of all the licenses, irrespective of the fact whether licenses issued before or after 24.1.2000 - especially in view of the non-obstante clause in sub-section (1) of Section 11 and sub-clause (ii) of Clause (b) of sub-section (l) of Section 11 of the TRAI (Amendment) Act of 2000?

3. Whether Authority has no power to fix terms and conditions of interconnectivity between service providers in respect of licenses issued after 24.01.2000 including terms and conditions of interconnection agreements - in view of, inter-alia, the scheme laid down in the provisos to Section 11(1) of the TRAI Act, 1997 as amended on 24.01.2000 and if it does not have any such power what would be the harmonious construction of the amended clause 11(1)(b)(ii) and the new scheme more specifically embodied in the provisos?

4. Whether under the amended provisions of the TRAI Act, 1997 introduced w.e.f 24.01.2000 - the harmonious construction of Section 11(1)(b)(ii) and the scheme of the provisos to Section 11(1) would allow the Authority to have the power to fix the terms and conditions of interconnectivity with respect to licenses issued before 24.1.2000, only to the extent the licensor (Govt. of India) accepts the recommendations of the Authority for incorporation in the new licenses, so as to achieve level playing field between the servic d

licenses before and after the amendment of the TRAI Act?

5. Whether the appeals are maintainable in the present form?

2. The larger Bench heard the arguments on various dates but released the cases vide order dated 19.10.2011. Thereafter, by mistake the Registry listed all the matters before a two Judge Bench. During the course of hearing, Shri A.S. Chandhiok, learned senior advocate appearing for BSNL invited the Court's attention to orders dated 6.2.2007 and 21.10.2010 and pointed out that the cases were earlier heard by the larger Bench. Thereupon, the two Judge Bench directed that the cases be posted before the larger Bench.

3. When the cases were listed before this Bench, learned counsel for the parties agreed that a preliminary issue relating to jurisdiction of the Telecom Disputes Settlement Appellate Tribunal (TDSAT) to entertain challenge to the regulations framed by the Authority may be decided before the questions framed vide order dated 6.2.2007 are taken up for consideration. Thereupon, the Court decided to hear the arguments on the following question:

"Whether in exercise of the power vested in it under Section 14(b) of the Act, TDSAT has the jurisdiction to entertain challenge to the regulations framed by the Authority under Section 36 of the Act.

4. For better appreciation of the arguments advanced by learned counsel for the parties, we may notice the facts borne out from the records of different appeals.

Civil Appeal Nos. 5253, 5184, 5873, 6068, 6255 of 2010 and Civil Appeal No. D28298 of 2010

5.1. The delay in filing and re-filing C.A. No. D28298 of 2010 is condoned.

5.2. These appeals have been filed by Bharat Sanchar Nigam Limited (BSNL), Cellular Operators Association of India (COAI), Association of Unified Telecom Service Providers of India (AUSPI), the Authority, M/s. Sistema Shyam TeleServices Limited and Mahanagar Telephone Nigam Limited (MTNL), respectively, against order dated 28.5.2010 passed by TDSAT whereby the appeal preferred by BSNL against the Telecommunication Interconnection (Port Charges) Amendment Regulation (1 of 2007) was allowed and the Authority was directed to give fresh look at the regulations and BSNL was directed not to claim any amount from any operator during the interregnum, i.e., from the date of coming into force of the regulations and the date of the order.

5.3. A perusal of the record shows that port charges came to be prescribed in Schedule 3 of the Telecommunication Interconnection (Charges and Revenue Sharing) Regulations, 1999, which came into force on 28.5.1999. By virtue of Clause 8, the regulations were given overriding effect qua the interconnection agreements. MTNL challenged the 1999 regulations before the Delhi High Court in Civil Writ Petition No. 6543/1999, which was allowed by the Division Bench of the High Court vide order dated 17.1.2000 [MTNL v. TRAI, AIR 2000 (Delhi) 208] and it was held that the Regulations framed under Section 36 of the Act could not be given overriding effect. Thereafter, the Authority framed the Telecommunication Interconnection (Port Charges) Amendment Regulations (6/2001). The port charges were specified in the schedule to the amended regulations. The amended regulations were challenged in Appeal Nos.11/2002 and 31/2003, which were allowed by TDSAT vide orders dated 27.4.2005 and 3.5.2005 respectively.

5.4. In view of the aforesaid orders of TDSAT, the Authority sought response of various service providers for review of port charges. In that process, BSNL raised objection to the jurisdiction of the Authority to vary the t... of interconnection agreements or the contractual rates. On 2.2.2007, the Authority issued Telecommunication Interconnection (Port Charges) Amendment Regulation (1 of 2007) reducing the port charges required to be paid by private telecom operators to BSNL by about 23-29%. BSNL challenged Notification dated 2.2.2007 in Appeal No. 4/2007. By an order dated 28.5.2010, TDSAT allowed the appeal of BSNL and issued directions to which reference has been made hereinabove.

Civil Appeal Nos. 951-952/2005

6.1. Civil Appeal No. 951/2005 has been filed by the Authority against order dated 21.4.2004 by which TDSAT allowed Appeal No.2/2004 filed by BSNL questioning direction dated 31.12.2003 issued under Section 13 read with Section 11(1)(b) of the Act. Civil Appeal No. 952/2005 has been filed by the Authority against order dated 10.8.2004 by which TDSAT dismissed Petition No.2/2004 for review of order dated 21.4.2004.

6.2. On receiving information that some operators were disconnecting Points of Interconnection (PoI) for the reason of non payment of Interconnection Usage Charges and other such reasons, the Authority issued direction dated 31.12.2003 under Section 13 read with Section 11(1)(b) conveying to all service providers that disconnection of PoIs was not desirable because the subscribers would be inconvenienced and all disputes should be resolved through mutual negotiations. It was also provided that if the dispute could not be resolved, then 10 days' notice of disconnection should be given to the erring party with a copy to the Authority. In the event of non-intervention by the Authority, the aggrieved party could disconnect the PoI or approach the Authority for determination of the matter.

6.3. BSNL filed Appeal No.2/2004 for striking down the aforesaid direction on the ground that only TDSAT was vested with the jurisdiction to decide the disputes and the Authority had

no jurisdiction in the matter. TDSAT allowed the appeal and held that the Authority did not have the jurisdiction to entertain dispute between the service providers. TDSAT noted that the words "dispute" and "determination" have been used in the direction issued by the Authority, referred to the judgment of this Court in Cellular Operators Association of India v. Union of India (2003) 3 SCC 186 and held that the jurisdiction of TDSAT is quite wide and is circumscribed only by the three instances, i.e., disputes before the MRTP Commission, Consumer Forums and those under Section 7B of the Telegraph Act.

6.4. The Authority filed Review Petition No. 2/2004 and argued that while the Authority can be faulted for the use of words "dispute" and "determination", its power to intervene cannot be questioned. Another plea taken by the Authority was that the regulations framed under Section 36 are in the nature of subordinate legislation and validity thereof cannot be questioned before TDSAT. The review petition was dismissed by TDSAT vide order dated 10.8.2004 reiterating that it had jurisdiction to entertain dispute relating to validity of regulations.

Civil Appeal Nos. 3298 and 4529 of 2005

7.1. These appeals are directed against order dated 27.4.2005 passed by TDSAT in Appeal Nos. 11 and 12 of 2002 filed by BSNL and MTNL respectively, challenging Clause 3.1 of the Telecommunication Interconnection (Reference Interconnect Offer) Regulation, 2002 (2 of 2002).

7.2. In exercise of its powers under Section 36 read with Section 11(1)(c) and (d) of the unamended Act, the Authority prescribed revenue sharing for service providers under the Calling Party Pays regime on 17.9.1999. This was challenged before the Delhi High Court. In its judgement [MTNL v. TRAI (supra)], the High Court observed that the Authority has no power to change or vary rights of parties under contracts or licenses.

7.3. After the judgment of the High Court, the Act was amended by Ordinance dated 24.1.2000 and Section 11(1)(b)(ii) was inserted to enable the Authority to fix the terms and conditions of interconnectivity between the service providers.

7.4. In exercise of the power vested in it under Section 36 read with Section 11(1)(b)(ii), (iii) and (iv), the Authority framed the 2002 Regulations. Under Clause 3.1 of these regulations, the service providers with significant market share were required to publish their Reference Interconnect Offer (RIO) within 90 days of the issue of the Regulations with prior approval of the Authority. The 2002 Regulations stipulate the broad framework, structure and provisions on which the service provider is to make an offer of interconnection with other service providers. BSNL submitted the proposed RIO on 12.7.2002. MTNL also submitted proposed RIO sometime in 2002. The RIOs of BSNL and MTNL were approved with certain changes effected vide identically worded letters dated 9.10.2002.

7.5. BSNL and MTNL filed Appeal Nos. 11 and 12/2002 challenging letters dated 9.10.2002 issued by the Authority. It was contended *inter alia* that the Authority did not have the power to frame such a regulation. They argued that the changes suggested in the RIO were non transparent and under the garb of the regulations, the Authority cannot be conferred power to fix the terms and conditions of interconnectivity which BSNL and MTNL can offer to other service providers. Clause 3.1 was challenged insofar as it had been interpreted to take away the statutory right to appeal as granted under the Act.

7.6. TDSAT disposed of both the appeals vide order dated 27.4.2005. TDSAT extensively referred to the orders passed in Review Petition No.2/2004 in Appeal No.2/2004 (BSNL v. TRAI) and Appeal No.3/2005 as also the order passed by the Delhi High Court wherein it was held that TDSAT is empowered to hear appeals involving challenge to the validity of the regulations framed under Section 36. TDSAT then held

that even after amendment of the Act, the Authority does not have the power to amend or override the terms and conditions of the interconnect agreements executed by the service providers.

<u>Civil Appeal Nos. 3299, 6049 of 2005 and 802 of 2006</u>

8.1. These appeals have been filed against order dated 3.5.2005 of TDSAT whereby it allowed Appeal No.31/2003 and partly allowed Petition No.20/2004 and quashed direction dated 22.7.2003 issued by the Authority on the premise that it did not have the power to override and make direct interconnectivity mandatory.

8.2. Direct connectivity between different service providers was introduced in light of NTP 1999 and the same was provided for in the license agreements of existing licensees through an amendment on 29.1.2001 as per DoT letter dated 9.8.2000 which stated that direct connectivity was permitted for the purpose of terminating traffic on the basis of mutual agreements. In the meanwhile, on 29.9.2000 BSNL was granted license to provide cellular mobile services and it commenced its Cellone Cellular Services in October 2002.

8.3. The Act was amended vide Ordinance dated 24.1.2000 to include the power to fix the terms and conditions of interconnectivity between service providers (Section 11(1)(b)(ii) of the amended Act).

8.4. The Authority issued Telecommunication Interconnection (Reference Interconnect Offer) Regulation, 2002 on 12.7.2002 and mooted the idea of an Interconnect Gateway Switch. On 15.5.2003, the Authority issued a consultation paper stating that if one of the parties demands direct connectivity it needs to be made mandatory through regulations. On 30.6.2003, the Authority called upon stakeholders to discuss the issue of direct connectivity. Thereafter, the Authority issued direction dated 22.7.2003 under Sectio ll service providers directing that direct connectivity be made between service providers at the earliest and not later than three months from the issue of the direction so as to promote network efficiency and consumer interest.

8.5. BSNL filed Appeal No. 31/2003 challenging direction dated 22.7.2003 on the ground that the same was contrary to the terms and conditions of the license agreements of basic and cellular operators.

8.6. The Authority issued IUC Regulations dated 29.10.2003 mandating direct connectivity between service providers. As per clause (b) of Schedule II, charges could be levied through mutual negotiations but they were to be lower than Rs.0.20. BSNL issued Circular dated 28.1.2004 levying charge of Rs.0.4 per minute for a call from cellular mobile network to another cellular network transited by BSNL. This charge included Rs.0.30 towards call termination and Rs.0.19 towards transit.

8.7. The Authority released Consultation Paper on Interconnect Exchange cum Inter-Carrier Billing Clearance House for Multi-Operator Multi-Service Scenario on 13.4.2004 mooting Interconnect Exchange as an alternative to direct connectivity.

8.8. COAI filed Petition No. 20/2004 seeking a direction against BSNL CellOne to directly connect to the Cellular Service Providers and to strike down the BSNL Circular requiring payment of Rs 0.19 transit charges which BSNL Basic Services Division was demanding and collecting.

8.9. TDSAT allowed Appeal No.31/2003 and partly allowed petition No.20/2004 and quashed direction dated 22.7.2003 on the ground that the Authority cannot issue direction resulting in modification of the licence issued after 2000 amendment. TDSAT held that fixation of the terms and conditions of interconnectivity and ensuring effective

interconnectivity is part of the legislative mandate of the Authority under Section 11(1)(b)(ii) and (iii). TDSAT referred to its earlier order dated 27.4.2005 passed in Appeal Nos. 11 and 12/2002 and held that the amendment of the Act does not override the law laid down by the Delhi High Court in MTNL v. TRAI (supra). TDSAT further held that the power vested in the Authority could be exercised in harmony with the terms of interconnectivity of licenses issued after the 2000 amendment and the principles laid down in the High Court judgment. With regard to the claim of COAI, TDSAT held that though BSNL was justified in collecting Rs.0.19 transit charges from Level I TAX to termination of calls in PSTN network or for providing interconnectivity to networks of other service providers, it was not justified in charging transit charges to the extent of Rs.0.19 for transit calls from, Level I TAX to Cellone's Gateway MSC. TDSAT held that it cannot direct BSNL to implement direct connectivity as the Authority did not have the power to override license terms and conditions for making the same mandatory either by direction under Section 13 or by regulation under Section 36.

<u>Civil Appeal Nos.5834-5836 and 5837 of 2005</u>

9.1. These appeals are directed against order dated 27.4.2005 passed by TDSAT whereby it allowed Petition No. 9 of 2001 filed by Association of Basic Telecom Operators and others and Petition No. 3/2001 filed by Cellular Operators Association of India, dismissed Petition No. 12/2003 filed by private BSOs as withdrawn and dismissed Appeal No. 5/2002 filed by BSNL.

9.2. Access charges to be paid by the Basic Licensees to the DoT (now BSNL) were provided for in tender document issued on 16.1.1995 at the rate of Rs 0.64 per MCU for STD calls and Rs 0.87 per MCU for ISD calls. Clarification was issued on 27.5.1996 reducing the charges to Rs 0.50 per MCU for STD calls and Rs 0.70 per MCU for ISD calls.

9.3. In 1997-98 interconnect agreements were signed A between Basic Operators and the then DoT providing for payment of interconnect charges including port charges at a minimum of Rs 54,000/- per PCM termination per annum for a period of 3 years and then actual/full cost based rates, and access charges at Rs 0.50 per MCU for STD calls and Rs 0.70 B per MCU for ISD calls. By 1.8.1999 all BSOs migrated to the revenue sharing regime instead of the fixed license fee regime. Port charges in respect of Cellular Mobile Service Providers were prescribed by the DoT vide Circulars dated 27.9.1996 and 5.6.1998 which extended that arrangement for computation C of port charges which was incorporated in interconnection agreements signed with private BSOs to CMSPs.

9.4. The Authority issued Telecommunication Interconnection (Charges and Revenue Sharing) Regulation, 1999 (hereinafter 'Interconnection Regulations 1999') vide D notification dated 28.5.1999 by which the port charges as also the access charges were reduced. Clause 8 of the Regulations provided that the Regulations would have an over-riding effect on the interconnect agreements entered into between the operators and DoT/BSNL. Consequent to the issuing of E Interconnect Regulations 1999, DoT issued circulars dated 1.10.1999, 12.10.1999 and 25.10.1999 altering the post charges and access charges. That clause was struck down by Delhi High Court in MTNL v. TRAI (supra).

F

9.5. After its creation on 1.10.2000, BSNL issued communications dated 28.4.2001 and 31.5.2001 requesting an increase in the access charges, making the regime of payment dependent on actual work done by the concerned operator. The BSOs made a representation to the Authority objecting to this G increase.

9.6. AUSPI filed Petition No. 9/2001 before TDSAT challenging communications dated 28.4.2001 and 31.5.2001. Vide interim order dated 10.7.2001, AUSPI was directed to continue paying the admitted amounts. AUSPI paid the port H

A charges and access charges under Interconnect Regulations, 1999 and hence BSNL issued circulars dated 2.11.2001 and 21.11.2001 for recovery of the amounts calculated on the basis of the interconnect agreements stating that in light of the Delhi High Court judgement, letter dated 12.10.1999 issued by DoT B on the basis of Interconnection Regulations 1999 had become null and void. As per this circular, BSNL revised retrospectively w.e.f. 1.5.1999 port charges to be levied from CMSPs at rates prevailing prior to 1.5.1999. Thereupon, AUSPI amended Petition No. 9/2001 and challenged circular dated 2.11.2001 C apart from the applicable rates of port charges. COAI separately filed Petition No.3/2002 for quashing circular dated 2.11.2001.

9.7. During the pendency of those petitions, the Authority issued Telecommunication Interconnection (Charges and Revenue Sharing) Regulation, 2001 on 14.12.2001 which dealt D only with access charges. These regulations were challenged by BSNL in Appeal No. 5/2002. the Authority thereafter issued Telecommunication Interconnection (Port Charges) Regulation, 2001 fixing rates of port charges w.e.f. 28.12.2001. These regulations were accepted and adopted by all the parties.

E

9.8. Private BSOs filed Petition No. 12/2003 challenging the applicable rate of port charges for period till issuance of Port Charges Regulation dated 28.12.2001. By an order dated 27.4.2005, TDSAT allowed Petition Nos. 9/2001 and 3/2002 F and quashed circular dated 2.11.2001 by observing that the demands raised therein are without basis. It held that the BSOs and CMSPs were liable to pay charges as per the DoT letter dated 12.10.1999 till the coming into effect of the Authority Port Charges Regulations, 2001. TDSAT dismissed Petition No.12/ G 2003 filed by private BSOs as withdrawn. It also dismissed Appeal No.5/2002 filed by BSNL and upheld the validity of the Interconnection Regulations, 2001 on the ground that they had become necessary to bring about certainty in the access charges regime and it could not be said that the Authority acted H unfairly or arbitrarily to enrich private op

Civil Appeal Nos. 2731, 2794 and 3504 of 2006.

10.1. The Authority issued direction dated 22.7.2003 under Section 13 of the Act to all service providers directing that direct connectivity be made between service providers at the earliest and not later than three months from the issue of the direction so as to promote network efficiency and consumer interest.

10.2. BSNL filed Appeal No. 31/2003 challenging direction dated 22.7.2003 on the ground that the same was contrary to the terms and conditions of the license agreements of basic and cellular operators.

10.3. In October 2003, the Authority issued Telecom Interconnection Usages Charges Regulations (IUC Regulations) mandating direct connectivity between service providers. As per clause (b) of Schedule II, charges could be levied through mutual negotiations subject to the condition that they shall not exceed Rs.0.20 per minute. BSNL issued Circular dated 28.1.2004 levying charge of Rs 0.4 per minute for a call from cellular mobile network to another cellular network transited by BSNL. This charge includes Rs 0.30 towards call termination and Rs 0.19 towards transit.

10.4. BSNL issued Circular dated 2.7.2004 to its telecom circles informing them of its decision to permit direct connectivity with the BSNL Cellular Network. Reliance Infocom was one of the UASL operators who had sought such connectivity. NLD and ILD operators were permitted to establish direct connectivity with CellOne network vide BSNL Circular dated 4.8.2004. Vide Circular dated 23.8.2004, Reliance was given direct interconnect as NLDO/ILDO on the same terms and conditions as Bharti Televentures Ltd.

10.5. COAI filed Petition No. 20/2004 seeking a direction against BSNL CellOne to directly connect to the Cellular Service Providers and to strike down the BSNL Circular

requiring payment of Rs 0.19 as transit charges which BSNL Basic Services Division was demanding and collecting.

10.6. Vide order dated 3.5.2005, TDSAT allowed Appeal No. 31/2003 and quashed direction dated 22.7.2003 holding that the direction mandating direct connectivity resulted in modification of license conditions of licenses issued after the 2000 amendment and as such this was not in accordance with the provision of the Act. TDSAT partly allowed Petition No. 20/2004 and held that BSNL was not justified in charging transit charges to the extent of Rs 0.19 for transit calls from, Level I TAX to Cellone's Gateway MSC. Relief of refund of amounts already collected was not granted.

10.7. In compliance of TDSAT's order, the Authority issued Telecom Regulatory Authority of India (Transit Charges for Bharat Sanchar Nigam Limited's CellOne Terminating Traffic) Regulation, 2005 (10 of 2005) dated 8.6.2005 under Section 36 read with section 11(1)(b)(ii), (iii) and (iv) clarifying that no transit charges shall be levied by BSNL on cellular operators for accessing CellOne subscribers wherever MSCs of both CellOne and private CMSPs are connected to the same BSNL switch.

10.8. Bharti Televentures Ltd. made representation dated 18.5.2005 to BNL to extend the benefit of Tribunal's order dated 3.5.2005. It also submitted representation dated 13.6.2005 to the Authority to amend regulations dated 8.6.2005 extending the waiver to fixed line service providers. Thereupon, fresh Addenda II was inserted into the Interconnect Agreement between Bharti and BSNL on 5.7.2005 which deals with the issue of direct connectivity and payment of transit charges.

10.9. BSNL extended benefit of the judgment dated 3.5.2005 to Tata Teleservices Limited in May 2005 on the ground that it was similarly situated as the cellular operators. However, in October 2005 it withdrew the benefit and demanded that Tata pay transit charg e ground that Tata could not avail of the benefit of the judgment as it was a UAS licensee and not a CMSP.

10.10. BSNL forwarded a draft Addenda to the Interconnect Agreement to Reliance Infocom Limited on 14.3.2005. The same was signed by the parties on 17.11.2005 for NLD services and on 6.1.2006 as UASL operator. Reliance filed representation before the Authority dated 30.8.2005 to extend regulation date 8.6.2005 to UAS licensees also. This request was declined by the Authority on 6.9.2005. In light of decision dated 11.11.2005 passed by TDSAT mandating level playing filed and reciprocity between service providers and the subsequent the Authority directive dated 16.11.2005 applying this judgment to all service providers although the petitioners had been only cellular operators, Reliance filed another representation dated 12.12.2005 but did not get any response from the Authority.

10.11. Bharti Televentures Limited filed Appeal No. 8/2005 seeking extension of the benefit of order dated 3.5.2005 and also for modification of the regulations and for extension of the benefit to similarly situated UAS Licensees.

10.12. By an order dated 10.2.2006, TDSAT dismissed the appeal and held that the transit charges would be determined by the interconnect agreement voluntarily entered into between Bharti and BSNL post judgment dated 3.5.2005. However, TDSAT did not go into the issue of whether basic service providers can be construed as similarly situated to cellular operators.

10.13. Bharti Televentures Limited challenged the aforesaid order in Review Application No. 1/2006, which was dismissed vide order dated 3.5.2006.

10.14. Tata Teleservices Limited filed Petition No. 132/2005 praying for extending the benefit of order dated 3.5.2005, setting aside the demands of BSNL for Rs 0.19 as transit

charges and modification of the regulations. That petition was dismissed by TDSAT vide order dated 3.5.2006 on the ground that similar appeal filed by Bharti Televentures Limited had been dismissed. Appeal No.7/2006 filed by Reliance Infocom Limited was also dismissed by TDSAT by relying upon the orders passed in the cases of Bharti Televentures Limited and Tata Teleservices Limited.

<u>Civil Appeal Nos. 4965-66 of 2007, 177 and 598-599 of 2008</u>

11.1. The Authority issued the 4th amendment to the IUC Regulations on 6.1.2005. Soon thereafter, BSNL issued circular dated 29.1.2005 for implementation of the Regulations stating in Annexure 2 that revenue shall be shared between BSNL and the private operator in the ratio of 50:50 for international roaming calls. COAI filed representations dated 31.1.2005, 7.2.2005, 8.2.2005 and 14.2.2005 against this circular. The Authority issued letter dated 31.1.2005 to BSNL inviting it to attend a discussion on the implementation of IUC Regulations with regard to separate trunk group for handing over roaming calls. In light of this, BSNL issued Circular dated 1.2.2005 deferring the formation on trunk group to 14.2.2005 for national roaming calls and to 7.2.2005 for international roaming calls. The matter was deferred further to 14.2.2005 and then to 28.2.2005 vide Circulars dated 8.2.2005 and 14.2.2005.

11.2. However, by some further correspondence, the Authority sought comments from all service providers on 11.3.2005 on the issues of levy of ADC and revenue sharing on roaming subscriber traffic. It moved a consultation paper on 17.3.2005 to address the issue of revenue share arrangement between terminating network and visiting network. BSNL submitted its comments on this paper on 10.5.2005. In the meanwhile, the Authority issued 5th amendment to the IUC Regulations on 11.4.2005 making ADC applicable to national calls at Rs 0.30 per minute and internat[ional roaming calls at] Rs 3.25 per minute. The amendment [...]y

BSNL vide Circular dated 9.5.2005. The amendment as it related to application of ADC was challenged by COAI in Appeal No. 7/2005 which was allowed vide order dated 21.9.2005. Thereafter, BSNL withdrew circular dated 9.5.2005 vide circular dated 13.10.2005.

11.3. On 23.6.2006, the Authority issued 6th amendment to IUC Regulations. BSNL issued Circular dated 28.2.2006 for implementation of the 6th amendment and provided for higher termination charges for roaming calls. Thereupon, COAI filed complaints before BSNL and also before the Authority regarding higher termination charges for roaming calls. The Authority issued letter dated 20.4.2006 to BSNL along with complaints filed by COAI and M/s BPL. Complaint of Bharti was also forwarded vide letter dated 24.4.2006. Despite agreeing to discuss the matter with the private operators, BSNL started raising bills as per the circular. COAI and others made representations dated 24.5.2006 and 12.6.2006 against thee demands. BSNL replied to the Authority's letter vide letter dated 28.4.2006 stating that the license agreements provide for revenue share and the circular was strictly in accordance with the same.

11.4. Vide decision dated 11.9.2006, the Authority rejected the claim of BSNL for revenue sharing in respect of roaming calls and directed BSNL to charge Rs 0.30 per minute for termination of national and international roaming calls as prescribed in IUC Regulations.

11.5. BSNL filed Appeal No. 14/2006 challenging the Authority's decision dated 11.9.2006 on the ground of lack of jurisdiction. COAI also filed Appeal No.16/2006 challenging the decision of the Authority insofar as it was made prospective.

11.6. During the pendency of the appeals, the Authority notified Telecommunication Tariff (forty fourth amendment) Order, 2007 on 24.1.2007 fixing maximum permissible charges for national roaming calls.

11.7. After hearing the parties, TDSAT vide order dated 24.8.2007 dismissed Appeal Nos. 14 and 16 of 2006 and Petition No.319/2006 and held that the decision taken by the Authority was legally correct and justified.

11.8. The Authority filed MA No. 121/2007 for correction of order dated 24.8.2007 for deletion of the words "admitted" from para 6 line 12 and "and is recommendatory" from para 9 line 24. MA was allowed vide impugned order dated 12.9.2007 and the words "and is recommendatory" were deleted. TDSAT held that functions enumerated in Section 11(1)(b) cannot be said to be part of the recommendatory power which is contained in Section 11(1)(a).

11.9. COAI and others filed EA No. 21/2007 seeking implementation of TDSAT's order dated 24.8.2007 and claiming benefit of the Authority order from 11.9.2006 when it was issued and refund of the amounts collected contrary to the same. EA was allowed vide impugned order dated 28.11.2007 and BSNL was directed to refund the amounts collected in excess of the Authority decision dated 11.9.206. Tribunal held that by virtue of its order, the Authority decision would be operative prospectively from the date on which it was issued and especially in light of the absence of stay, BSNL was not entitled to collect any sum contrary to the Authority decision and cannot now take advantage of its wrong.

Civil Appeal Nos. 271-281 of 2011

12.1. These appeals have been filed for setting aside final judgment and order dated 29.9.2010 passed by TDSAT whereby it disposed off Appeal Nos. 4/2006; 6/2006; 5/2007; 5/2008; 2-8/2009 and remanded the matter to the Authority with a direction to consider the matter relating to IUC Regulations afresh.

12.2. The Authority issued Telecommunication Interconnection (Charges and Revenu n

(No. 5 of 2001) – basic framework for regulating access charges on 14.12.2001. Separate Regulation for regulating port charges was issued by the Authority in Dec 2001. On 24.1.2003, the Authority issued Telecom Interconnection Usage Charges Regulation, 2003 according to which termination charges were fixed at Rs 0.30 per minute (metro) and Rs 0.40 (circle). The concept of Access Deficit Charge (ADC) was also introduced at 30% of the total sectoral revenue - fee paid by private operators to cross subsidise BSNL for deploying its fixed network in non-lucrative areas.

12.3. On receipt of representation dated 4.2.2003 by COAI about the anomalies in the 2003 IUC Regulations, the Authority undertook a review on 29.10.2003 and reduced the termination charges to a uniform rate, i.e., Rs. 0.30 per minute for all types of calls and the ADC was made 10%. The representation made by COAI for further reduction in the amount of termination charges was, however, rejected by the Authority.

12.4. Between 2005 and 2008, 5 amendments were made and in the matter of payment of ADC on 9.3.2009, the Authority notified IUC (Amendment Regulations, 2009) fixing termination charge at Rs 0.20 per minute for local and national long distance calls and mobile telephone services. These regulations were challenged by BSNL and various private operators by filing separate appeals, the details of which are given below:

Appeal No.	Appellant	Details of Appeal
Appeal No. 6/2006	BSNL	Challenged the IUC Regulations, 2006 alleging denial of payment of ADC by TRAI and prescription of uniform termination charges when cost of calls terminating in wireless network is almost 1/3rd of calls on the wireline network.
Appeal No. 2007	BSNL	Challenged the 8th Amendment dt. 21.3.2007 to the extent of reduction of 5/ ADC payable to BSNL and fixation of uniform termination charges (Mobile Termination Charge and Fixed Termination Charge).
Appeal No. 5/2008	BSNL	Challenged the 9th Amendment dt. 27.3.2008 to the extent of reduction of ADC payable to BSNL and fixation of uniform termination charges.
Appeal No. 4/2006	COAI	Challenging the Regulations, 2006 to the extent that Mobile Termination Charge at Rs. 0.30 per minute has been maintained which is not cost based as stated by TRAI.
Appeal No. 2/2009	BSNL	Seeking setting aside of the Regulation dt. 9.3.2009 to the extent of fixation of termination charges and carriage charge.
Appeal No. 3/2009	AUSPI	Seeking setting aside of Regulation dt. 9.3.2009. Review of termination charge, transit charge and port charge.
Appeal No. 4/2009	Vodafone	Seeking setting aside of Regulation dt. 9.3.2009. Reduce termination charge to 35 paise or remand for fresh consideration by TRAI. Determine MTC using Forward looking long range increment cost (FL-LRIC). Take in to account CAPEX, OPEX, common cost and cost of capital mark up listed under the heading "International Practice in Cost Modelling" which is very well established. Not to offset this cost by applying amount attributable to revenue earned from provision of telecom services including VAS in determining MTC.
Appeal	M/s	Similar to Vodafo

No. 5/2009	Bharati Airtel	Additionally, increase termination charges on international roaming. Determination of transit charge/carriage charge from level II TAX to SDCC and Intra SDCA and TAX transit charge on basis of cost principles.
Appeal No. 6/2009	M/s Idea Cellular Ltd. & Ors.	Similar to M/s Bharati Airtel
Appeal No. 7/2009	M/s Aircel Ltd. & Ors.	Similar to Vodafone.
Appeal No. 8/2009	Etisalat D.B. Telecom (P) Ltd.	Seeking setting aside of Regulation dt. 9.3.2009. Direction to TRAI to: re-introduce termination charges based on whether operator is a new entrant and had fulfilled roll out obligation; determine MTC at not more then 09 paise per minute and FTC at not more than 10 paise per minute; fix TAX transit charge at not more than 02 paise; reduce long distance carriage charge to not more than 11 paise per minute; fix 'nil' charge for receipt of interconnect SMS traffic on the receiving telecom network.

12.5. By an order dated 12.5.2009, TDSAT dismissed Appeal Nos. 6/2006, 5/2007 and 5/2008. However, by the impugned order some of the appeals were disposed of and the matter was remanded to the Authority with a direction to consider the matter afresh and complete the consultation process in a time bound manner so that the new IUC charges could be made effective/implemented by 1.1.2011.

Transferred Case No.39 of 2010

13.1. The transferred case is Letters Patent Appeal No.337/2007 titled TRAI v. Telecom Dispute Settlement Appellate Tribunal and another, which was filed before the Division Bench of the Delhi High Court against order dated 23.12.2005 passed by the learned Single Judge in Writ Petition No.2838/2005.

13.2. The Authority enacted the Telecommunication Interconnection Usage Charges Regulation 2003 (4 of 2003) on 29.10.2003 under Section 36 read with Section 11(1)(b)(ii), (iii) and (iv). These regulations were amended vide notifications dated 25.11.2003, 12.12.2003 and 31.12.2003 and 6.1.2005. By the last amendment, provision was made for modification of the method and manner of charging Access Deficit Charges

13.3. MTNL filed Appeal No. 3/2006 for quashing the amendment made in 2005 on the premise that its entitlement to Access Deficit Charges had been arbitrarily reduced. On notice by TDSAT, the Authority raised a preliminary objection to the former's jurisdiction. TDSAT relied upon various provisions of the Act, the judgments of this Court in *Clariant International Limited v. Security Exchange Board* (2004) 8 SCC 524, *Cellular Operators Association of India v. Union of India* (2003) 3 SCC 186 and *West Bengal Electivity Regulatory Commission v. CESC Ltd* (2002) 8 SCC 715 and held that the Authority is empowered to frame regulations circumscribed by the statutory provisions and that it has no authority to frame regulations in respect of matters not specifically provided for and in such matters only TDSAT had the jurisdiction to issue directions.

14. Before proceeding further, we may notice the background in which the Act was enacted. In India, the first telegraph link was established in 1939 between Calcutta and Diamond Harbour. In 1851, the telegraph line was opened for traffic but it was largely confined to t a

Company. The Indian Telegraph Act was enacted in 1885. It gave exclusive privilege of establishing, maintaining and working of telegraphs to the Central Government, which was also empowered to grant licence to private persons to establish telegraph network in any part of India.

15. After Independence, the Government of India took complete control of the telecom sector and brought it under the Post and Telegraph Department. One major step taken for improving telecommunication services in the country was the establishment of a modern telecommunication manufacturing facility at Bangalore under the public sector, in the name of "Indian Telephone Industries Ltd". 1984 represents an important milestone in the development of telecommunication sector. In that year, the Centre for Development of Telematics ("C-DoT") was set up for developing indigenous technologies and licences were given to the private sector to manufacture subscriber-equipment. In 1986, Mahanagar Telephone Nigam Ltd. and Videsh Sanchar Nigam Ltd. ("VSNL") were set up. In July 1992 a decision was taken to allow private investment for the services like electronic mail, voicemail, data services, audio text services, video text services, video conferencing, radio paging and cellular mobile telephone.

16. In February 1993, the Finance Minister in his Budget speech announced Government's intention to encourage private sector involvement and participation in Telecom to supplement efforts of Department of Telecommunications especially in creation of internationally competitive industry. On 13.5.1994, National Telecom policy was announced which was placed in Parliament saying that the aim of the policy was to supplement the effort of the Department of Telecommunications in providing telecommunications services. The main objectives of that policy were:

> "(i) affording telecommunication for all and ensuring the availability of telephone on demand;

> (ii) providing certain basic telecom services at affordable and reasonable prices to all people and covering all villages;
>
> (iii) giving world standard telecom services; addressing consumer complaints, dispute resolution and public interface to receive special attention and providing the widest permissible range of services to meet the customers' demand and at the same time at a reasonable price;
>
> (iv) creating a major manufacturing base and major export of telecom equipment having regard to the country's size and development; and
>
> (v) protecting the defence and security interests of the country."

17. With the entry of private operators into telecom sector, proper regulation of the sector was considered appropriate. An important step in the institutional reform of Indian telecom sector was setting up of an independent regulatory authority, i.e., Telecom Regulatory Authority. Initially, it was proposed to set up the Authority as a non-statutory body and for that purpose, the Indian Telegraph (Amendment) Bill, 1995 was introduced and was passed by Lok Sabha. However, when the matter was taken up in Rajya Sabha, the members expressed the view that the Authority should be set up as a statutory body. Keeping that in view as also the 22nd Report of the Standing Committee on Communications, the Telecom Authority of India Ordinance, 1996 was promulgated. In *Delhi Science Forum v. Union of India* (1996) 2 SCC 405, this Court took cognizance of some of the provisions contained in the Ordinance and observed:

> "The existence of a Telecom Regulatory Authority with the appropriate powers is essential for introduction of plurality in the Telecom sector. The National Telecom Policy is a historic departure from the practic e

past century. Since the private sector will have to contribute more to the development of the telecom network than DoT/ MTNL in the next few years, the role of an independent Telecom Regulatory Authority with appropriate powers need not be impressed, which can harness the individual appetite for private gains, for social ends. The Central Government and the Telecom Regulatory Authority have not to behave like sleeping trustees, but have to function as active trustees for the public good."

(emphasis supplied)

18. The 1996 Ordinance was replaced by the Act. The main purpose of establishing the Authority as a statutory body was to ensure that the interest of consumers are protected and, at the same time, to create a climate for growth of telecommunications, broadcasting and cable services in such a manner which could enable India to play leading role in the emerging global information society. The goals and objectives of the Authority are as follows:

i. Increasing tele-density and access to telecommunication services in the country at affordable prices.

ii. Making available telecommunication services which in terms of range, price and quality are comparable to the best in the world.

iii. Providing a fair and transparent policy environment which promotes a level playing field and facilitates fair competition.

iv. Establishing an interconnection regime that allows fair, transparent, prompt and equitable interconnection.

v. Re-balancing tariffs so that the objectives of

affordability and operator viability are met in a consistent manner.

vi. Protecting the interest of consumers and addressing general consumer concerns relating to availability, pricing and quality of service and other matters.

vii. Monitoring the quality of service provided by the various operators.

viii. Providing a mechanism for funding of net cost areas/ public telephones so that Universal Service Obligations are discharged by telecom operators for spread of telecom facilities in remote and rural areas.

ix. Preparing the grounds for smooth transition to an era of convergence of services and technologies.

x. Promoting the growth of coverage of radio in India through commercial and noncommercial channels.

xi. Increasing consumer choice in reception of TV channels and choosing the operator who would provide television and other related services.

19. The Preamble and Sections 3, 11 to 14, 18, 33, 35, 36 and 37 of the Act (unamended) read as under:

"**Preamble**

An Act to provide for the establishment of the Telecom Regulatory Authority of India to regulate the telecommunication, and services, and for matters connected therewith or incidental thereto.

Section 3 - Establishment and incorporation of Authority-(1) With effect from such date as the Central

Government may, by notification appoint, there shall be established, for the purposes of this Act, an Authority to be called the Telecom Regulatory Authority of India.

(2) The Authority shall be a body corporate by the name aforesaid, having perpetual succession and a common seal, with power, subject to the provisions of this Act, to acquire, hold and dispose of property, both movable and immovable, and to contact, and shall, by the said name, sue or be sued.

(3) The authority shall consist of a Chairperson, and not less than two, but not exceeding six members, to be appointed by the Central Government.

(4) The head office of the Authority shall be at New Delhi.

Section 11. Functions of Authority

(1) Notwithstanding anything contained in the Indian Telegraph Act, 1885 the functions of the Authority shall be to-

a. recommend the need and timing for introduction of new service provider;

b. recommend the terms and conditions of licence to a service provider;

c. ensure technical compatibility and effective inter-connection between different service providers;

d. regulate arrangement amongst service providers of sharing their revenue derived from providing telecommunication services;

e. ensure compliance of terms and conditions of licence;

f. recommend revocation of licence for non-compliance of terms and conditions of licence;

g. laydown and ensure the time period for providing local and long distance circuits of telecommunication between different service providers;

h. facilitate competition and promote efficiency in the operation of telecommunication services so as to facilitate growth in such services;

i. protect the interest of the consumers of telecommunication service;

j. monitor the quality of service and conduct the periodical survey of such provided by the service providers;

k. inspect the equipment used in the network and recommend the type of equipment to be used by the service providers;

l. maintain register of interconnect agreements and of all such other matters as may be provided in the regulations;

m. keep register maintained under clause (l) open for inspection to any member of public on payment of such fee and compliance of such other requirements as may be provided in the regulations;

n. settle disputes between service providers;

o. render advice to the Central Government in the matters relating to the development of telecommunication technology and any other matter reliable to telecommunication industry in general;

p. levy fees and other charges at such rates and in respect of such services as may be determined by regulations;

q. ensure effective compliance of universal service obligations;

r. perform such other functi h

administrative and financial functions as may be entrusted to it by the Central Government or as may be necessary to carry out the provisions of this Act.

(2) Notwithstanding anything contained in the Indian Telegraph Act, 1885, the Authority may, from time to time, by order, notify in the Official Gazette the rates at which the telecommunication services within India and outside India shall be provided under this Act including the rates at which messages shall be transmitted to any country outside India;

Provided that the Authority may notify different rates for different persons or class of persons for similar telecommunication services and where different rates are fixed as aforesaid the Authority shall record the reasons therefor.

(3) While discharging its functions under sub-section (1), the Authority shall not act against the interest of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality.

(4) The Authority shall ensure transparency while exercising its powers and discharging its functions.

12. Powers of Authority to call for information, conduct investigations, etc.-(1) Where the Authority considers it expedient so to do, it may, by order in writing,-

(a) call upon any service provider at any time to furnish in writing such information or explanation relating to its affairs as the Authority may require; or

(b) appoint one or more persons to make an inquiry in relation to the affairs of any service provider; and

(c) direct any of its officers or employees to inspect the

books of account or other documents of any service provider.

(2) Where any inquiry in relation to the affairs of a service provider has been undertaken under sub-section (1),-

(a) every officer of the Government Department, if such service provider is a department of the Government;

(b) every director, manager, secretary or other officer, if such service provider is a company; or

(c) every partner, manager, secretary or other officer, if such service provider is a firm; or

(d) every other person or body of persons who has had dealings in the course of business with any of the persons mentioned in clauses (b) and (c),

shall be bound to produce before the Authority making the inquiry, all such books of account or other documents in his custody or power relating to, or having a bearing on the subject-matter of such inquiry and also to furnish to the Authority with any such statement or information relating thereto, as the case may be, required of him, within such time as may be specified.

(3) Every service provider shall maintain such books of account or other documents as may be prescribed.

(4) The Authority shall have the power to issue such directions to service providers as it may consider necessary for proper functioning by service providers.

13. Powers of Authority to issue directions- The Authority may, for the discharge of its functions under sub-section (1) of section 11, issue such directions from time to time to the service providers, as it may consider necessary.

14. Authority to settle disputes-(1) If a dispute arises, in respect of matters referred to in sub-section (2), among service providers or between service providers and a group of consumers, such disputes shall be adjudicated by a bench constituted by the Chairperson and such bench shall consist of two members;

Provided that if the members of the bench differ on any point or points they shall state the point or points on which they differ and refer the same to a third member for hearing on such point or points and such point or points shall be decided according to the opinion of that member.

(2) The bench constituted under sub-section (1) shall exercise, on and from the appointed day all such jurisdiction, powers and authority as were exerciseable immediately before that date by any

civil court on any matter relating to-

(i) technical compatibility and inter-connections between service providers;

(ii) revenue sharing arrangements between different service providers;

(iii) quality of telecommunication services and interest of consumers;

Provided that nothing in sub-section shall apply in respect of matters relating to-

(a) the monopolistic trade practice, restrictive trade practice and unfair trade practice which are subject to the jurisdiction of the Monopolies and Restrictive Trade Practices Commission established under sub-section (1) of section 5 of the Monopolies and Restrictive Trade Practices Act, 1969;

(b) the complaint of an individual consumer maintainable

before a Consumer Disputes Redressal Forum or a Consumer Disputes Redressal Commission or the National Consumer Redressal Commission established under section 9 of the Consumer Protection Act, 1986;

(c) dispute between telegraph authority and any other person referred to in sub-section (1) of section 7B of the Indian Telegraph Act, 1885.

18. Appeal to High Court - Any person aggrieved by any decision or order of the Authority may file an appeal to the High Court within thirty days from the date of communication of the decision or order of the Authority to him;

Provided that the High Court may, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a further period not exceeding sixty days.

33. Delegation. - The Authority may, by general or special order in writing, delegate to any member, officer of the Authority or any other person subject to such conditions, if any, as may be specified in the order, such of its powers and functions under this Act (except the power to settle dispute under Chapter IV and to make regulation under section 36) as it may deem necessary.

35.Power to make rules.- (1) The Central government may, by notification, make rules for carrying out the purposes of this Act.

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

(a) the salary and allowances payable to and the other conditions of service of the Chairperson and members under sub-section (5) of section 5;

(b) the powers and functions of the Chairperson under subsection (1) of section 6;

(c) the procedure for conducting an inquiry made under subsection (2) of section 7;

(d) the category of books of accounts or other documents which are required to be maintained under sub-section (3) of section 12;

(e) the period within which an application is to be made under sub-section (1) of section 15;

(f) the manner in which the accounts of the Authority shall be maintained under sub-section (1) of section 23;

(g) the time within which and the form and manner in which returns and report are to be made to the Central Government under sub-section (1) and (2) of section 24;

(h) any other matter which is to be, or may be, prescribed, or in respect of which provision is to be made, by rules;

36. Power to make regulations.-(1) The Authority may, by notification, make regulations consistent with this Act and the rules made thereunder to carry out the purposes of Act.

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

(a) the times and places of meetings of the Authority and the procedure to be followed at such meetings under subsection (1) of section 8, including quorum necessary for the transaction of business;

(b) the transaction of business at the meetings of the

Authority under sub-section (4) of section 8;

(c) the salaries and allowances payable to and the other conditions of service of officers and other employees of the Authority under sub-section (2) of section 10;

(d) matters in respect of which register is to be maintained by the Authority under clause (l) of sub-section (l) of section 11;

(e) levy of fee and lay down such other requirements on fulfilment of which a copy of register may be obtained under clause (m) of sub-section (l) of section 11;

(f) levy of fees and other charges under clause (p) of subsection (1) of Section 11.

37. Rules and regulations to laid before Parliament. - Every rule and every regulation made under this Act shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or regulations or both Houses agree that the rule or regulation should not be made, the rule or regulation shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule or regulation."

20. With a view to overcome the difficulties experienced in the implementation of the Act, the Central Government constituted a Group on Telecom and IT Convergence under the Chairmanship of the Finance Minister. The recommendations made by the Group led to the issuance of the Telecom

Regulatory Authority of India (Amendment) Ordinance, 2000, which was replaced by the Telecom Regulatory Authority of India (Amendment) Act, 2000. One of the important features of the Amendment Act was the establishment of a Tribunal known as the Telecom Disputes Settlement and Appellate Tribunal for adjudicating disputes between a licensor and a licencee, between two or more service providers, between a service provider and a group of consumers, and also to hear and dispose of any appeals from the direction, decision or order of the Authority.

21. The provisions of the amended Act, which have bearing on the decision of the question framed in the opening paragraph of this judgment are as under:

> "**2. Definitions**. –(1) xxx xxx xxx
>
> (aa) "Appellate Tribunal" means the Telecom Disputes Settlement and Appellate Tribunal established under section 14;
>
> (b) "Authority" means the Telecom Regulatory Authority of India established under sub- section (1) of section 3;
>
> (e) "Licensee" means any person licensed under sub-section (1) of section 4 of the Indian Telegraph Act, 1885 (13 of 1885) for providing specified public telecommunication services;
>
> (ea) "licensor" means the Central Government or the telegraph authority who grants a license under section 4 of the Indian Telegraph Act, 1885;
>
> (i) "regulations" means regulations made by the Authority under this Act;
>
> (j) "service provider" means the Government as a service provider and includes a licensee;

> (k) "telecommunication service" means service of any description (including electronic mail, voice mail, data services, audio tax services, video tax services, radio paging and cellular mobile telephone services) which is made available to users by means of any transmission or reception of signs, signals, writing, images and sounds or intelligence of any nature, by wire, radio, visual or other electro- magnetic means but shall not include broadcasting services:
>
> Provided that the Central Government may notify other service to be telecommunication service including broadcasting services.
>
> **11. Functions of Authority.**—(1) Notwithstanding anything contained in the Indian Telegraph Act, 1885 (13 of 1885), the functions of the Authority shall be to—
>
> (a) make recommendations, either suo motu or on a request from the licensor, on the following matters, namely—
>
> (i) need and timing for introduction of new service provider;
>
> (ii) terms and conditions of licence to a service provider;
>
> (iii) revocation of licence for non-compliance of terms and conditions of licence;
>
> (iv) measures to facilitate competition and promote efficiency in the operation of telecommunication services so as to facilitate growth in such services;
>
> (v) technological improvements in the services provided by the service providers;
>
> (vi) type of equipment to be used by the service providers after inspection of equipment used in the network;
>
> (vii) measures for the developmen[illegible] n

technology and any other matter relatable to telecommunication industry in general;

(viii) efficient management of available spectrum;

(b) discharge the following functions, namely—

(i) ensure compliance of terms and conditions of licence;

(ii) notwithstanding anything contained in the terms and conditions of the licence granted before the commencement of the Telecom Regulatory Authority of India (Amendment) Act, 2000, fix the terms and conditions of interconnectivity between the service providers;

(iii) ensure technical compatibility and effective inter-connection between different service providers;

(iv) regulate arrangement amongst service providers of sharing their revenue derived from providing telecommunication services;

(v) lay down the standards of quality of service to be provided by the service providers and ensure the quality of service and conduct the periodical survey of such service provided by the service providers so as to protect interest of the consumers of telecommunication service;

(vi) lay down and ensure the time period for providing local and long distance circuits of telecommunication between different service providers;

(vii) maintain register of interconnect agreements and of all such other matters as may be provided in the regulations;

(viii) keep register maintained under clause (vii) open for inspection to any member of public on payment of such fee and compliance of such other requirement as may be provided in the regulations;

(ix) ensure effective compliance of universal service obligations;

(c) levy fees and other charges at such rates and in respect of such services as may be determined by regulations;

(d) perform such other functions including such administrative and financial functions as may be entrusted to it by the Central Government or as may be necessary to carry out the provisions of this Act:

Provided that the recommendations of the Authority specified in clause (a) of this sub-section shall not be binding upon the Central Government:

Provided further that the Central Government shall seek the recommendations of the Authority in respect of matters specified in sub-clauses (i) and (ii) of clause (a) of this sub-section in respect of new licence to be issued to a service provider and the Authority shall forward its recommendations within a period of sixty days from the date on which that Government sought the recommendations:

Provided also that the Authority may request the Central Government to furnish such information or documents as may be necessary for the purpose of making recommendations under sub-clauses (i) and (ii) of clause (a) of this sub-section and that Government shall supply such information within a period of seven days from receipt of such request:

Provided also that the Central Government may issue a licence to a service provider if no recommendations are received from the Authority within the period specified in the second proviso or within such period as may be mutually agreed upon between the Central Government and the Authority:

Provided also that if the Central Government having considered that recommendation of the Authority, comes to a prima facie conclusion that such recommendation cannot be accepted or needs modifications, it shall refer the recommendation back to the Authority for its reconsideration, and the Authority may, within fifteen days from the date of receipt of such reference, forward to the Central Government its recommendation after considering the reference made by that Government. After receipt of further recommendation if any, the Central Government shall take a final decision.

(2) Notwithstanding anything contained in the Indian Telegraph Act, 1885 (13 of 1885), the Authority may, from time to time, by order, notify in the Official Gazette the rates at which the telecommunication services within India and outside India shall be provided under this Act including the rates at which messages shall be transmitted to any country outside India:

Provided that the Authority may notify different rates for different persons or class of persons for similar telecommunication services and where different rates are fixed as aforesaid the Authority shall record the reasons therefor.

(3) While discharging its functions under sub-section (1), or sub-section (2) the Authority shall not act against the interest of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality.

(4) The Authority shall ensure transparency while exercising its powers and discharging its functions.

12. Powers of Authority to call for information, conduct investigations, etc. - (1) Where the Authority

considers it expedient so to do, it may, by order in writing,-

(a) call upon any service provider at any time to furnish in writing such information or explanation relating to its affairs as the authority may require; or

(b) appoint one or more persons to make an inquiry in relation to the affairs of any service provider; and

(c) direct any of its officers or employees to inspect the books of account or other documents of any service provider.

(2) Where any inquiry in relation to the affairs of a service provider has been undertaken under sub-section (1),-

(a) every officer of the Government Department, if such service provider is a department of the Government;

(b) every director, manager, secretary or other officer, if such service provider is a company; or

(c) every partner, manager, secretary or other officer, if such service provider is a firm; or

(d) every other person or body of persons who has had dealings in the course of business with any of the persons mentioned in clauses (b) and (c),

shall be bound to produce before the Authority making the inquiry, all such books of account or other documents in his custody or power relating to, or having a bearing on the subject-matter of such inquiry and also to furnish to the Authority with any such statement or information relating thereto, as the case may be, required of him, within such time as may be specified.

(3) Every service provider shall maintain such books of account or other documents as may be prescribed.

(4) The Authority shall have the power to issue such directions to service providers as it may consider necessary for proper functioning by service providers.

13. Power of Authority to issue directions.—The Authority may, for the discharge of its functions under sub-section (1) of section 11, issue such directions from time to time to the service providers, as it may consider necessary:

Provided that no direction under sub-section (4) of Section 12 or under this section shall be issued except on the matters specified in clause (b) of sub-section (1) of Section 11."

14. Establishment of Appellate Tribunal.—The Central Government shall, by notification, establish an Appellate Tribunal to be known as the Telecom Disputes Settlement and Appellate Tribunal to–

(a) adjudicate any dispute–

(i)between a licensor and a licensee;

(ii)between two or more service providers;

(iii) between a service provider and a group of consumers;

Provided that nothing in this clause shall apply in respect of matters relating to–

(A) the monopolistic trade practice, restrictive trade practice and unfair trade practice which are subject to the jurisdiction of the Monopolies and Restrictive Trade Practices Commission established under sub-section (1) of section 5 of the Monopolies and Restrictive Trade Practices Act, 1969 (54 of 1969);

(B) the complaint of an individual consumer maintainable

before a consumer Disputes Redressal forum or a Consumer Disputes Redressal Commission or the National Consumer Redressal commission established under section 9 of the Consumer Protection Act, 1986 (68 of 1986);

(C) dispute between telegraph authority and any other person referred to in sub-section (1) of section 7B of the Indian Telegraph Act 1885 (13 of 1885);

(b) hear and dispose of appeal against any direction, decision or order of the Authority under this Act.

14A. Application for settlement of disputes and appeals to Appellate Tribunal.-

(7) The Appellate Tribunal may, for the purpose of examining the legality or propriety or correctness of any dispute made in any application under sub-section (1), or of any direction or order or decision of the Authority referred to in the appeal preferred under sub-section (2), on its own motion or otherwise, call for the records relevant to disposing of such applications or appeal and make such orders as it thinks fit.

14M. Transfer of pending cases.—All applications, pending for adjudication of disputes before the Authority immediately before the date of establishment of the Appellate Tribunal under this Act, shall stand transferred on that date to such Tribunal:

Provided that all disputes being adjudicated under the provisions of Chapter IV as it stood immediately before the commencement of the Telecom Regulatory Authority (Amendment) Act, 2000, shall continue to be adjudicated by the Authority in accordance with the provisions, contained in that Chapter, till the establishment of the Appellate Tribunal under the said Act.

A

Provided further that all cases referred to in the first provision shall be transferred by the Authority to the Appellate Tribunal immediately on its establishment under section 14.

B

14N. Transfer of appeals.—(1) All appeals pending before the High Court immediately before the commencement of the Telecom Regulatory Authority (Amendment) Act, 2000, shall stand transferred to the Appellate Tribunal on its establishment under section 14.

C

(2) Where any appeal stands transferred from the High Court to the Appellate Tribunal under sub-section (1),-

(a) the High Court shall, as soon as may be after such transfer, forward the records of such appeal to the Appellate Tribunal; and

D

(b) the Appellate Tribunal may, on receipt of such records, proceed to deal with such appeal, so far as may be from the stage which was reached before such transfer or from any earlier stage or de novo as the Appellate Tribunal may deem fit.

E

18. Appeal to Supreme Court—(1) Notwithstanding anything contained in the Code of Civil Procedure, 1908 (5 of 1908) or in any other law, an appeal shall lie against any order, not being an interlocutory order, of the Appellate Tribunal to the Supreme Court on one or more of the grounds specified in section 100 of that Code.

F

(2) No appeal shall lie against any decision or order made by the Appellate Tribunal with the consent of the parties.

G

(3) Every appeal under this section shall be preferred within a period of ninety days from the date of the decision or order appealed against:

Provided that the Supreme Court may entertain the appeal after the expiry of the said period of ninety days, if it is

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A

satisfied that the appellant was prevented by sufficient cause from preferring the appeal in time.

B

33. Delegation. - The Authority may, by general or special order in writing, delegate to any member, officer of the Authority or any other person subject to such conditions, if any, as may be specified in the order, such of its powers and functions under this Act (except the power to settle dispute under Chapter IV and to make regulation under section 36) as it may deem necessary.

C

35. Power to make rules.-<u>(1)</u> The Central Government may, by notification, make rules for carrying out the purposes of this Act.

D

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

(a) the salary and allowances payable to and the other conditions of service of the Chairperson and members under sub-section (5) of section 5;

E

(aa) the allowance payable to the part-time members under sub-section (6A) of section 5;

F

(b) the powers and functions of the Chairperson under sub-section (1) of section 6;

(c) the procedure for conducting an inquiry made under sub- section (2) of section 7;

G

(ca) the salary and allowances and other conditions of service of officers and other employees of the Authority under sub-section (2) of section 10;

(d) the category of books of account or other documents which are required to be maintained under sub-section (3)

H

of section 12;

(da) the form, the manner of its verification and the fee under sub-section (3) of section 14A;

(db) the salary and allowances payable to and other terms and conditions of service of the Chairperson and other Members of the Appellate Tribunal under section 14E;

(dc) the salary and allowances and other conditions of service of the officers and employees of the Appellate Tribunal under sub-section (3) of section 14H;

(dd) any other power of a civil court required to be prescribed under clause (i) of sub-section (2) of section 16;

(e) the period within which an application is to be made under sub-section (1) of section 15;

(f) the manner in which the accounts of the Authority shall be maintained under sub-section (1) of section 23;

(g) the time within which and the form and manner in which returns and report are to be made to the Central Government under sub-sections (1) and (2) of section 24;

(h) any other matter which is to be, or may be, prescribed, or in respect of which provision is to be made, by rules.

36. Power to make regulations.-(1) The Authority may, by notification, make regulations consistent with this Act and the rules made thereunder to carry out the purpose of this Act.

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

(a) the times and places of meetings of the Authority and the procedure to be followed at such meetings under sub-section (1) of section 8, including quorum necessary for the transaction of business;

(b) the transaction of business at the meetings of the Authority under sub-section (4) of section 8;

(c) omitted by Act 2 of 2000

(d) matters in respect of which register is to be maintained by the Authority under clause (l) of sub-section (1) of section 11;

(e) levy of fee and lay down such other requirements on fulfilment of which a copy of register may be obtained under sub clause (b) of sub- section (1) of section 11;

(f) levy of fees and other charges under clause (c) of sub-section (1) of section 11.

37. Rules and regulations to laid before Parliament. - Every rule and every regulation made under this Act shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or regulations or both Houses agree that the rule or regulation should not be made, the rule or regulation shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule or regulation."

22. A comparative statement of the relevant provisions of the unamended and amended Acts is given below:

UNAMENDED ACT	AMENDED ACT
PREAMBLE An Act to provide for the establishment of the Telecom Regulatory Authority of India to regulate the telecommunication services, and for matters connected therewith or incidental thereto.	**PREAMBLE** An Act to provide for the establishment of the Telecom Regulatory Authority of India and the Telecom Disputes Settlement and Appellate Tribunal to regulate the telecommunication services, adjudicate disputes, dispose of appeals and to protect the interests of service providers and consumers of the telecom sector, to promote and ensure orderly growth of the telecom sector and for matters connected therewith or incidental thereto.
Section 3. **Establishment and incorporation of Authority.-**(1) With effect from such date as the Central Government may, by notification appoint, there shall be established, for the purposes of this Act, an Authority to be called the Telecom Regulatory Authority of India.	**Section 3** **Establishment and incorporation of Authority.-**(1) With effect from such date as the Central Government may, by notification appoint, there shall be established, for the purposes of this Act, an Authority to be called the Telecom Regulatory Authority of India.

(2) The Authority shall be a body corporate by the name aforesaid, having perpetual succession and a common seal, with power, subject to the provisions of this Act, to acquire, hold and dispose of property, both movable and immovable, and to contract, and shall, by the said name, sue or be sued. (3) The Authority shall consist of a Chairperson, and not less than two, but not exceeding six members, to be appointed by the Central Government. (4) The head office of the Authority shall be at New Delhi.	(2) The Authority shall be a body corporate by the name aforesaid, having perpetual succession and a common seal, with power, subject to the provisions of this Act, to acquire, hold and dispose of property, both movable and immovable, and to contract, and shall, by the said name, sue or be sued. (3) The Authority shall consist of a Chairperson, and not more than two whole-time members and not more than two part-time members, to be appointed by the Central Government. (4) The head office of the Authority shall be at New Delhi.
Section 11. **Functions of Authority.-**(1) Notwithstanding anything contained in the Indian Telegraph Act, 1885 the functions of the Authority shall be to- (a) recommend the need and timing for introduction of new service provider; (b) recommend the terms	Section 11. **Functions of Authority.-**(1) Notwithstanding anything contained in the Indian Telegraph Act, 1885 (13 of 1885), the functions of the Authority shall be to- (a) make recommendations, either suo motu or on a request from the licensor, on the following matters,

and conditions of licence to a service provider;

(c) ensure technical compatibility and effective inter-connection between different service providers;

(d) regulate arrangement amongst service providers of sharing their revenue derived from providing telecommunication services;

(e) ensure compliance of terms and conditions of licence;

(f) recommend revocation of licence for non-compliance of terms and conditions of licence;

(g) lay down and ensure the time period for providing local and long distance circuits of telecommunication between different service providers;

(h) facilitate competition and promote efficiency in the operation of telecommunication services so as to facilitate growth in such services;

namely:-

(i) need and timing for introduction of new service provider;

(ii) terms and conditions of licence to a service provider;

(iii) revocation of licence for non-compliance of terms and conditions of licence;

(iv) measures to facilitate competition and promote efficiency in the operation of telecommunication services so as to facilitate growth in such services;

(v) technological improvements in the services provided by the service providers;

(vi) type of equipment to be used by the service providers after inspection of equipment used in the network;

(vii) measures for the development of telecommunication

(i) protect the interest of the consumers of telecommunication service;

(j) monitor the quality of service and conduct the periodical survey of such provided by the service providers;

(k) inspect the equipment used in the network and recommend the type of equipment to be used by the service providers;

(l) maintain register of interconnect agreements and of all such other matters as may be provided in the regulations;

(m) keep register maintained under clause (l) open for inspection to any member of public on payment of such fee and compliance of such other requirements as may be provided in the regulations;

(n) settle disputes between service providers;

(o) render advice to the Central Government in the matters relating to the

technology and any other matter relatable to telecommunication industry in general;

(viii) efficient management of available spectrum;

(b) discharge the following functions, namely:-

(i) ensure compliance of terms and conditions of licence;

(ii) notwithstanding anything contained in the terms and conditions of the licence granted before the commencement of the Telecom Regulatory Authority of India (Amendment) Act, 2000, fix the terms and conditions of inter-connectivity between the service providers;

(iii) ensure technical compatibility and effective inter-connection between different service providers;

development of telecommunication technology and any other matter relatable to telecommunication industry in general;

(p) levy fees and other charges at such rates and in respect of such services as may be determined by regulations;

(q) ensure effective compliance of universal service obligations;

(r) perform such other functions including such administrative and financial functions as may be entrusted to it by the Central Government or as may be necessary to carry out the provisions of this Act.

(2) Notwithstanding anything contained in the Indian Telegraph Act, 1885, the Authority may, from time to time, by order, notify in the Official Gazette the rates at which the telecommunication services within India and outside India shall be provided under this Act including the rates at which

(iv) regulate arrangement amongst service providers of sharing their revenue derived from providing telecommunication services;

(v) lay-down the standards of quality of service to be provided by the service providers and ensure the quality of service and conduct the periodical survey of such service provided by the service providers so as to protect interest of the consumers of telecommunication service;

(vi) lay-down and ensure the time period for providing local and long distance circuits of telecommunication between different service providers;

(vii) maintain register of interconnect agreements and of all such other matters as may be provided in the regulations;

messages shall be transmitted to any country outside India;

Provided that the Authority may notify different rates for different persons or class of persons for similar telecommunication services and where different rates are fixed as aforesaid the Authority shall record the reasons therefor.

(3) While discharging its functions under sub-section (1), the Authority shall not act against the interest of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality.

(4) The Authority shall ensure transparency while exercising its powers and discharging its functions.

(viii) keep register maintained under clause (vii) open for inspection to any member of public on payment of such fee and compliance of such other requirement as may be provided in the regulations;

(ix) ensure effective compliance of universal service obligations;

(c) levy fees and other charges at such rates and in respect of such services as may be determined by regulations;

(d) perform such other functions including such administrative and financial functions as may be entrusted to it by the Central Government or as may be necessary to carry out the provisions of this Act:

Provided that the recommendations of the Authority specified in clause (a) of this sub-section shall not be bind

Government:

Provided further that the Central Government shall seek the recommendations of the Authority in respect of matters specified in sub-clauses (i) and (ii) of clause (a) of this sub-section in respect of new licence to be issued to a service provider and the Authority shall forward its recommendations within a period of sixty days from the date on which that Government sought the recommendations:

Provided also that the Authority may request the Central Government to furnish such information or documents as may be necessary for the purpose of making recommendations under sub-clauses (i) and (ii) of clause (a) of this sub-section and that Government shall supply such information within a period of seven days from receipt of such request:

Provided also that the Central Government may issue a licence to a service provider if no recommendations are

received from the Authority within the period specified in the second proviso or within such period as may be mutually agreed upon between the Central Government and the Authority:

Provided also that if the Central Government having considered that recommendation of the Authority, comes to a prima facie conclusion that such recommendation cannot be accepted or needs modifications, it shall, refer the recommendation back to the Authority for its reconsideration, and the Authority may within fifteen days from the date of receipt of such reference, forward to the Central Government its recommendation after considering the reference made by that Government. After receipt of further recommendation if any, the Central Government shall take a final decision.

(2) Notwithstanding anything contained in the Indian Telegraph Act, 1885 (13 of 1885), the Authority may, from time to time, by order, notify in the Offic[illegible]t

	which the telecommunication services within India and outside India shall be provided under this Act including the rates at which messages shall be transmitted to any country outside India: Provided that the Authority may notify different rates for different persons or class of persons for similar telecommunication services and where different rates are fixed as aforesaid the Authority shall record the reasons therefor. (3) While discharging its functions under sub-section (1) or sub-section (2) the Authority shall not act against the interest of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality. (4) The Authority shall ensure transparency while exercising its powers and discharging its functions.
Section 13 **Powers of Authority to issue directions.-** The	**Section 13** **Power of Authority to issue directions.-** The Authority may,

Authority may, for the discharge of its functions under sub-section (1) of section 11, issue such directions from time to time to the service providers, as it may consider necessary.	for the discharge of its functions under sub-section (1) of section 11, issue such directions from time to time to the service providers, as it may consider necessary: Provided that no direction under subsection (4) of section 12 or under this section shall be issued except on the matters specified in clause (b) of sub-section. (1) of section 11.
CHAPTER IV **SETTLEMENT OF DISPUTES** **Section 14.** **Authority to settle disputes.-** (1) If a dispute arises, in respect of matters referred to in sub-section (2), among service providers or between service providers and a group of consumers, such disputes shall be adjudicated by a bench constituted by the Chairperson and such bench shall consist of two members: Provided that if the members of the bench differ on any point or points they shall state the point or points on which they differ and refer the same	**CHAPTER IV** **APPELLATE TRIBUNAL** **Section 14.** **Establishment of Appellate Tribunal.–** The Central Government shall, by notification, establish an Appellate Tribunal to be known as the Telecom Disputes Settlement and Appellate Tribunal to— (a) adjudicate any dispute— (i) between a licensor and a licensee; (ii) between two or more service providers; (iii) between a service provid[illegible] consum[illegible]

to a third member for hearing on such point or points and such point or points shall be decided according to the opinion of that member.

(2) The bench constituted under sub-section (1) shall exercise, on and from the appointed day all such jurisdiction , powers and authority as were exercisable immediately before that date by any civil court on any matter relating to-

(i) technical compatibility and interconnections between service providers;

(ii) revenue sharing arrangements between different service providers;

(iii) quality of telecommunication services and interest of consumers:

Provided that nothing in this sub-section shall apply in respect of matters relating to-

(a) the monopolistic trade practice, restrictive trade practice and unfair trade practice which are subject to the jurisdiction of the Monopolies and Restrictive Trade Practices Commission

Provided that nothing in this clause shall apply in respect of matters relating to—

(A) the monopolistic trade practice, restrictive trade practice and unfair trade practice which are subject to the jurisdiction of the Monopolies and Restrictive Trade Practices Commission established under subsection (1) of section 5 of the Monopolies and Restrictive Trade Practices Act, 1969 (54 of 1969);

(B) the complaint of an individual consumer maintainable before a Consumer Disputes Redressal Forum or a Consumer Disputes Redressal Commission or the National Consumer **Disputes?** Redressal Commission established under section 9 of the Consumer Protection Act, 1986 (68 of 1986);

(C) dispute between telegraph authority and any other person referred to in sub-section (1) of section 7B of the Indian Telegraph Act, 1885 (13 of 1885);

established under sub-section (1) of Section 5 of the Monopolies and Restrictive Trade Practices Act, 1969 (54 of 1969);

(b) the complaint of an individual consumer maintainable before a Consumer Disputes Redressal Forum or a Consumer Disputes Redressal Commission or the National Consumer **Disputes?** Redressal Commission established under section 9 of the Consumer Protection Act, 1986 (68 of 1986);

(c) dispute between telegraph authority and any other person referred to in sub-section (1) of section 7-B of the Indian Telegraph Act, 1885 (13 of 1885).

(b) hear and dispose of appeal against any direction, decision or order of the Authority under this Act.

Section 14A - Application for settlement of disputes and appeals to Appellate Tribunal

(1) The Central Government or a State Government or a local authority or any person may make an application to the Appellate Tribunal for adjudication of any dispute referred to in clause (a) of section 14.

(2) The Central Government or a State Government or a local authority or any person aggrieved by any direction, decision or order made by the Authority may prefer an appeal to the Appellate Tribunal.

(3) Every appeal under sub-section (2) shall be preferred within a period of thirty days from the date on which a copy of the direction or order or decision made by the Authority is received by the Central Government or the State Government or the local authority or the aggrieved person and it shall be in such form, ve

and be accompanied by such fee as may be prescribed:

Provided that the Appellate Tribunal may entertain any appeal after the expiry of the said period of thirty days if it is satisfied that there was sufficient cause for not filing it within that period.

(4) On receipt of an application under sub-section (1) or an appeal under sub-section (2), the Appellate Tribunal may, after giving the parties to the dispute or the appeal an opportunity of being heard, pass such orders thereon as it thinks fit.

(5) The Appellate Tribunal shall send a copy of every order made by it to the parties to the dispute or the appeal and to the Authority, as the case may be.

(6) The application made under subsection (1) or the appeal preferred under sub-section (2) shall be dealt with by it as expeditiously as possible and endeavour shall be made by it to dispose of the application or appeal finally within ninety days from the date of receipt of application or appeal, as the case may

be:

Provided that where any such application or appeal could not be disposed of within the said period of ninety days, the Appellate Tribunal shall record its reasons in writing for not disposing of the application or appeal within that period.

(7) The Appellate Tribunal may, for the purpose of examining the legality or propriety or correctness, of any dispute made in any application under sub-section (1), or of any direction or order or decision of the Authority referred to in the appeal preferred under sub-section (2), on its own motion or otherwise, call for the records relevant to **deposing** of such application or appeal and make such orders as it thinks fit.

Section 14M - Transfer of pending cases

All applications, pending for adjudication of disputes before the Authority immediately before the date of establishment of the Appellate Tribunal under this Act, shall stand transferred on that date

	Provided that all disputes being adjudicated under the provisions of Chapter IV as it stood immediately before the commencement of the Telecom Regulatory Authority of India (Amendment) Act, 2000, shall continue to be adjudicated by the Authority in accordance with the provisions, contained in that Chapter, till the establishment of the Appellate Tribunal under the said Act: Provided further that all cases referred to in the first proviso shall be transferred by the Authority to the Appellate Tribunal immediately on its establishment under section 14. **Section 14N - Transfer of appeals** (1) All appeals pending before the High Court immediately before the commencement of the Telecom Regulatory Authority of India (Amendment) Act, 2000, shall stand transferred to the Appellate Tribunal on its establishment under section 14. (2) Where any appeal

	stands transferred from the High Court to the Appellate Tribunal under sub-section (1),— (a) the High Court shall, as soon as may be after such transfer, forward the records of such appeal to the Appellate Tribunal; and (b) the Appellate Tribunal may, on receipt of such records, proceed to deal with such appeal, so far as may be from the stage which was reached before such transfer or from any earlier stage or de novo as the Appellate Tribunal may deem fit.
Section 16 **Procedures and powers of Authority.-** (1) The Authority shall be guided by the principles of natural justice. (2) The Authority shall have, for the purpose of discharging their functions under this Chapter, the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908) in respect of the following matters, namely (a) summoning and	**Section 16** **Procedure and powers of Appellate Tribunal.-** (1) The Appellate Tribunal shall not be bound by the procedure laid down by the Code of Civil Procedure, 1908 (5 of 1908), but shall be guided by the principles of natural justice and, subject to the other provisions of this Act, the Appellate Tribunal shall have powers to regulate its own procedure. (2) The [illegible] sha[illegible]

enforcing the attendance of any person and examining him on oath; (b) requiring the discovery and production of documents; (c) receiving evidence on affidavits; (d) issuing commissions for the examination of witnesses or documents; (e) reviewing its decisions; (f) dismissing an application for default or deciding it ex parte; (g) setting aside any order of dismissal of any application for default or any order passed by it ex parte; (h) any other matter which may be prescribed. (3) Every proceeding before the Authority shall be deemed to be a judicial proceeding within the meaning of Sections 193 and 228, and for the purpose of Section 196 of the Indian Penal Code, 1860 (45 of 1860) and the Authority shall be deemed to be a civil court for all the	purposes of discharging its functions under this Act, the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908), while trying a suit, in respect of the following matters, namely:— (a) summoning and enforcing the attendance of any person and examining him on oath; (b) requiring the discovery and production of documents; (c) receiving evidence on affidavits; (d) subject to the provisions of sections 123 and 124 of the Indian Evidence Act,1872 (1 of 1872), requisitioning any public record or document or a copy of such record or document, from any office; (e) issuing commissions for the examination of witnesses or documents; (f) reviewing its decisions; (g) dismissing an application for default or deciding it,

purposes of Section 195 and Chapter XXVI of the Code of Criminal Procedure 1973 (2 of 1974).	ex parte; (h) setting aside any order of dismissal of any application for default or any order passed by it, ex parte; and (i) any other matter which may be prescribed. (3) Every proceeding before the Appellate Tribunal shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228, and for the purposes of section 196 of the Indian Penal Code (45 of 1860) and the Appellate Tribunal shall be deemed to be a civil court for the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973 (2 of 1974).
Section 19 **Orders passed by Authority or High Court to be executable as a decree.-** Every order made by the Authority under this Act or the order made by the High Court in any appeal against any order of the Authority shall, on a certificate issued by any	**Section 19.** **Orders passed by Appellate Tribunal to be executable as a decree.-**(1) An order passed by the Appellate Tribunal under this Act shall be executable by the Appellate Tribunal as a decree of civil court, and for this purpose, the Appellate Tribunal shall have all the p

officer of the Authority or the Registrar of the High Court, as the case may be, be deemed to be decree of the civil court and shall be executable in the same manner as a decree of that court.	(2) Notwithstanding anything contained in sub-section (1), the Appellate Tribunal may transmit any order made by it to a civil court having local jurisdiction and such civil court shall execute the order as if it were a decree made by that court.
Section 20 **Penalty for wilful failure to comply with orders of Authority or High Court.-** If any person wilfully fails to comply with the orders of the Authority or any order of the High Court, as the case may be, he shall be punishable with fine which may extend to one lakh rupees and in case of a second or subsequent offence with fine which may extend to two lakh rupees and in the case of continuing contravention with additional fine which may extend to two lakh rupees for every day during which the default continues.	**Section 20** **Penalty for wilful failure to comply with orders of Appellate Tribunal.-**If any person wilfully fails to comply with the order of the Appellate Tribunal, he shall be punishable with fine which may extend to one lakh rupees and in case of a second or subsequent offence with fine which may extend to two lakh rupees and in the case of continuing contravention with additional fine which may extend to two lakh rupees for every day during which such default continues.]
Section 36 **Power to make regulations.-**(1) The Authority may, by notification,	**Section 36** **Power to make regulations.-**(1)The Authority may, by notification, make

make regulations consistent with this Act and the rules made thereunder to carry out the purposes of this Act. (2) In particular, and without prejudice to the generality of the foregoing power, such regulations may provide for all or any of the following matters, namely:- (a) the times and places of meetings of the Authority and the procedure to be followed at such meetings under sub-section (1) of Section 8, including quorum necessary for the transaction of business; (b) the transaction of business at the meetings of the Authority under sub-section (4) of Section 8; (c) the salaries and allowances payable to and the other conditions of service of officers and other employees of the Authority under sub-section (2) of Section 10; (d) matters in respect of which register is to be maintained by the	regulations consistent with this Act and the rules made thereunder to carry out the purposes of this Act. (2) In particular, and without prejudice to the generality of the foregoing power, such regulations may provide for all or any of the following matters, namely:- (a) the times and places of meetings of the Authority and the procedure to be followed at such meetings under sub-section (1) of section 8, including quorum necessary for the transaction of business; (b) the transaction of business at the meetings of the Authority under sub-section (4) of section 8; xxx (d) matters in respect of which register is to be maintained by the authority under sub-clause (vii) of clause (b) of sub-section (1) of section 11; (e) levy of fee and lay down suc

Authority under clause (l) of sub-section (1) of Section 11;	on fulfilment of which a copy of register may be obtained under sub-clause (viii) of clause (b) of sub-section (1) of section 11;
(e) levy of fee and lay down such other requirements on fulfilment of which a copy of register may be obtained under clause (m) of sub-section (1) of Section 11;	(f) levy of fees and other changes under clause (c) of sub-section (1) of section 11;
(f) levy of fees and other charges under clause (p) of sub-section (1) of section 11.	

23. We shall now deal with the question formulated by this Court, the first facet of which relates to the scope of Section 36 of the Act.

24. Shri R.F. Nariman, learned Solicitor General argued that the power vested in the Authority to make regulations for carrying out the purposes of the Act is very wide and is not controlled by Section 36(2), which provides for framing of regulations on specified matters. He submitted that if power is conferred upon a statutory authority to make subordinate legislation in general terms, the particularization of the topics is merely illustrative and does not limit the scope of the general power. Learned Solicitor General further argued that for carrying out the purposes of the Act, the Authority can make regulations on various matters specified in other sections including Sections 8(1), 8(4), 11(1)(b), 12(4) and 13. He submitted that the regulations made under Section 36(1) and (2) are in the nature of subordinate legislation and are required to be laid before each House of Parliament in terms of Section 37 and Parliament can approve, modify or annul the same. He further submitted that a restrictive interpretation of Section 36(1) with reference to Clauses (a), (b) and (d) of Section 36(2)

will make the provision otiose and the Court should not adopt that course.

25. Shri A.S. Chandhiok, learned senior counsel appearing for BSNL argued that sub-section (1) of Section 36 should not be construed as conferring unbridled power upon the Authority to make regulations, else other provisions like Sections 12(4) and 13, which empower the Authority to issue directions on certain matters would become redundant. Shri C.S. Vaidyanathan, learned senior counsel appearing for the appellants in C.A. Nos.6049/2005, 802/2006, 4523/2006 and 5184/2010 argued that Section 36(1) should be construed consistent with other provisions of the Act and regulations cannot be made on the matters covered by other provisions. He referred to Section 11(2) and argued that the power conferred upon the Authority to issue an order fixing the rates at which the telecommunication services are to be provided within and outside India including the rates at which messages are required to be transmitted to any country outside India and the power vested in the authority under Section 12(4) and 13 to issue directions to the service providers cannot be controlled by making regulations under Section 36(1). Shri Vaidyanathan emphasized that if Parliament has conferred power upon the Authority under Section 11(2) to notify the rates by a transparent method, the power under Section 36(1) cannot be used for framing regulation on that topic. Learned senior counsel referred to Section 62 of the Electricity Act, 2003, which, according to him, is pari materia to Section 11(2) and argued that in view of paragraph 15 of the judgment in *PTC India Limited v. Central Electricity Regulatory Commission* (2010) 4 SCC 603, regulations cannot be framed on the subject specified in that section. Dr. A.M. Singhvi, learned senior counsel appearing for the appellants in C.A. Nos.271-281/2011 argued that the operation of Section 36(1) of the Act is controlled by Section 36(2), which provide for framing of regulation in respect of some ministerial acts required to be performed under the Act and argued that the Authority cannot m e

subjects specifically covered by other provisions. Dr. Singhvi submitted that the Court should not give an interpretation to Section 36(1) which will make the Authority an unruly horse and enable it to style every instrument as a regulation and thereby exclude the same from challenge before TDSAT. An ancillary argument made by Dr. Singhvi is that if regulations are framed on the topics covered by other provisions of the Act, then TDSAT will be denuded much of its jurisdiction and the purpose of creating an independent adjudicatory body will be defeated. Shri Mukul Rohatgi, learned senior counsel argued that the scope of Section 36(1) should be confined to the topics specified in sub-section (2) thereof, else the same will become inconsistent with other provisions of the Act including Sections 11(2), (4), 12(4) and 13. Shri Ramji Srinivasan, learned counsel appearing in some of the appeals, argued that the regulation making power under Section 36(1) cannot be used for nullifying the power of the Authority to issue directions on the topics specified in Sections 11(1)(b), 11(2), 12(4) and 13.

26. We have considered the respective arguments. Under the unamended Act, the Authority had the following three types of functions:

RECOMMENDATORY FUNCTIONS

Under Section 11 (1) (a) of the TRAI Act 1997, the Authority is required to make recommendations either suo moto or on a request from the licensor, i.e., Department of Telecommunications or Ministry of Information & Broadcasting in the case of Broadcasting and Cable Services.

TRAI has powers to make recommendations either suo motu or on request from the licensor on the following matters as per **Section 11(1)(a)**:

(i) need and timing for introduction of new service provider;

(ii) terms and conditions of licence to a service provider;

(iii) revocation of licence for non-compliance of terms and conditions of licence;

(iv) measures to facilitate competition and promote efficiency in the operation of telecommunication services so as to facilitate growth in such services;

(v) technological improvements in the services provided by the service providers;

(vi) type of equipment to be used by the service providers after inspection of equipment used in the network;

(vii) measures for the development of telecommunication technology and any other matter relatable to telecommunication industry in general;

(viii) efficient management of available spectrum.

REGULATORY FUNCTIONS

The Authority also had regulatory and tariff setting functions, like ensuring compliance of terms and conditions of licence, laying standard of Quality of Service (QoS) to be provided by service providers and notifying the rates at which telecommunication has to be provided and ensuring effective compliance of USOs. It also had the power to call upon any service provider at any time to furnish in formation or explanation, in writing, relating to its affairs. It was required to ensure transparency while exercising its powers and discharging its functions. It was given powers to punish for violation of its directions.

Another approach was through feedback / representations received from consumers / con[illegible]s, experts etc.

These functions could be discharged by the Authority through a multipronged approach. One of these approaches was by analyzing the reports received from the service providers. In certain cases, the Authority could on its own initiative take action for ensuring compliance of terms and conditions of license.

ADJUDICATORY FUNCTIONS

Originally, TRAI was also empowered to adjudicate upon disputes among Service Providers or between the Service Providers and a group of Consumers on matters relating to technical compatibility and interconnection between the Service Providers, revenue sharing arrangement between Service Providers, quality of telecommunication services and interests of consumers.

27. After the amendment of 2000, the Authority can either suo motu or on a request from the licensor make recommendations on the subjects enumerated in Section 11(1)(a)(i) to (viii). Under Section 11 (1)(b), the authority is required to perform nine functions enumerated in clauses (i) to (ix) thereof. In these clauses, different terms like ‘ensure’, ‘fix’, ‘regulate’ and ‘lay down’ have been used. The use of the term ‘ensure’ implies that the Authority can issue directions on the particular subject. For effective discharge of functions under various clauses of Section 11(1) (b), the authority can frame appropriate regulations. The term ‘regulate’ contained in sub-clause (iv) shows that for facilitating arrangement amongst service providers for sharing their revenue derived from providing telecommunication services, the Authority can either issue directions or make regulations.

28. The terms ‘regulate’ and ‘regulation’ have been interpreted in large number of judgments. We may notice few of them. In *V.S. Rice & Oil Mills v. State of A.P.* AIR 1964 SC

1781, agreements for a period of ten years had been executed for supply of electricity and the same did not contain any provision authorising the Government to increase the rates during their operation. However, in exercise of power under Section 3(1) of the Madras Essential Articles Control and Requisitioning (Temporary Powers) Act, 1949, the State Government issued order enhancing the agreed rates. The same was challenged on the ground that any increase in agreed tariff was out of the purview of Section 3(1). Chief Justice Gajendragadkar, speaking for the Constitution Bench, observed as under:

> “The word regulate is wide enough to confer power on the State to regulate either by increasing the rate, or decreasing the rate, the test being what is it that is necessary or expedient to be done to maintain, increase, or secure supply of the essential articles in question and to arrange for its equitable distribution and its availability at fair prices. The concept of fair prices to which Section 3(1) expressly refers does not mean that the price once fixed must either remain stationary, or must be reduced in order to attract the power to regulate. The power to regulate can be exercised for ensuring the payment of a fair price, and the fixation of a fair price would inevitably depend upon a consideration of all relevant and economic factors which contribute to the determination of such a fair price. If the fair price indicated on a dispassionate consideration of all relevant factors turns out to be higher than the price fixed and prevailing, then the power to regulate the price must necessarily include the power to increase so as to make it fair. Hence the challenge to the validity of orders increasing the agreed tariff rate on the ground that they are outside the purview of Section 3(1) cannot be sustained.”

29. In *State of Tamil Nadu v. Hind Stone* (1981) 2 SCC 205, this Court held that the word ‘regulate’ must be interpreted to include ‘prohibition’ within its fold. So s

made in that judgment (paragraph 10) are extracted below:

> "We do not think that 'regulation' has that rigidity of meaning as never to take in 'prohibition'. Much depends on the context in which the expression is used in the statute and the object sought to be achieved by the contemplated regulation. It was observed by Mathew, J. in *G.K. Krishnan v. State of T.N.* (1975) 1 SCC 375: 'The word "regulation" has no fixed connotation. Its meaning differs according to the nature of the thing to which it is applied.' In modern statutes concerned as they are with economic and social activities, 'regulation' must, of necessity, receive so wide an interpretation that in certain situations, it must exclude competition to the public sector from the private sector. More so in a welfare State. It was pointed out by the Privy Council in *Commonwealth of Australia v. Bank of New South Wales* (1949) 2 All ER — and we agree with what was stated therein — that the problem whether an enactment was regulatory or something more or whether a restriction was direct or only remote or only incidental involved, not so much legal as political, social or economic consideration and that it could not be laid down that in no circumstances could the exclusion of competition so as to create a monopoly, either in a State or Commonwealth agency, be justified. Each case, it was said, must be judged on its own facts and in its own setting of time and circumstances and it might be that in regard to some economic activities and at some stage of social development, prohibition with a view to State monopoly was the only practical and reasonable manner of regulation. The statute with which we are concerned, the Mines and Minerals (Regulation and Development) Act, is aimed, as we have already said more than once, at the conservation and the prudent and discriminating exploitation of minerals. Surely, in the case of a scarce mineral, to permit exploitation by the State or its agency and to prohibit exploitation by private agencies is the most effective method of conservation and prudent exploitation. If you want to conserve for the future, you must prohibit in the present. We have no doubt that the prohibiting of leases in certain cases is part of the regulation contemplated by Section 15 of the Act."

30. In *K. Ramanathan v. State of Tamil Nadu* (1985) 2 SCC 116, this Court interpreted the word 'regulation' appearing in Section 3(2)(d) of the Essential Commodities Act, 1955 and observed:

> "The word "regulation" cannot have any rigid or inflexible meaning as to exclude "prohibition". The word "regulate" is difficult to define as having any precise meaning. It is a word of broad import, having a broad meaning, and is very comprehensive in scope. There is a diversity of opinion as to its meaning and its application to a particular state of facts, some courts giving to the term a somewhat restricted, and others giving to it a liberal, construction. The different shades of meaning are brought out in Corpus Juris Secundum, Vol. 76 at p. 611:
>
> > "'Regulate' is variously defined as meaning to adjust; to adjust, order, or govern by rule, method, or established mode; to adjust or control by rule, method, or established mode, or governing principles or laws; to govern; to govern by rule; to govern by, or subject to, certain rules or restrictions; to govern or direct according to rule; to control, govern, or direct by rule or regulations.
> >
> > 'Regulate' is also defined as meaning to direct; to direct by rule or restriction; to direct or manage according to certain standards, laws, or rules; to rule; to conduct; to fix or establish; to restrain; to restrict."
>
> See also: Webster's Third New Ir y,

Vol. II, p. 1913 and Shorter Oxford Dictionary, Vol. II, 3rd Edn., p. 1784.

It has often been said that the power to regulate does not necessarily include the power to prohibit, and ordinarily the word “regulate” is not synonymous with the word “prohibit”. This is true in a general sense and in the sense that mere regulation is not the same as absolute prohibition. At the same time, the power to regulate carries with it full power over the thing subject to regulation and in absence of restrictive words, the power must be regarded as plenary over the entire subject. It implies the power to rule, direct and control, and involves the adoption of a rule or guiding principle to be followed, or the making of a rule with respect to the subject to be regulated. The power to regulate implies the power to check and may imply the power to prohibit under certain circumstances, as where the best or only efficacious regulation consists of suppression. It would therefore appear that the word “regulation” cannot have any inflexible meaning as to exclude “prohibition”. It has different shades of meaning and must take its colour from the context in which it is used having regard to the purpose and object of the legislation, and the Court must necessarily keep in view the mischief which the legislature seeks to remedy.

The question essentially is one of degree and it is impossible to fix any definite point at which “regulation” ends and “prohibition” begins. We may illustrate how different minds have differently reacted as to the meaning of the word “regulate” depending on the context in which it is used and the purpose and object of the legislation. In *Slattery v. Nalyor LR* (1888) 13 AC 446 the question arose before the Judicial Committee of the Privy Council whether a Bye-law by reason of its prohibiting internment altogether in a particular cemetery, was ultra vires because the Municipal Council had only power of regulating internments whereas the Bye-law totally prohibited them in the cemetery in question, and it was said by Lord Hobhouse, delivering the judgment of the Privy Council:

> “A rule or Bye-law cannot be Held as ultra vires merely because it prohibits where empowered to regulate, as regulation often involved prohibition.”

31. In *Jiyajeerao Cotton Mills Ltd. v. M.P. Electricity Board* 1989 Supp (2) SCC 52, the validity of the orders providing for higher charges/tariff for electricity consumed beyond legally fixed limit was upheld in view of Section 22(b) of the Electricity Act, which permits the State Government to issue an appropriate order for regulating the supply, distribution and consumption of electricity. It was held that the Court while interpreting the expression “regulate” must necessarily keep in view the object to be achieved and the mischief sought to be remedied. The necessity for issuing the orders arose out of the scarcity of electricity available to the Board for supplying to its customers and, therefore, in this background the demand for higher charges/tariff was held to be a part of a regulatory measure.

32. In *Deepak Theatre v. State of Punjab* 1992 Supp (1) SCC 684, this Court upheld classification of seats and fixation of rates of admission according to the paying capacity of a cinegoer by observing that the same is an integral part of the power to make regulation and fixation of rates of admission became a legitimate ancillary or incidental power in furtherance of the regulation under the Act.

33. The term ‘regulation’ was also interpreted in *Quarry Owners’ Association v. State of Bihar* (2000) 8 SCC 655 in the context of the provisions contained in the Mines and Minerals (Regulation Development) Act, 1957 and it was held:

> “Returning to the present case we find that the words “regulation of mines and miner e

incorporated both in the Preamble and the Statement of Objects and Reasons of this Act. Before that we find that the Preamble of our Constitution in unequivocal words expresses to secure for our citizens social, economic and political justice. It is in this background and in the context of the provisions of the Act, we have to give the meaning of the word "regulation". The word "regulation" may have a different meaning in a different context but considering it in relation to the economic and social activities including the development and excavation of mines, ecological and environmental factors including States' contribution in developing, manning and controlling such activities, including parting with its wealth, viz., the minerals, the fixation of the rate of royalties would also be included within its meaning."

34. Reference in this connection can also be made to the judgment in *U.P. Coop. Cane Unions Federation v. West U.P. Sugar Mills Association* (2004) 5 SCC 430. In that case, the Court interpreted the word 'regulation' appearing in U.P. Sugarcane (Regulation of Supply and Purchase) Act, 1953 and observed:

> " "Regulate" means to control or to adjust by rule or to subject to governing principles. It is a word of broad impact having wide meaning comprehending all facets not only specifically enumerated in the Act, but also embraces within its fold the powers incidental to the regulation envisaged in good faith and its meaning has to be ascertained in the context in which it has been used and the purpose of the statute."

35. It is thus evident that the term 'regulate' is elastic enough to include the power to issue directions or to make regulations and the mere fact that the expression "as may be provided in the regulations" appearing in clauses (vii) and (viii) of Section 11(1)(b) has not been used in other clauses of that sub-section does not mean that the regulations cannot be

framed under Section 36(1) on the subjects specified in clauses (i) to (vi) of Section 11(1)(b). In fact, by framing regulations under Section 36, the Authority can facilitate the exercise of functions under various clauses of Section 11(1)(b) including clauses (i) to (vi).

36. We may now advert to Section 36. Under sub-Section (1) thereof the Authority can make regulations to carry out the purposes of the Act specified in various provisions of the Act including Sections 11, 12 and 13. The exercise of power under Section 36(1) is hedged with the condition that the regulations must be consistent with the Act and the Rules made thereunder. There is no other restriction on the power of the Authority to make regulations. In terms of Section 37, the regulations are required to be laid before Parliament which can either approve, modify or annul the same. Section 36(2), which begins with the words "without prejudice to the generality of the power under sub-section (1)" specifies various topics on which regulations can be made by the Authority. Three of these topics relate to meetings of the Authority, the procedure to be followed at such meetings, the transaction of business at the meetings and the register to be maintained by the Authority. The remaining two topics specified in Clauses (e) and (f) of Section 36(2) are directly referable to Section 11(1)(b)(viii) and 11(1)(c). These are substantive functions of the Authority. However, there is nothing in the language of Section 36(2) from which it can be inferred that the provisions contained therein control the exercise of power by the Authority under Section 36(1) or that Section 36(2) restricts the scope of Section 36(1).

37. It is settled law that if power is conferred upon an authority/body to make subordinate legislation in general terms, the particularization of topics is merely illustrative and does not limit the scope of general power. In *Emperor v. Sibnath Banerji* AIR 1942 PC 156, the Privy Council considered the correctness of the judgment of the Federal Court, which held that Rule 26 of the Defence of India Rules framed und[illegible]n

3(2) of the Defence of India Act, 1939 was ultra vires the provisions of the Act. While reversing the judgment of the Federal Court, the Privy Council observed:

> "In the opinion of their Lordships, the function of sub-section (2) is merely an illustrative one; the rule-making power is conferred by sub-section (1), and "the rules" which are referred to in the opening sentence of Sub-section (2) are the . Rules which are authorized by, and made under, sub-section (1); the provisions of sub-section (2) are not restrictive of Sub-section (1), as, indeed is expressly stated by the words "without prejudice to the generality of the powers conferred by sub-section (l)."

38. The proposition laid down in Sibnath Banerji's case was followed by this Court in large number of cases. In *Afzal Ullah v. State of Uttar Pradesh* 1964 (4) SCR 991, the Constitution Bench considered challenge to the validity of bye-law No.3 framed by Municipal Board, Tanda. The appellant had questioned the bye-law on the ground that the same was ultra vires the provisions of Section 241 of the United Provinces Municipalities Act, 1916. The facts of that case were that the appellant had established a market for selling food-grains, vegetables, fruits, fish etc. The Chairman of the Municipal Board issued a notice to the appellant requiring him to obtain a licence for running the market with an indication that if he fails to do so, criminal proceedings will be initiated against him. On account of his failure to take the required licence, the appellant was tried by Tahsildar, Tanda in Criminal Case No.141 of 1960. The Tahsildar acquitted the appellant on the ground that the prosecution had failed to prove the fact that in the market established on the land belonging to the appellant, vegetables, fruits and fish were sold. The order of acquittal was set aside by the High Court and the appellant was convicted under Section 299(1) of the 1916 Act read with clause (3) of the relevant bye-laws. In the appeal filed before this Court, it was argued that bye-law 3(a) and other bye-laws passed by the

Board are ultra vires the provisions of Section 241 of the Act. The Constitution Bench referred to the provisions of Sections 241 and 298 of the Act and various clauses of Section 298(2) which specify the topics on which bye-laws can be framed and observed:

> "Even if the said clauses did not justify the impugned Bye-law, there can be little doubt that the said Bye-laws would be justified by the general power conferred on the Boards by Section 298(1). It is now well-settled that the specific provisions such as are contained in the several clauses of Section 298(2) are merely illustrative and they cannot be read as restrictive of the generality of powers prescribed by Section 298(1) (vide Emperor v. Sibnath Banerji). If the powers specified by Section 298(1) are very wide and they take in within their scope Bye-laws like the ones with which we are concerned in the present appeal, it cannot be said that the powers enumerated under Section 298(2) control the general words used by Section 298(1). These latter clauses merely illustrate and do not exhaust all the powers conferred on the Board, so that any cases not falling within the powers specified by Section 298(2) may well be protected by Section 298(1), provided, of course, the impugned Bye-law can be justified by-reference to the requirements of Section 298(1). There can be no doubt that the impugned Bye-laws in regard to the markets framed by Respondent 2 are for the furtherance of municipal administrate ion under the Act, and so, would attract the provisions of Section 298(1). Therefore, we are satisfied that the High Court was right in coming to the conclusion that the impugned Bye-laws are valid."

(emphasis supplied)

39. In *Rohtak Hissar District Electricity Supply Company Ltd. v. State of Uttar Pradesh and others* AIR 1966 SC 1471, this Court dealt with the rule making power of the State Government under the Uttar Pradesh I[illegible]t,

1947 and observed:

> "Section 15(1) confers wide powers on the appropriate Government to make rules to carry out the purposes of the Act; and Section 15(2) specifies some of the matters enumerated by clauses (a) to (e), in respect of which rules may be framed. It is well-settled that the enumeration of the particular matters by sub-section (2) will not control or limit the width of the power conferred on the appropriate Government by sub-section (1) of Section 15; and so, if it appears that the item added by the appropriate Government has relation to conditions of employment, its addition cannot be challenged as being invalid in law."
>
> (emphasis supplied)

40. In *K. Ramanathan v. State of Tamil Nadu* (supra), a three-Judge Bench of this Court considered the scope of Section 3(1), (2) and Section 5 of the Essential Commodities Act, 1955. The appellant and other agriculturists of Tanjavur District had challenged the constitutional validity of clause 3(1-a) of the Order issued by the Central Government under Section 5 read with Section 3 of the Essential Commodities Act, 1955 placing complete ban on the transport, movement or otherwise carrying of paddy outside the districts. The High Court rejected their challenge and dismissed the writ petitions. Before this Court, it was argued that the delegation of power under Section 5 of the Act must necessarily be given a restricted interpretation. While rejecting the argument, this Court referred to the judgment in Sibnath Banerji's case, Santosh Kumar Jain v. State AIR 1951 SC 201 and observed:

> "Learned Counsel for the appellant however strenuously contends that the delegation of powers by the Central Government under Section 5 of the Act must necessarily be in relation to 'such matters' and subject to 'such conditions' as may be specified in the notification. The whole attempt on the part of the learned Counsel is to

> confine the scope and ambit of the impugned order to CL (d) of Sub-section (2) of Section 3 of the Act which uses the word 'regulating' and take it out of-the purview of Sub-section (1) of Section 3 which uses the words 'regulating or prohibiting'. That is not proper way of construction of Sub-section (1) and (2) of Section 3 of the Act in their normal setting. The restricted construction of Section 3 contended for by learned Counsel for the appellant would render the scheme of the Act wholly unworkable as already indicated, the source of power to make an order of this description is Sub-section (1) of Section 3 of the Act and sub's. (2) merely provides illustration for the general powers conferred by Sub-section (1). Sub-section (2) of Section 3 of the Act commences with the words 'Without prejudice to the generality of the powers conferred by Sub-section (1)'. It is manifest that Sub-section (2) of Section 3 of the Act confers no fresh powers but is merely illustrative of the general powers conferred by Sub-section (1) of Section 3 without exhausting the subjects in relation to which such powers can be exercised."

41. The question was again considered in *D.K. Trivedi and Sons v. State of Gujarat* 1986 (Supp) SCC 20. This Court was called upon to examine the challenge to the constitutionality of Section 15 of the Mines and Minerals (Regulation and Development) Act, 1957, the power of the State Governments to make rules under Section 15 to enable them to charge dead rent and royalty in respect of leases of mines and minerals granted to them and to enhance the rates of dead rent and royalty. While repelling the argument that the 1957 Act does not contain guidelines for exercise of power by the State Government under Section 15(1), this Court observed:

> "32. There is no substance in the contention that no guidelines are provided in the 1957 Act for the exercise of the rule-making power of the State Governments under Section 15(1). As mentioned earli n

pari materia with Section 13(1). Section 13, however, contains sub-section (2) which sets out the particular matters with respect to which the Central Government may make rules "In particular, and without prejudice to the generality of the foregoing power", that is, the rule-making power conferred by sub-section (1). It is well settled that where a statute confers particular powers without prejudice to the generality of a general power already conferred, the particular powers are only illustrative of the general power and do not in any way restrict the general power. Section 2 of the Defence of India Act, 1939, as amended by Section 2 of the Defence of India (Amendment) Act, 1940, conferred upon the Central Government the power to make such rules as appeared to it "to be necessary or expedient for securing the defence of British India, the public safety, the maintenance of public order or the efficient prosecution of war, or for maintaining supplies and services essential to the life of the community". Sub-section (2) of Section 2 conferred upon the Central Government the power to provide by rules or to empower any authority to make orders providing for various matters set out in the said sub-section. This power was expressed by the opening words of the said sub-section (2) to be "Without prejudice to the generality of the powers conferred by sub-section (1)". In King Emperor v. Sibnath Banerji the Judicial Committee of the Privy Council held:

> "In the opinion of Their Lordships, the function of sub-section (2) is merely an illustrative one; the rule-making power is conferred by subsection (1), and 'the rules' which are referred to in the opening sentence of sub-section (2) are the rules which are authorized by, and made under, sub-section (1); the provisions of sub-section (2) are not restrictive of sub-section (1), as, indeed, is expressly stated by the words 'without prejudice to the generality of the powers conferred by sub-section (1).'"

The above proposition of law has been approved and accepted by this Court in *Om Prakash v. Union of India* (1970) 3 SCC 942 and *Shiv Kirpal Singh v. V.V. Giri* (1970) 2 SCC 567.

33. A provision similar to sub-section (2) of Section 13, however, does not find place in Section 15. In our opinion, this makes no difference. What sub-section (2) of Section 13 does is to give illustrations of the matters in respect of which the Central Government can make rules for "regulating the grant of prospecting licences and mining leases in respect of minerals and for purposes connected therewith". The opening clause of sub-section (2) of Section 13, namely, "In particular, and without prejudice to the generality of the foregoing power", makes it clear that the topics set out in that sub-section are already included in the general power conferred by sub-section (1) but are being listed to particularize them and to focus attention on them. The particular matters in respect of which the Central Government can make rules under sub-section (2) of Section 13 are, therefore, also matters with respect to which under sub-section (1) of Section 15 the State Governments can make rules for "regulating the grant of quarry leases, mining leases or other mineral concessions in respect of minor minerals and for purposes connected therewith". When Section 14 directs that "The provisions of Sections 4 to 13 (inclusive) shall not apply to quarry leases, mining leases or other mineral concessions in respect of minor minerals", what is intended is that the matters contained in those sections, so far as they concern minor minerals, will not be controlled by the Central Government but by the concerned State Government by exercising its rule-making power as a delegate of the Central Government. Sections 4 to 12 form a group of sections under the heading "General restrictions on undertaking prospecting and mining operations". The exclusion of the application of th r

A minerals means that these restrictions will not apply to
minor minerals but that it is left to the State Governments
to prescribe such restrictions as they think fit by rules made
under Section 15(1). The reason for treating minor minerals
differently from minerals other than minor minerals is
B obvious. As seen from the definition of minor minerals
given in clause (e) of Section 3, they are minerals which
are mostly used in local areas and for local purposes while
minerals other than minor minerals are those which are
necessary for industrial development on a national scale
C and for the economy of the country. That is why matters
relating to minor minerals have been left by Parliament to
the State Governments while reserving matters relating to
minerals other than minor minerals to the Central
Government. Sections 13, 14 and 15 fall in the group of
D sections which is headed "Rules for regulating the grant
of prospecting licences and mining leases". These three
sections have to be read together. In providing that Section
13 will not apply to quarry leases, mining leases or other
mineral concessions in respect of minor minerals what was
done was to take away from the Central Government the
E power to make rules in respect of minor minerals and to
confer that power by Section 15(1) upon the State
Governments. The ambit of the power under Section 13
and under Section 15 is, however, the same, the only
difference being that in one case it is the Central
F Government which exercises the power in respect of
minerals other than minor minerals while in the other case
it is the State Governments which do so in respect of minor
minerals. <u>Sub-section (2) of Section 13 which is illustrative
of the general power conferred by Section 13(1) contains
G sufficient guidelines for the State Governments to follow in
framing the rules under Section 15(1), and in the same
way, the State Governments have before them the
restrictions and other matters provided for in Sections 4
to 12 while framing their own rules under Section 15(1).</u>"
H (emphasis supplied)

A 42. The same proposition has been reiterated in *Academy
of Nutrition Improvement v. Union of India* (2011) 8 SCC 274
[Para66] . The observations contained in the last portion of that
paragraph suggesting that the power conferred upon the rule
making authority does not entitle it to make rules beyond the
B scope of the Act has no bearing on these cases because it has
not been argued before us that the regulations framed under
Section 36 are ultra vires the provisions of the Act.

43. Here it will be apposite to mention that Section
C 11(1)(b)(iv) specifically postulates making of regulations for
discharging the functions specified in those clauses. Section
11(2), which contains non-obstante clause vis-à-vis the Indian
Telegraph Act, 1885, lays down that the Authority may, from time
to time, by order notify the rates at which the telecommunication
D services within or outside India shall be provided under the Act
subject to the limitation specified in Section 11(3). Under
Section 12(1), the Authority is empowered to issue order and
call upon any service provider to furnish such information or
explanation relating to its affair or appoint one or more persons
E to make an inquiry in relation to the affairs of any service
provider and direct inspection of the books of account or other
documents of any service provider. Sections 12(4) and 13 of
the Act on which reliance has been placed by the learned
counsel for the respondents in support of their argument that
F the Authority cannot frame regulations on the subjects
mentioned in these two sections are only enabling provisions.
This is evinced from the expressions "shall have the power"
used in Section 12(4) and "The Authority may" used in Section
13. In terms of Section 12(4), the Authority can issue such
G directions to service providers, as it may consider necessary,
for proper functioning by service providers. Section 13 lays
down that the Authority may for discharge of its functions under
Section 11(1), issue such directions to the service providers,
as it may consider necessary. The scope of this provision is
H

limited by the proviso, which lays down that no direction under Section 12(4) or Section 13 shall be issued except on matters specified in Section 11(1)(b). It is thus clear that in discharge of its functions, the Authority can issue directions to the service providers. The Act speaks of many players like the licensors and users, who do not come within the ambit of the term "service provider". If the Authority has to discharge its functions qua the licensors or users, then it will have to use powers under provisions other than Sections 12(4) and 13. Therefore, in exercise of power under Section 36(1), the Authority can make regulations which may empower it to issue directions of general character applicable to service providers and others and it cannot be said that by making regulations under Section 36(1) the Authority has encroached upon the field occupied by Sections 12(4) and 13 of the Act.

44. Before parting with this aspect of the matter, we may notice Sections 33 and 37. A reading of the plain language of Section 33 makes it clear that the Authority can, by general or special order, delegate to any member or officer of the Authority or any other person such of its powers and functions under the Act except the power to settle disputes under Chapter IV or make regulations under Section 36. This means that the power to make regulations under Section 36 is non-delegable. The reason for excluding Section 36 from the purview of Section 33 is simple. The power under Section 36 is legislative as opposed to administrative. By virtue of Section 37, the regulations made under the Act are placed on par with the rules which can be framed by the Central Government under Section 35 and being in the nature of subordinate legislations, the rules and regulations have to be laid before both the Houses of Parliament which can annul or modify the same. Thus, the regulations framed by the Authority can be made ineffective or modified by Parliament and by no other body.

45. In view of the above discussion and the propositions laid down in the judgments referred to in the preceding

paragraphs, we hold that the power vested in the Authority under Section 36(1) to make regulations is wide and pervasive. The exercise of this power is only subject to the provisions of the Act and the Rules framed under Section 35 thereof. There is no other limitation on the exercise of power by the Authority under Section 36(1). It is not controlled or limited by Section 36(2) or Sections 11, 12 and 13.

46. The second and more important facet of the question framed by the Court is whether TDSAT has the jurisdiction to entertain challenge to the regulations framed by the Authority.

47. The learned Solicitor General referred to Articles 323A and 323B of the Constitution, Section 14 of the Administrative Tribunals Act, 1985, the judgment of the larger Bench in *L. Chandra Kumar v. Union of India* (1997) 3 SCC 261 and argued that whenever Parliament wishes to confer power of judicial review on an adjudicatory body other than the regular Courts, it has enacted a provision like Section 14 of the 1985 Act. He submitted that the language of Section 14 of the Act, which was enacted after 12 years of the enactment of the 1985 Act and was amended in 2000 does not empower TDSAT to undertake judicial review of subordinate legislation. Learned Solicitor General further argued that the words 'direction', 'decision' or 'order' used in Section 14(b) should not be given over-stretched meaning to empower TDSAT to entertain challenge to the regulations made under Section 36 of the Act, which are in the nature of subordinate legislation. He emphasized that if these words are interpreted to include the regulations made under Section 36, the same interpretation would hold good qua the rules framed under Section 35 because they are also in the nature of subordinate legislation. Learned Solicitor General submitted that it would be an extremely anomalous position if the rules framed under Section 35 and the regulations framed under Section 36 are challenged before TDSAT and validity thereof is examined by a Bench comprising non-judicial members. T[illegible]r

General relied upon the judgment of the Constitution Bench in *PTC India Ltd. v. Central Electricity Regulatory Commission* (2010) 4 SCC 603 and argued that even though in paragraph 94 of the judgment the Bench had observed that summary of findings and answer to the reference shall not be construed as a general principle of law to be applied to Appellate Tribunals vis-à-vis Regulatory Commissions constituted under other enactments including the Act, the ratio of the judgment is clearly attracted in the present case. He submitted that Section 79 of the Electricity Act, 2003 (for short, 'the 2003 Act') does not contain Clauses like 11(1)(b)(vii) and (viii) of the Act and provision like Section 36(2) of the Act is not contained in the 2003 Act and further that Section 111 of the 2003 Act contains only the word 'order' as against the words 'direction', 'decision' or 'orders' used in Section 14 but that these differences are insignificant and there is no justification to ignore the ratio of the judgment of the Constitution Bench. Shri Nariman submitted that distinction sought to be made by the other side with reference to the language of Sections 79, 111 and 178(2)(ze) of the Electricity Act, 2003 is illusory because after noticing Section 121 which uses the words 'orders', 'instructions' or 'directions', the Constitution Bench has unequivocally held that the said section does not confer power of judicial review on the Appellate Tribunal.

48. S/Shri A.S. Chandhiok, C.S. Vaidyanathan, Dr. A.M. Singhvi, Ramji Shrinivashan and Mukul Rohatgi, learned senior counsel relied upon the judgment of the larger Bench in *L. Chandra Kumar vs. Union of India* (supra) and argued that every Tribunal constituted under an Act of Parliament or State Legislature is empowered to exercise power of judicial review qua the rules and regulations. They also relied upon the judgments of this Court in *Cellular Operators Assn. of India v. Union of India* (2003) 3 SCC 186, *Hotel & Restaurant Association v. Star India (P) Ltd.* (2006) 13 SCC 753, *Union of India v. TATA Teleservices (Maharashtra) Ltd.* (2007) 7 SCC 517, *Union of India v. Association of Unified Telecom*

Service Providers of India (2011) 10 SCC 543 and argued that the validity of the regulations framed under Section 36 can be examined by TDSAT and in appropriate cases the same can be struck down. They further argued that the regulations framed under Section 36 are essentially in the nature of a decision taken by the Authority and the same can always be subjected to challenge under Section 14(b). Learned senior counsel also referred to order dated 28.3.2006 passed by a three-Judge Bench in Civil Appeal No.6743/2003 – Telecom Regulatory Authority of India v. BPL Mobile Cellular Ltd. and argued that having taken the stand before this Court that a 'direction' includes 'regulation', the Authority is estopped from adopting a different posture before this Court on the issue of maintainability of appeal under Section 14(b) involving challenge to the regulations. Dr. Singhvi and Shri Rohatgi argued that one of the objectives of the amendments made in 2000 was to create a specialised body for expeditious adjudication of disputes and appeals and that objective will be totally defeated if the regulations framed under Section 36 are excluded from the ambit of Section 14(b). They also relied upon the judgment of this Court in *Madras Bar Association v. Union of India* (2010) 11 SCC 1 and argued that once Parliament has conferred power of judicial review upon TDSAT, there is no valid ground to whittle down the scope thereof by giving a restrictive interpretation to Section 14(b) of the Act.

49. Before dealing with the respective arguments, we may revert back to Section 14 (unamended and amended). Under the unamended Section 14(1), the Authority could decide disputes among service providers and between service providers and a group of consumers. In terms of Section 14(2) (unamended), the bench constituted by the Chairperson of the Authority can exercise powers and authority which were exercisable earlier by the Civil Court on technical compatibility and inter-connections between service providers, revenue sharing arrangements between different service providers, quality of telecommunication serv f

consumers. However, the disputes specified in clauses (a), (b) and (c) of Section 14(2) could not be decided by the Bench constituted by the Chairperson.

50. Since the mechanism provided for settlement of disputes under Section 14 of the unamended Act was not satisfactory, Parliament substituted that section and facilitated establishment of an independent adjudicatory body known as TDSAT. Clause (a) of amended Section 14 confers jurisdiction upon TDSAT to adjudicate any dispute between a licensor and licensee, between two or more service providers and between a service provider and a group of consumers. Three exceptions to the adjudicatory power of TDSAT relates to the cases which are subject to the jurisdiction of Monopolies and Restrictive Trade Practices Commission, the complaint of an individual consumer which could be maintained under the consumer forums established under the Consumer Protection Act, 1986 and dispute between Telegraph Authority and any other person referred to in Section 7B(1) of the Indian Telegraph Act, 1885. In terms of clause (b) of Section 14 (amended), TDSAT is empowered to hear and dispose of appeal against any direction, decision or order of the Authority. Section 14A(1) provides for making of an application to TDSAT for adjudication of any dispute referred to in Section 14(a). Section 14A(2) and (3) provides for filing an appeal against any direction, decision or order made by the Authority and also prescribes the period of limitation. Sub-sections (4) to (7) of Section 14 are, by and large, procedural. Section 14B relates to composition of Appellate Tribunal. Section 14C prescribes qualifications for Chairperson and Members. Section 14D speaks of tenure of the Chairperson and every other Member of TDSAT. Section 14E speaks of terms and conditions of service. Section 14F provides for filling up the vacancies. Section 14G deals with removal and resignation of Chairperson or any Member of TDSAT. Section 14H relates to staff of TDSAT. Section 14I empowers the Chairperson to make provisions of distribution of business of TDSAT amongst

different Benches and their roster. Section 14J empowers the Chairperson to transfer cases from one Bench to the other. Section 14K lays down that decision of any application or appeal should be by majority. Section 14L treats the Chairperson and Members etc. of TDSAT to be public servants. Sections 14M and 14N provide for transfer of pending cases and appeals.

51. The primary objective of the 2000 amendment was to separate adjudicatory functions of the Authority from its administrative and legislative functions and ward off the criticism that the one who is empowered to make regulations and issue directions or pass orders is clothed with the power to decide legality thereof. The word 'direction' used in Section 14(b) is referable to Sections 12(4) and 13. The word 'order' is referable to Section 11(2) and 12(1). The word 'decision' has been used in Section 14-A(2) and (7). This is because the proviso to Section 14-M postulates limited adjudicatory function of the Authority in respect of the disputes being adjudicated under Chapter IV before the 2000 amendment. This proviso was incorporated in Section 14-M to avoid a hiatus between the coming into force of the 2000 amendment and the establishment of TDSAT.

52. None of the words used in Section 14(b) have anything to do with adjudication of disputes. Before the 2000 Amendment, the applications were required to be filed under Section 15 which also contained detailed procedure for deciding the same. While sub-Section (2) of Section 15 used the word 'orders', sub-Sections (3) and (4) thereof used the word 'decision'. In terms of sub-Section (5), the orders and directions of the Authority were treated as binding on the service providers, Government and all other persons concerned. Section 18 provided for an appeal against any decision or order of the Authority. Such an appeal could be filed before the High Court. The amendment made in 2000 is intended to vest the original jurisdicti … n

TDSAT and the same is achieved by Section 14(a). The appellate jurisdiction exercisable by the High Court is also vested in TDSAT by virtue of Section 14(b) but this does not include decision made by the Authority. Section 14-N provides for transfer to all appeals pending before the High Court to TDSAT and in terms of Clause (b) of sub-Section (2), TDSAT was required to proceed to deal with the appeal from the stage which was reached before such transfer or from any earlier stage or de novo as considered appropriate by it. Since High Court while hearing appeal did not have the power of judicial review of subordinate legislation, the transferee adjudicatory forum, i.e., TDSAT cannot exercise that power under Section 14(b).

53. In *Cellular Operators Assn. of India v. Union of India* (supra), Pattanaik, C.J., who authored main judgment of the three Judge Bench, referred to Section 14 and observed:

> "Suffice it to say, Chapter IV containing Section 14 was inserted by an amendment of the year 2002 and the very Statement of Objects and Reasons would indicate that to increase the investors' confidence and to create a level playing field between the public and the private operators, suitable amendment in the Telecom Regulatory Authority of India Act, 1997 was brought about and under the amendment, a tribunal was constituted called the Telecom Disputes Settlement and Appellate Tribunal for adjudicating the disputes between a licensor and a licensee, between two or more service providers, between a service provider and a group of consumers and also to hear and dispose of appeal against any direction, decision or order of the Authority. The aforesaid provision was absolutely essential as the organizations of the licensor, namely, MTNL and BSNL were also service providers. That being the object for which an independent tribunal was constituted, the power of that Tribunal has to be adjudged from the language conferring that power and it would not

> be appropriate to restrict the same on the ground that the decision which is the subject-matter of challenge before the Tribunal was that of an expert body. It is no doubt true, to which we will advert later, that the composition of the Telecom Regulatory Authority of India as well as the constitution of GOT-IT in April 2001 consists of a large number of eminent impartial experts and it is on their advice, the Prime Minister finally took the decision, but that would not in any way restrict the power of the Appellate Tribunal under Section 14, even though in the matter of appreciation the Tribunal would give due weight to such expert advice and recommendations. Having regard to the very purpose and object for which the Appellate Tribunal was constituted and having examined the different provisions contained in Chapter IV, more particularly, the provision dealing with ousting the jurisdiction of the civil court in relation to any matter which the Appellate Tribunal is empowered by or under the Act, as contained in Section 15, we have no hesitation in coming to the conclusion that the power of the Appellate Tribunal is quite wide, as has been indicated in the statute itself and the decisions of this Court dealing with the power of a court, exercising appellate power or original power, will have no application for limiting the jurisdiction of the Appellate Tribunal under the Act. Since the Tribunal is the original authority to adjudicate any dispute between a licensor and a licensee or between two or more service providers or between a service provider and a group of consumers and since the Tribunal has to hear and dispose of appeals against the directions, decisions or order of TRAI, it is difficult for us to import the self-contained restrictions and limitations of a court under the judge-made law to which reference has already been made and reliance was placed by the learned Attorney-General."

(emphasis supplied)

A 54. In *Union of India v. TATA Teleservices (Maharashtra) Ltd.* (supra), the two Judge Bench of this Court referred to the scheme of the Act and observed:

> "The conspectus of the provisions of the Act clearly indicates that disputes between the licensee or licensor,
> B between two or more service providers which takes in the Government and includes a licensee and between a service provider and a group of consumers are within the purview of TDSAT. A plain reading of the relevant provisions of the Act in the light of the Preamble to the Act
> C and the Objects and Reasons for enacting the Act, indicates that disputes between the parties concerned, which would involve significant technical aspects, are to be determined by a specialised tribunal constituted for that purpose. There is also an ouster of jurisdiction of the civil
> D court to entertain any suit or proceeding in respect of any matter which TDSAT is empowered by or under the Act to determine. The civil court also has no jurisdiction to grant an injunction in respect of any action taken or to be taken in pursuance of any power conferred by or under the Act.
> E The constitution of TDSAT itself indicates that it is chaired by a sitting or retired Judge of the Supreme Court or sitting or a retired Chief Justice of the High Court, one of the highest judicial officers in the hierarchy and the members thereof have to be of the cadre of Secretaries to the
> F Government, obviously well experienced in administration and administrative matters.
>
> The Act is seen to be a self-contained code intended to deal with all disputes arising out of telecommunication
> G services provided in this country in the light of the National Telecom Policy, 1994. This is emphasised by the Objects and Reasons also.
>
> Normally, when a specialised tribunal is constituted for dealing with disputes coming under it of a particular nature
> H taking in serious technical aspects, the attempt must be

> A to construe the jurisdiction conferred on it in a manner as not to frustrate the object sought to be achieved by the Act. In this context, the ousting of the jurisdiction of the civil court contained in Section 15 and Section 27 of the Act has also to be kept in mind. The subject to be dealt with under the
> B Act has considerable technical overtones which normally a civil court, at least as of now, is ill equipped to handle and this aspect cannot be ignored while defining the jurisdiction of TDSAT."

55. In the aforementioned judgments, this Court has laid
C emphasis on the scope of the jurisdiction of TDSAT but has not dealt with the question whether the words 'direction', 'decision' or 'order' include 'regulations' framed under Section 36 of the Act and the same could be subjected to appellate jurisdiction of TDSAT. Therefore, those judgments cannot be
D relied upon for holding that in exercise of power under Section 14(b) of the Act TDSAT can hear an appeal against regulations framed under Section 36.

56. We may now deal with the judgment of three Judge
E Bench in Civil Appeal No.6743/2003 – Telecom Regulatory Authority of India v. BPL Mobile Cellular Ltd. is clearly distinguishable. The facts of that case were that in May, 2001 respondent No.1 offered a scheme as a promotional plan to its customers. Several thousand subscribers accepted the offer.
F In October, 2001 the scheme was dropped. A public interest litigation was filed by one subscriber challenging the unilateral dropping of the scheme by respondent No.1. The High Court passed an order and directed the appellant to submit a report in that connection. No report having been submitted, by a
G subsequent order dated 24.9.2002, the High Court directed the appellant to take steps after hearing the parties and submit a report of compliance within a period of three months from the date of the order. Pursuant to this directive the appellant passed an order on 23.12.2002 holding, inter alia, that
H respondent No.1 had violated th[illegible]e

Telecommunication Tariff Order, 1999 insofar as it had failed to inform the appellant either as to the introduction of the scheme or subsequent withdrawal hereof. It was found that the action of respondent No.I had adversely affected the interest of the subscribers. Finally the appellant opined that the violation was of serious nature and to be dealt with in accordance with Section 29 read with Section 34 of the Act. Thereafter, a complaint was lodged before the jurisdictional Magistrate. Respondent No.1 filed an appeal against order dated 23.12.2002. TDSAT allowed the appeal and held that Section 29 could not be invoked for any violation of an order issued by the appellant. This Court referred to Sections 29 and 34 and formulated the following question:

> "Whether the word 'directions' would include the Telecommunication Tariff Order, 1999 (hereinafter referred to as the 'Order') so that any violation thereof would be punishable under Section 29 read with Section 34."

The Court then referred to Sections 11(1)(c), 11(2), 12(4), 13 and observed:

> "The order which has been passed in 1999 has in fact sought to and ensures compliance of the terms and conditions of the licence granted by the Government of India to the respondent.
>
> It appears to us on a reading of all these provisions that the word 'directions' had been used in a wide sense to cover orders/regulations which in effect direct an action to be taken we were to limit Section 29 only to directions which were not directory orders or/directory regulations this would mean that violation of such orders/regulations would not carry any penal consequence whatsoever. Consequently, the entire scheme of the Act would become unworkable. Besides Section 11(1)(b) in respect of which directions may be issued has itself also been widely framed. Indeed the order in question pertains to the provisions of Section 11(1)(b)(i) as we have already stated. It may be that Section 29 creates an offence and therefore, must be strictly construed. However, that principle will not militate with the principle that the interpretation of a word must be made contextually. We have to ascertain the meaning of the word 'directions' in Section 29. The word 'directions' can take within its fold directory orders and regulations in the nature of directions as a matter of semantics. Besides in the context of the Act there is no reason not to include the orders and regulations containing directions within the word 'directions.' This would also be a logical corollary as such regulations and orders have appended to them a more serious mandate."

57. From the above extracted portion of the order it is evident that the Bench, which decided the matter, felt that the view taken by TDSAT would encourage rampant violation of the orders without any penal consequence and the entire scheme of the Act would become unworkable. The word 'directions' used in Section 29 of the Act was interpreted to include orders and regulations in the context of the factual matrix of that case and the apprehension of the Court that Section 29 would otherwise become unworkable, but the same cannot be read as laying down a proposition of law that the words 'direction', 'decision' or 'order' used in Section 14(b) would include regulation framed under Section 36, which are in the nature of subordinate legislation.

58. In *PTC India Ltd. v. Central Electricity Regulatory Commission* (surpa), the Constitution Bench framed the following questions:

> "(i) Whether the Appellate Tribunal constituted under the Electricity Act, 2003 (the 2003 Act) has jurisdiction under Section 111 to examine the validity of the Central Electricity Regulatory Commission (Fixation of Trading Margin) Regulations, 2006 framed in exercise of power conferred under Section 178 of th

(ii) Whether Parliament has conferred power of judicial review on the Appellate Tribunal for Electricity under Section 121 of the 2003 Act?

(iii) Whether capping of trading margins could be done by CERC (the Central Commission) by making a regulation in that regard under Section 178 of the 2003 Act?"

59. The Constitution Bench extensively referred to the provisions of the Electricity Act, 2003 including Sections 73, 75, 79, 86, 111, 177, 178, 179, 181 and 182, and observed:

"47. On the above submissions, one of the questions which arises for determination is—whether trading margin fixation (including capping) under the 2003 Act can only be done by an order under Section 79(1)(j) and not by regulations under Section 178? According to the appellant(s) it can only be done by an order under Section 79(1)(j), particularly when under Section 178(2) power to make regulations is co-relatable to the functions ascribed to each authority under the said 2003 Act.

48. In every case one needs to examine the statutory context to determine whether a court or a tribunal hearing a case has jurisdiction to rule on a defence based upon arguments of invalidity of subordinate legislation or administrative act under it. There are situations in which Parliament may legislate to preclude such challenges in the interest of promoting certainty about the legitimacy of administrative acts on which the public may have to rely.

49. On the above analysis of various sections of the 2003 Act, we find that the decision-making and regulation-making functions are both assigned to CERC. Law comes into existence not only through legislation but also by regulation and litigation. Laws from all three sources are binding. According to Professor Wade, "between legislative and administrative functions we have regulatory

functions". A statutory instrument, such as a rule or regulation, emanates from the exercise of delegated legislative power which is a part of administrative process resembling enactment of law by the legislature whereas a quasi-judicial order comes from adjudication which is also a part of administrative process resembling a judicial decision by a court of law.

50. Applying the above test, price fixation exercise is really legislative in character, unless by the terms of a particular statute it is made quasi-judicial as in the case of tariff fixation under Section 62 made appealable under Section 111 of the 2003 Act, though Section 61 is an enabling provision for the framing of regulations by CERC. If one takes "tariff" as a subject-matter, one finds that under Part VII of the 2003 Act actual determination/fixation of tariff is done by the appropriate Commission under Section 62 whereas Section 61 is the enabling provision for framing of regulations containing generic propositions in accordance with which the appropriate Commission has to fix the tariff. This basic scheme equally applies to the subject-matter "trading margin" in a different statutory context as will be demonstrated by discussion hereinbelow."

The Bench then referred to the judgments in *Narinder Chand Hem Raj v. Lt. Governor, H.P.* (1971) 2 SCC 747 and *Indian Express Newspapers (Bombay) (P) Ltd. v. Union of India* (1985) 1 SCC 641 and held:

"53. Applying the abovementioned tests to the scheme of the 2003 Act, we find that under the Act, the Central Commission is a decision-making as well as regulation-making authority, simultaneously. Section 79 delineates the functions of the Central Commission broadly into two categories—mandatory functions and advisory functions. Tariff regulation, licensing (including inter-State trading licensing), adjudication upon disput[illegible]g companies or transmission licensees fall under the head "mandatory functions" whereas advising the Central Government on formulation of National Electricity Policy and tariff policy would fall under the head "advisory functions". In this sense, the Central Commission is the decision-making authority. Such decision-making under Section 79(1) is not dependent upon making of regulations under Section 178 by the Central Commission. Therefore, functions of the Central Commission enumerated in Section 79 are separate and distinct from functions of the Central Commission under Section 178. The former are administrative/adjudicatory functions whereas the latter are legislative.

54. As stated above, the 2003 Act has been enacted in furtherance of the policy envisaged under the Electricity Regulatory Commissions Act, 1998 as it mandates establishment of an independent and transparent Regulatory Commission entrusted with wide-ranging responsibilities and objectives inter alia including protection of the consumers of electricity. Accordingly, the Central Commission is set up under Section 76(1) to exercise the powers conferred on, and in discharge of the functions assigned to, it under the Act. On reading Sections 76(1) and 79(1) one finds that the Central Commission is empowered to take measures/steps in discharge of the functions enumerated in Section 79(1) like to regulate the tariff of generating companies, to regulate the inter-State transmission of electricity, to determine tariff for inter-State transmission of electricity, to issue licences, to adjudicate upon disputes, to levy fees, to specify the Grid Code, to fix the trading margin in inter-State trading of electricity, if considered necessary, etc. These measures, which the Central Commission is empowered to take, have got to be in conformity with the regulations under Section 178, wherever such regulations are applicable. Measures under Section 79(1), therefore, have got to be in conformity with

the regulations under Section 178.

55. To regulate is an exercise which is different from making of the regulations. However, making of a regulation under Section 178 is not a precondition to the Central Commission taking any steps/measures under Section 79(1). As stated, if there is a regulation, then the measure under Section 79(1) has to be in conformity with such regulation under Section 178. This principle flows from various judgments of this Court which we have discussed hereinafter. For example, under Section 79(1)(*g*) the Central Commission is required to levy fees for the purpose of the 2003 Act. An order imposing regulatory fees could be passed even in the absence of a regulation under Section 178. If the levy is unreasonable, it could be the subject-matter of challenge before the appellate authority under Section 111 as the levy is imposed by an order/decision-making process. Making of a regulation under Section 178 is not a precondition to passing of an order levying a regulatory fee under Section 79(1)(*g*). However, if there is a regulation under Section 178 in that regard then the order levying fees under Section 79(1)(*g*) has to be in consonance with such regulation."

The Constitution Bench then considered the question whether Section 121 of the Electricity Act, 2003 can be read as conferring power of judicial review upon the Appellate Tribunal. The Bench referred to the judgment in *Raman and Raman Ltd. v. State of Madras* AIR 1959 SC 694 and observed:

"83. Applying the tests laid down in the above judgment to the present case, we are of the view that, the words "orders", "instructions" or "directions" in Section 121 do not confer power of judicial review in the Tribunal. It is not possible to lay down any exhaustive list of cases in which there is failure in performance of statutory functions by the appropriate Commission. However, by way of illustrations, we may state that, under Section 79(1)(h) CERC is required to specify the Grid Code having regard to the Grid Standards. Section 79 comes in Part X. Section 79 deals with functions of CERC. The word "grid" is defined in Section 2(32) to mean high voltage backbone system of interconnected transmission lines, sub-stations and generating plants. Basically, a grid is a network. Section 2(33) defines "Grid Code" to mean a code specified by CERC under Section 79(1)(h). Section 2(34) defines "Grid Standards" to mean standards specified under Section 73(d) by the Authority.

84. Grid Code is a set of rules which governs the maintenance of the network. This maintenance is vital. In summer months grids tend to trip. In the absence of the making of the Grid Code in accordance with the Grid Standards, it is open to the Tribunal to direct CERC to perform its statutory functions of specifying the Grid Code having regard to the Grid Standards prescribed by the Authority under Section 73. One can multiply these illustrations which exercise we do not wish to undertake. Suffice it to state that, in the light of our analysis of the 2003 Act, hereinabove, the words "orders, instructions or directions" in Section 121 of the 2003 Act cannot confer power of judicial review under Section 121 to the Tribunal, which, therefore, cannot go into the validity of the impugned 2006 Regulations, as rightly held in the impugned judgment."

60. The summary of the findings of the Constitution Bench are contained in paragraph 92, which is reproduced below:

"92. (i) In the hierarchy of regulatory powers and functions under the 2003 Act, Section 178, which deals with making of regulations by the Central Commission, under the authority of subordinate legislation, is wider than Section 79(1) of the 2003 Act, which enumerates the regulatory

functions of the Central Commission, in specified areas, to be discharged by orders (decisions).

(ii) A regulation under Section 178, as a part of regulatory framework, intervenes and even overrides the existing contracts between the regulated entities inasmuch as it casts a statutory obligation on the regulated entities to align their existing and future contracts with the said regulation.

(iii) A regulation under Section 178 is made under the authority of delegated legislation and consequently its validity can be tested only in judicial review proceedings before the courts and not by way of appeal before the Appellate Tribunal for Electricity under Section 111 of the said Act.

(iv) Section 121 of the 2003 Act does not confer power of judicial review on the Appellate Tribunal. The words "orders", "instructions" or "directions" in Section 121 do not confer power of judicial review in the Appellate Tribunal for Electricity. In this judgment, we do not wish to analyse the English authorities as we find from those authorities that in certain cases in England the power of judicial review is expressly conferred on the tribunals constituted under the Act. In the present 2003 Act, the power of judicial review of the validity of the regulations made under Section 178 is not conferred on the Appellate Tribunal for Electricity.

(v) If a dispute arises in adjudication on interpretation of a regulation made under Section 178, an appeal would certainly lie before the Appellate Tribunal under Section 111, however, no appeal to the Appellate Tribunal shall lie on the validity of a regulation made under Section 178.

(vi) Applying the principle of "generality versus enumeration", it would be open to the Central Commission to make a regulation on any residu n

178(1) read with Section 178(2)(ze). Accordingly, we hold that CERC was empowered to cap the trading margin under the authority of delegated legislation under Section 178 vide the impugned Notification dated 23-1-2006.

(vii) Section 121, as amended by the Electricity (Amendment) Act 57 of 2003, came into force with effect from 27-1-2004. Consequently, there is no merit in the contention advanced that the said section has not yet been brought into force."

61. In our view, even though in paragraph 94 of the judgment the Constitution Bench clarified that the judgment will not govern the cases under the Act, the ratio of that judgment is clearly attracted in these cases.

62. The judgments of the larger Bench in *L. Chandra Kumar v. Union of India* (supra) and *Union of India v. Madras Bar Association* (2010) 11 SCC 1 are clearly distinguishable. In L. Chandra Kumar's case, this Court considered the scope of Section 14 of the 1985 Act, which reads as under:

"**14. Jurisdiction, powers and authority of the Central Administrative Tribunal**.- (1) Save as otherwise expressly provided in this Act, the Central Administrative Tribunal shall exercise, on and from the appointed day, all the jurisdiction, powers and authority exercisable immediately before that day by all courts except the Supreme Court in relation to-

(a) recruitment, and matters concerning recruitment, to any All-India Service or to any civil service of the Union or a civil post under the Union or to a post connected with defence or in the defence services, being, in either case, a post filled by a civilian;

(b) all service matters concerning-

(i) a member of any All-India Service; or

(ii) a person not being a member of an All-India Service or a person referred to in clause (c) appointed to any civil service of the Union or any civil post under the Union; or

(iii) a civilian not being a member of an All-India Service or a person referred to in clause (c) appointed to any defence, services or a post connected with defence,

and pertaining to the service of such member, person or civilian, in connection with the affairs of the Union or of any State or of any local or other authority within the territory of India or under the control of the Government of India or of any corporation or society owned or controlled by the Government;

(c) all service matters pertaining to service in connection with the affairs of the Union concerning a person appointed to any service or post referred to in sub-clause (ii) or sub-clause (iii) of clause (b), being a person whose services have been placed by a State Government or any local or other authority or any corporation or society or other body, at the disposal of the Central Government for such appointment.

Explanation.- For the removal of doubts, it is hereby declared that references to "Union" in this sub-section shall be construed as including references also to a Union territory.

(2) The Central Government may, by notification, apply with effect from such date as may be specified in the notification the provisions of sub-section (3) to local or other authorities within the territory of India or under the control of the Government of India and to corporations or societies owned or controlled by Government, not being a local or other authority or corporation or society controlled or owned by a State Government:

Provided that if the Central Government considers it expedient so to do for the purpose of facilitating transition to the scheme as envisaged by this Act, different dates may be so specified under this sub- section in respect of different classes of, or different categories under any class of, local or other authorities or corporations or societies.

(3) Save as otherwise expressly provided in this Act, the Central Administrative Tribunal shall also exercise, on and from the date with effect from which the provisions of this sub- section apply to any local or other authority or corporation or society, all the jurisdiction, powers and authority exercisable immediately before that date by all courts (except the Supreme Court) in relation to—

(a) recruitment, and matters concerning recruitment, to any service or post in connection with the affairs of such local or other authority or corporation or society; and

(b) all service matters concerning a person other than a person referred to in clause (a) or clause (b) of sub-section (1) appointed to any service or post in connection with the affairs of such local or other authority or corporation or society and pertaining to the service of such person in connection with such affairs."

The larger Bench then dealt with the scope of the power of judicial review vested in the Supreme Court and the High Courts and proceeded to observe:

"Before moving on to other aspects, we may summarise our conclusions on the jurisdictional powers of these Tribunals. The Tribunals are competent to hear matters where the vires of statutory provisions are questioned. However, in discharging this duty, they cannot act as substitutes for the High Courts and the Supreme Court which have, under our constitutional set-up, been specifically entrusted with such an obligation. Their

function in this respect is only supplementary and all such decisions of the Tribunals will be subject to scrutiny before a Division Bench of the respective High Courts. The Tribunals will consequently also have the power to test the vires of subordinate legislations and rules. However, this power of the Tribunals will be subject to one important exception. The Tribunals shall not entertain any question regarding the vires of their parent statutes following the settled principle that a Tribunal which is a creature of an Act cannot declare that very Act to be unconstitutional. In such cases alone, the High Court concerned may be approached directly. All other decisions of these Tribunals, rendered in cases that they are specifically empowered to adjudicate upon by virtue of their parent statutes, will also be subject to scrutiny before a Division Bench of their respective High Courts. We may add that the Tribunals will, however, continue to act as the only courts of first instance in respect of the areas of law for which they have been constituted. By this, we mean that it will not be open for litigants to directly approach the High Courts even in cases where they question the vires of statutory legislations (except, as mentioned, where the legislation which creates the particular Tribunal is challenged) by overlooking the jurisdiction of the Tribunal concerned."

63. In *Union of India v. Madras Bar Association* (supra) and *State of Gujarat v. Gujarat Revenue Tribunal Bar Association* (2012) 10 SCC 353 : 2012 (10) SCALE 285, this Court applied the principles laid down in L. Chandra Kumar's case and reiterated the importance of Tribunals created for resolution of disputes but these judgments too have no bearing on the decision of the question formulated before us.

64. In the result, the question framed by the Court is answered in the following terms:

In exercise of the power vested in it under Section 14(b) of the Act, TDSAT does not have the jurisdiction to entertain the challenge to the regulations framed by the Authority under Section 36 of the Act.

65. As a corollary, we hold that the contrary view taken by TDSAT and the Delhi High Court does not represent correct law. At the same time, we make it clear that the aggrieved person shall be free to challenge the validity of the regulations framed under Section 36 of the Act by filing appropriate petition before the High Court.

66. The cases may now be listed before an appropriate Bench for deciding the questions framed vide order dated 6.2.2007 passed in Civil Appeal No.3298/2005 and some of the connected matters.

R.P. Reference Answered.

GLAXOSMITHKLINE PHARMACEUTICALS LIMITED (FORMERLY KNOWN AS SMITHKLINE BEECHAM PHARMACEUTICALS (INDIA) LIMITED)

v.

UNION OF INDIA & ORS.

(Civil Appeal No. 1939 of 2004)

DECEMBER 09, 2013

[R.M. LODHA AND KURIAN JOSEPH, JJ.]

DRUGS (PRICES CONTROL) ORDER, 1995:

Para 14 (1) and 16 — Fixation of price of bulk drug or formulation – Compliance of – Held: Once the Government exercises power and fixes maximum sale price of bulk drugs specified in the First Schedule, there is ban to sell a bulk drug at a price exceeding the maximum sale price so fixed plus local taxes, if any — True import of paragraph 14(1) is that once the price notification is gazetted, it takes effect immediately though its enforcement is postponed by fifteen days to enable the manufacturers and others to make suitable arrangements with regard to unsold stocks — During the period of fifteen days, it is not open to the manufacturer to manufacture and clear bulk drug or formulation at pre-notification prices – Period of 15 days is simply a grace period or cooling period allowed to manufacturers to adjust their business in a manner where appropriate arrangements are made with regard to unsold stocks in distribution chain – Drugs (Price Control) Orders, 1987 – Para 16(3).

Fixation of price of bulk drug or formulation – Nature and object of — Held: Price fixation by Central Government under DPCO is in the nature of legislative measure and dominant object and purpose of such price fixation is equitable distribution and availability of commodities at fair price.

A *Circulars:*

Circular issued by Department – Held: If departmental circular provides an interpretation which runs contrary to the provisions of law, such interpretation cannot bind the court – B *The 1979 circular falls in such category – Circular dated 28.4.1979 issued by the Ministry of Petroleum, Chemicals and Fertilizers, Department of Chemicals and Fertilizers, Government of India – Interpretation of statutes – Contemporanea expositio.*

C **The instant appeals arose out of the judgments of the High Courts of Karnataka and Delhi wherein they took diametrical opposite views on the question whether the prices fixed under the Drugs (Prices Control) Order ('DPCO') in respect of drugs/formulations would be** D **operative in respect of all sales subsequent to 15 days from the date of the notification by the Government in the official gazette/receipt of the price fixation order by the manufacturer.**

Writ petitions were filed before the Karnataka High E **Court challenging the notices issued by the Inspector of Drugs pursuant to the explanatory notice dated 10.03.1998 issued by the National Pharmaceutical Pricing Authority (NPCA) clarifying that "the notification reduces the existing prices and the manufacturers must make** F **effective the prices so fixed/revised, within 15 days (from the date of the notification in the official gazette or receipt of the order of the NPCA) as required under para 14(1) of the DPCO,1995 and also issue necessary revised price lists as required under para 14(3) of that Order." The** G **Karnataka High Court held that every manufacturer and distributor would be duty bound to issue a revised price list within 15 days from the date of the notification issued by the Government under para 9 of the DPC Order.**

H **The Delhi High Court in the writ petition arising out**

A **of the price fixation order dated 17.3.1988 issued under para 9(1) of the DPCO, 1987, said to have been received by the manufacturer on 21.3.1988, did not agree with the view adopted by the Karnataka High Court, and relying upon the circular dated 28.4.1979 allowed the writ petition** B **and quashed the seizure memo whereby the goods had been seized.**

Disposing of the appeals, the Court

HELD: 1.1. Under the respective Para 3 of DPCO C **1995, the Central Government is empowered to fix price of the bulk drugs for regulating the equitable distribution of indigenously manufactured bulk drugs and the maximum price at which the bulk drug shall be sold. Such fixation of maximum sale price of bulk drugs** D **specified in the First Schedule has to be done by notification in the official gazette. Once the Government exercises the power and fixes maximum sale price of bulk drugs specified in the First Schedule, there is ban to sell a bulk drug at a price exceeding the maximum sale price** E **so fixed plus local taxes, if any. It is the obligation of the manufacturer, if he commences production of the bulk drug after the commencement of the order, to furnish the details to the Government in Form I and any such additional information as may be required by the** F **Government within 15 days of the commencement of the production of such bulk drug. If any manufacturer desires revision of the maximum sale price of a bulk drug fixed under sub-paragraph (1) or (4) or as permissible under sub-paragraph (3), it is permitted to make an application** G **to the Government in Form I. [para 44] [1147-B-E]**

1.2. Insofar as a retail price of scheduled formulations is concerned, under paragraph 7, the Central Government is empowered to fix the same in accordance with the formula laid down therein. The method of H **calculation of retail price of formulati[illegible]d**

in paragraph 7. With a view to enable the manufacturers of similar formulations to sell those formulations in pack size different to the pack size for which ceiling price has been notified under sub-paragraphs (1) and (2) of paragraph 9, manufacturers have to work out the price for their respective formulation packs in accordance with such norms as may be notified by the Government from time to time. The manufacturer is required to intimate the price of formulation pack, so worked out, to the Government and such formulation pack can be released for sale only after the expiry of 60 days after such intimation. However, Government may, within its power, revise the price so intimated by the manufacturer and upon such revision the manufacturer is not permitted to sell such formulation at a price exceeding the price so revised. [para 45] [1147-F-H; 1148-A-B]

1.3. Under paragraph 13, the Government has been conferred with the overriding power requiring the manufacturers, importers or distributors to deposit the amount accrued due to charging of prices higher than those fixed or notified by the Government under the DPCO,1987 and so also under DPCO,1995. [para 46] [1148-C]

1.4. The price fixation by the Central Government under DPCO is in the nature of legislative measure and the dominant object and purpose of such price fixation is the equitable distribution and availability of commodities at fair price. The whole idea behind such price fixation is to control hoarding, cornering or artificial short supply and give benefit to the consumer. The regulation of drug price is ultimately for the benefit of the consumer. [para 47] [1148-D-E]

1.5. Paragraph 14 of DPCO,1995 makes provision for carrying out the effect of the price fixed or revised by the Government. Sub-paragraph (1) of paragraph 14 provides

that every manufacturer or importer shall carry into effect the price of a bulk drug or formulation, as fixed by the Government, within fifteen days from the date of notification in the official gazette or receipt of the order of the Government by such manufacturer or importer. During this period of 15 days, it is not open to the manufacturer to manufacture and clear the bulk drug or formulation at pre-notification prices. It is important to bear in mind that under paragraph 14(2), the manufacturer is required to print the retail price of the formulation on the label of the container of the formulation. This is expressed by the words "retail price not to exceed" preceding it "local taxes extra" succeeding it. Sub-para (2) of para 14 does not indicate that upto to the expiry of the fifteenth day from the date of notification of the price fixation order in the official gazette or receipt of the price fixation order by the manufacturer, he is at liberty to manufacture the formulation and print on them the pre-notification prices. [para 48] [1148-F-G; 1149-A-C]

1.6. The true import of paragraph 14(1) is that once the price notification is gazetted, it takes effect immediately though its enforcement is postponed by fifteen days to enable the manufacturers and others to make suitable arrangements with regard to unsold stocks. The period of 15 days is simply a grace period or cooling period allowed to manufacturers to adjust their business in a manner where appropriate arrangements are made with regard to the unsold stocks in the distribution chain. If the stocks cleared by the manufacturer before the fifteenth day are sold to the consumer at the higher unrevised price then, that may result in same formulation being offered for sale to a consumer at two different prices. This must be avoided. Further, the manufacturer may increase manufacture of the bulk drugs during fifteen-day period of notified price a[illegible]t

the unrevised/higher price. This will also lead to frustrating the regulatory regime which is sought to be put in place by DPCO.[para 49-50] [1149-D-F, H; 1150-A]

1.7. The DPCO defines 'dealer', 'distributor', 'manufacturer', 'retailer' and 'wholesaler'. The provisions contained in paragraphs 3,8, 9 and other relevant provisions clearly show that DPCO effectively covers the chain from manufacture of the bulk drug by the manufacturer to sale of formulation to consumer though there may be several persons in the distribution chain. The provisions of DPCO requires not just the end point sale to be at the notified price, but also every sale within the distribution chain must be at the notified price, if such sale is made after the date on which sale price is operative. There cannot be two prices at the end point of the distribution chain depending on the batch number. [para 51] [1150-C-D, E, G-H]

1.8. Paragraph 16 of DPCO,1995 bans sale of bulk drug or formulation to a consumer at a price exceeding the price specified in the current price list or price indicated on the label of the container or pack thereof whichever is less, plus all taxes, if any payable. The expressions 'current price list' and 'whichever is less' in paragraph 16 are significant. The current price list is simply the price reflecting the currently operating notified price under the DPCO. Once a price is notified for a formulation, it takes effect immediately and sale of the formulation to the consumer has only to be at the notified price. This is the plain and ordinary meaning of paragraph 16. The expression, 'whichever is less' further makes it an absolute obligation on all concerned not to sell any formulation to any consumer at a price exceeding the price specified in the current price list or price indicated on the label of the container or pack thereof whichever is less. [para 52] [1151-A-D]

1.9. This Court is of the considered view that if an interpretation of paragraph 14(1),(2)(3), paragraph 16(3) and paragraph 19 of DPCO,1995 results in frustrating its object and leads to denial of the benefit of current notified price to the consumer, then such interpretation must be avoided. [para 55] [1152-C-D]

1.10. It is true that the principle of *contemporanea expositio* guides that contemporaneous administrative construction, unless clearly wrong, should be given considerable weight and should not be lightly overturned, but in light of the construction of the relevant provisions indicated in the instant judgment, the view in the circular cannot be followed and upheld. [para 56] [1152-E-F]

Union of India and Another v. Cynamide India Limited and Another; **1987 (2) SCR 841 = (1987) 2 SCC 720;** *Collector of Central Excise, Patna v. Usha Martin Industries* **1997 (3) Suppl. SCR 601 = (1997) 7 SCC 47; and** *Commissioner of Customs, Calcutta and others v. Indian Oil Corporation Limited and Anr.* **2004 (2) SCR 511 = (2004) 3 SCC 488 – referred to.**

1.12. It is well settled that if the departmental circular provides an interpretation which runs contrary to the provisions of law, such interpretation cannot bind the court. The 1979 circular falls in such category. Moreover, the 1979 circular is with reference to the DPCO, 1979 whereas the Court is concerned with DPCO, 1987 and DPCO, 1995. It cannot be said that in view of the saving clause in DPCO, 1987, the circular is saved and is further saved by the saving clause in DPCO,1995. [para 60] [1154-C-D]

Union of India v. Ranbaxy Laboratories Limited and Others **2008 (8) SCR 315 = (2008) 7 SCC 502 – held inapplicable**

1.14. The Delhi High Court in the impugned order has erred in relying upon 1979 circular. Moreover, it has gone more by practical difficulties which a manufacturer may suffer and completely overlooked the scheme of the DPCO which is intended to give benefit to the consumer of the reduced current price of the formulation. The view of the Delhi High Court is fundamentally flawed and clearly wrong. The Karnataka High Court has taken the correct view and the same is upheld. [para 65-66] [1157-A, C; 1158-A]

Desh Bandhu Gupta and Company and Others v. Delhi Stock Exchange Association Ltd. **1979 (3) SCR 373 = (1979) 4 SCC 565;** *State of Madhya Pradesh and another v. M/s. G.S. Dall and Flour Mills* **1990 (1) Suppl. SCR 590 = 1992 Supp.(1) SCC 150;** *Bengal Iron Corporation and another v. Commercial Tax Officer and Others;* **1993 (3) SCR 433 = 1994 Supp.(1) SCC 310;** *Commissioner of Central Excise, Bolpur v. Ratan Melting & Wire Industries* **2008 (14) SCR 653 = (2008) 13 SCC 1; and** *Union of India v. Arviva Industries (I) Ltd.* **2007(209) E.L.T. 5 (S.C.) – cited.**

Case Law Reference:

2008 (8) SCR 315	**held inapplicable**	**para 26**
1979 (3) SCR 373	**cited**	**para 27**
1997 (3) Suppl. SCR 601	**referred to**	**para 29**
1987 (2) SCR 841	**referred to**	**para 34**
1990 (1) Suppl. SCR 590	**cited**	**para 36**
1993 (3) SCR 433	**cited**	**para 37**
2008 (14) SCR 653	**cited**	**para 38**
2004 (2) SCR 511	**referred to**	**para 58**
2007(209) E.L.T. 5 (S.C.)	**cited**	**para 59**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1939 of 2004.

From the Judgment & Order dated 12.11.2002 of the High Court of Karnataka at Bangalore in Civil Writ Petition No. 38973 of 1998.

WITH

C.A. No. 1940, 1941 and 1942 of 2004, 10901-10902 of 2013.

Indira Jaising, Rakesh Kumar Khanna, ASG, S. Ganesh U.A. Rana, Mrinal Majumar (for Gagrat & Co.), Bina Gupta, Aman Ahluwalia, Prateek Jalan, Supriya Jain, Priyanka Sinha, Sonakshi Malhan (for Shreekant N. Terdal), Puneet Taneja, Pravin Bahadur, Mallika Joshi, Amit Agrawal, Rajan Narain for the appearing parties.

The Judgment of the Court was delivered by

R.M. LODHA, J. 1. Leave granted in SLP(C) Nos.27241-27242 of 2010.

2. This is a group of six appeals, by special leave, four arising from the judgment of the Karnataka High Court and two from the Delhi High Court.

3. The two High Courts, Karnataka and Delhi, have taken diametrical opposite view on the question whether the prices fixed under the Drugs (Prices Control) Order (for short, 'DPCO') in respect of drugs/formulations would be operative in respect of all sales subsequent to 15 days from the date of the notification by the Government in the official gazette/receipt of the price fixation order by the manufacturer.

4. The Drugs (Prices Control) Order,1995 (for short, 'DPCO,1995') was under consideration before the Karnataka High Court whereas the Drugs (Prices Control) Order,1987 (for short, 'DPCO,1987') fell for consideratio[illegible]h

Court. Although, the sequence of the relevant paragraphs in the two DPCOs differ but the relevant provisions are almost identical. The view of the Karnataka High Court has not been accepted expressly by the Delhi High Court. Since the common arguments have been advanced in this group of matters and the question of law is identical, all these six appeals were heard together and are disposed of by the common order.

5. The facts in civil appeals from Karnataka High Court are these: The appellant, in the year 1998, was manufacturer of Furoxene Tablets and was also the sole distributor for Dependal-M Tablets and Dependal Suspension manufactured by Kanpha Labs, Bangalore. Dependal-M and Dependal Suspension and Furoxene are formulations of Furozolidine and Metronidazole. On 09.03.1998, a notification was issued by the National Pharmaceutical Pricing Authority (NPCA) under the DPCO,1995, whereby the ceiling price in regard to several formulations consisting of Furozolidine and/or Metronidazole was fixed exclusive of excise duty and local taxes. The notification was gazetted on 09.03.1998 itself.

6. On 10.03.1998, NPCA issued an explanatory notice clarifying that the notification reduces the existing prices and the manufacturers must make effective the prices so fixed/ revised, within 15 days (from the date of the notification in the official gazette or receipt of the order of the NPCA) as required under para 14(1) of the DPCO,1995 and also issue necessary revised price lists as required under para 14(3) of that Order.

7. On 14.07.1998, the Inspector of Drugs, Varanasi issued a letter addressed to the appellant-Company that it has not given the effect to the notification dated 09.03.1998.

8. On 22.07.1998, the appellant-Company responded to the letter received from the Inspector of Drugs and brought to his notice that the notification dated 09.03.1998 has been given effect to from the first batch manufactured on the expiry of 15

days from the date of the notification which is permissible under para 14 of the DPCO,1995.

9. On 30.07.1998, Inspector of Drugs sent another letter to the appellant-Company stating therein that under paragraph 16 of DPCO,1995, all sales of the subject formulations would have to be made at the new ceiling price fixed on 09.03.1998 irrespective of the date of manufacture of the subject formulations. The plea of the appellant-Company was, accordingly, rejected by the Inspector of Drugs and he proposed to initiate the prosecution against the appellant-Company under the Essential Commodities Act,1955 ('EC Act'). This was reiterated by the Inspector of Drugs in his further communication dated 16.11.1998.

10. The appellant-Company then challenged the notices/ letters dated 14.07.1998, 30.07.1998 and 16.11.1998 by filing a writ petition before the High Court. The writ petition was contested by the Central Government and its functionaries.

11. The Karnataka High Court by its judgment dated 12.11.2002 dismissed the writ petition. The principal reasoning is reflected in paragraph 9 of the judgment which reads as follows:

"9. Having regard to the provisions of para 14 of DPC Order, petitioner who is a manufacturer of Furoxene tablets, ought to carry into effect the revised price fixed as per Notification dated 09.03.1998 within 15 days from the date of the said Notification or receipt of the Order of the Government. There is no dispute that the Notification dated 09.03.1998 was published in the Gazette of India on the same date. While sub-para (2) of para 14 requires the retail price of the formulation as notified by the Government being displayed on the label of the container of the formulation and the minimum pack offered for retail sale, sub-para (3) thereof requires the manufacturer to issue a price list and supplementary price list to the dealers and other persons specified therein indicating reference to price fixation/revision from time to time. Para 16 of DPC Order prohibits all persons including manufacturers/ distributors/retailers from selling any formulation at the price exceeding the price specified in the current price list indicated on the label of the pack whichever is less. Thus, a combined reading of these provisions make it clear that every manufacturer and distributor is duty bound to issue a revised price list within 15 days from the date of the notification issued by the Government under para 9 of the DPC Order. It is also clear that manufacturers, distributors and retailers will be liable to sell formulations from the date of such revised price list (which is required to publish within 15 days from the date of notification) at the revised prices and not the prices mentioned on the label of the container or pack. In view of it, the contention of the Petitioner that revised prices will not apply to the existing stocks but only to new batches of drugs and formulations to be manufactured after 15 days of the notification cannot be accepted. The provisions of the DPC Order are clear that prices should be revised within 15 days even in regard to the formulations which were manufactured prior to the date of notification or those manufactured within 15 days from the date of notification."

12. It is from the above judgment that four appeals arise at the instance of the manufacturer/distributor.

13. The two appeals from the judgment of the Delhi High Court are at the instance of the Central Government. The facts in these two appeals in brief are these: For the period 01.04.1979 to 25.08.1987, Drugs (Prices Control) Order,1979 (for short, 'DPCO,1979') was in operation. The bulk drug Ranitidine and its formulation were not subject to price control under DPCO,1979, and, consequently, there was no price fixation at all in respect of Zinetac tablets.

14. On 26.08.1987, DPCO,1987 came into force whereby the bulk drug Ranitidine was included and, accordingly, Zinetac tablets (its formulations) were subjected to price control.

15. On 17.03.1988, the price fixation order was issued under para 9(1) of the DPCO,1987 fixing the retail price of Zinetac tablets. The price fixation order is said to have been received by the manufacturer (Biotech Pharma) on 21.03.1988.

16. The respondent is distributor of the Zinetac tablets in the strength of 150 mg and 300 mg per tablet manufactured by Biotech Pharma. Zinetac is a formulation of the bulk drug Ranitidine. On 04.04.1988, the Biotech Pharma sent the supplementary price list effective from 04.04.1988 in form V. It is the case of the respondent that the price fixed by the price fixation order dated 17.03.1988 is applicable with effect from 04.04.1988 (on expiry of 15 days from 21.03.1988, i.e., the date of receipt of the price fixation order dated 17.03.1988).

17. On 23.05.1988, seizures were made of 300 mg Zinetac tablets from Batch No.3104. The respondent's case is that Batch No.3104 is prior to Batch No.3115 mentioned as the effective batch number in the manufacturer's letter dated 04.04.1988.

18. The respondent-Company challenged the seizure of goods by filing a writ petition before the Delhi High Court. The writ petition was contested by the Central Government before the Delhi High Court and the judgment of the Karnataka High Court was also cited. However, Delhi High Court did not agree with the view adopted by the Karnataka High Court. The Delhi High Court heavily relied upon a circular dated 28.04.1979 issued by the Ministry of Petroleum, Chemicals and Fertilizers, Department of Chemicals and Fertilizers, Government of India. The said circular though was issued in the context of paragraph 19(2) of DPCO,1979 but the Delhi High Court was of the view that the said circular was identical to paragraph 16(3) of DPCO,1987, and, therefore, the positio ct

of the DPCO,1979 would continue to hold the field in respect of the very same provisions in DPCO,1987. The Delhi High Court, accordingly, by its judgment dated 22.10.2009 allowed the writ petition and quashed the seizure memo whereby the goods were seized. The Union of India is aggrieved by the judgment and the two appeals arise therefrom.

19. We have heard Mr. S. Ganesh, learned senior counsel for the manufacturer/distributor and Ms. Indira Jaising, learned Additional Solicitor General for the Union of India.

20. It is appropriate at this stage to reproduce the few relevant paragraphs of DPCO,1987 and DPCO,1995 side by side.

DPCO, 1987	DPCO, 1995
16(3) Every manufacturer or importer shall give effect to the price of a bulk drug or formulation, as the case may be, as fixed by the government from time to time within 15 days from the receipt by such manufacturer or importer of the communication in this behalf from the government and issue a supplementary price list in this regard to the dealers, state drugs controllers and the government and indicate necessary reference to such price fixation.	14(1) Every manufacturer or importer shall carry into effect the price of a bulk drug or formulation, as the case may be, as fixed by the Government from time to time, within fifteen days from the date of notification in the Official Gazette or receipt of the order of the Government in this behalf by such manufacturer or importer.
17. Every manufacturer importer or distributor of a formulation intended for sale shall display in indelible print mark, on the label of container of the formulation and the minimum pack thereof offered for retail sale, the maximum retail price of that formulation with the words "retail price not to exceed" preceding it, and "local taxes extra" succeeding it. Provided that in the case of a container consisting of smaller saleable packs, the retail price of such smaller pack shall also be displayed on the label of each smaller pack and such price shall not be more than the pro-rata price of the main pack rounded off to the nearest paisa.	14(2) Every manufacturer, importer or distributor of a formulation intended for sale shall display in indelible print mark, on the label of container of the formulation and the minimum pack thereof offered for retail sale, the retail price of that formulation notified in the Official Gazette or ordered by the Government in this behalf, with the words "retail price not to exceed" preceding it, "local taxes extra" succeeding it, and "under Government Prices Control" on a red strip, in the case of scheduled formulations: Provided that in the case of a container consisting of smaller saleable packs, the retail price of such smaller pack shall also be displayed on the label of each smaller pack and such price shall not be more than the *pro-rata* retail price of the main pack rounded off to the nearest paisa.
21. Prices to the traders:- (1) A manufacturer, distributor or wholesaler shall sell a formulation to a retailer, unless otherwise permitted under the provisions of this Order or any other made	14(3) Every manufacturer or importer shall issue a price list and supplementary price list, if required, in form V to the dealers, State Drugs Controllers and the Government indicating referen

thereunder, at a price equal to the retail price (excluding excise duty, if any) minus 16% thereof in the case of price controlled drug.

(2) Notwithstanding anything contained in sub-paragraph (1), the Government may by a general or special Order fix, in public interest, the price to the wholesaler or retailer in respect of any formulation the price of which has been fixed or revised under this Order.

fixation or revision as covered by the order or Gazette notification issued by the Government from time to time.

15(1) Every manufacturer, importer or distributor of a non-scheduled formulation intended for sale shall display in indelible print mark, on the label of container of the formulation and the minimum pack thereof offered for retail sale, the retail price of that formulation with the words "retail price not to exceed" preceding it and the words "local taxes extra" succeeding it, and the words "Not under Price Control" on a green strip:

Provided that in the case of a container consisting of smaller saleable packs, the retail price of such smaller pack shall also be displayed on the label of each smaller pack and such price shall not be more than the *pro-rata* retail price of the main pack rounded off to the nearest paisa.

(2) Every manufacturer or

importer shall issue a price list and supplementary price list, if required of the non-scheduled formulation in Form V to the dealers, State Drugs Controllers and the Government indicating changes from time to time.

(3) Every retailer and dealer shall display the price list and the supplementary price list, if any, as furnished by the manufacturer or importer, on a conspicuous part of the premises where he carries on business in a manner so as to be easily accessible to any person wishing to consult the same.

19(1) A manufacturer, distributor or wholesaler shall sell a formulation to a retailer, unless otherwise permitted under the provisions of this Order or any order made thereunder, at a price equal to the retail price, as specified by an order or notified by the Government (excluding excise duty, if any), minus sixteen per cent thereof in the case of scheduled drugs.

(2) Notwithstanding

anything contained in sub-paragraph (1), the Government may by a general or special order fix, in public interest, the price of formulation sold to the wholesaler or retailer in respect of any formulation the price of which has been fixed or revised under this Order.

21. The comparative statement of the above provisions indicates that para 14(1) of DPCO,1995 is identical to para 16(3) of DPCO,1987. Para 14(2) of DPCO,1995 is identical to para 17 of DPCO,1987. Para 14(3) of DPCO,1995 is identical to para 16(3) of DPCO,1987 and para 15(1) of DPCO,1995 is identical to para 17 of DPCO,1987.

22. In light of the similarity of the above provisions, for the sake of convenience, we shall refer henceforth to the provisions contained in DPCO,1995.

23. Mr. S. Ganesh, learned senior counsel for the manufacturer/distributor argues that on a plain reading of para 14(1) of the DPCO,1995, a manufacturer is given fifteen days from the date of notification of a price fixation by the Government in the official gazette or receipt of the price fixation order by the manufacturer for carrying into effect the price of the bulk drug or formulation. Under para 14(2) of the DPCO,1995, the manufacturer is required to print indelibly the retail price of the formulation on the label of the container of the formulation with the words “retail price not to exceed” preceding it and “local taxes extra” succeeding it. Therefore, upto the expiry of the fifteenth day from the date of the notification, the price fixation order in the official gazette or receipt of the price fixation order by the manufacturer, the

manufacturer is at liberty to manufacture the formulations and print on them the pre-notification prices and clear the same from his factory after paying excise duty on the basis of such provided price.

24. Mr. S. Ganesh, learned senior counsel relies upon the Circular dated 28.04.1979 issued by the Central Government wherein it was clarified that all reductions in the prices of formulations effected from time to time by the Central Government would be applicable to the stocks cleared on and after the date of effectuation of reduction. The clarificatory Circular further says that price list shall state clearly the batch numbers from which the reduction is effective. It is, thus, the submission of Mr. S. Ganesh that the formulations which are manufactured and cleared prior to the date of effectuation of reduction (the 15th day after the date of notification in the official gazette or the date of receipt of price fixation/reduction order) are not subject to the price reduction and, accordingly, the said pre-effective batch products can be sold at the previously existing and operating prices which would be printed on them.

25. It is argued by Mr. S. Ganesh that the said circular has not been withdrawn and it has been continuously observed by the trade as well as by the Central Government for several decades. It is his submission that if the interpretation as above is not accepted, the consequence will be that the period of 15 days expressly allowed by para 14(1) of the DPCO,1995 and the specific provision in Form V regarding the effective batch number to which the price reduction/fixation would apply, will all be rendered completely meaningless and otiose. With reference to practical problems, it is submitted that the manufacturer pays excise duty on the basis of the printed price at the time of the manufacture and clearance from his factory and also on the payment of sales tax on the sale price charged by the manufacturer to the distributor/wholesalers, which again will be on the basis of the printed price. The payment of excise duty and sales tax having become final, [illegible]nt

cannot possibly be refunded and re-assessed. Moreover, if a distributor/wholesaler/retailer has already paid a higher price on the basis of the previously prevailing price, he cannot possibly be required to sell the formulation at the newly reduced price. According to Mr. S. Ganesh, learned senior counsel such an interpretation will be contrary to and in fact destructive of the provisions of para 19 of the DPCO,1995.

26. Mr. S. Ganesh, heavily relied upon the judgment of this Court in *Ranbaxy Laboratories Limited*[1] which interpreted an exemption notification. Drawing analogy from that judgment, it is argued that just as the exemption notification which was issued under para 25 of the DPCO,1995 was addressed to the manufacturer, similarly, price fixation/revision notification is also addressed to the manufacturer who is required to effectuate the same by printing the revised price on all products manufactured and cleared by him from the 15th day after the date of notification/receipt of the order, and also issuing the revised price list declaring the effective batch number from which revised price will operate.

27. Mr. S. Ganesh, learned senior counsel submits that the manufacturer/distributor having acted as per circular dated 28.04.1979, cannot be lawfully prosecuted/penalized since the circular constitutes the *contemporanea expositio* of the Central Government which framed the DPCO. In this regard, learned senior counsel places reliance upon the decision of this Court in *Desh Bandhu Gupta*[2]. His submission is that under the DPCOs, every price list is in respect of "effective batch number". The clarification made with regard to DPCO,1979 is equally applicable for interpretation of 1995, DPCO, since para 14(1) and 14(3) of DPCO, 1995 is identical to DPCO,1979.

28. Mr. S. Ganesh, learned senior counsel argues that there

1. Union of India v. Ranbaxy Laboratories Limited and Others; [(2008 7 SCC 502.

2. Desh Bandhu Gupta and Company and Others v. Delhi Stock Exchange Association Ltd; [(1979) 4 SCC 565.

is no allegation of any act or omission by the manufacturer/distributor during the period of 15 days allowed by para 14 of DPCO,1995. He further submits that the interpretation of DPCO,1979, DPCO,1987 and DPCO,1995 is no more a relevant issue as with effect from June, 2013, DPCO, 2013 has come into operation and its scheme and provisions are entirely different from the earlier DPCOs.

29. Relying upon the decision of this Court in *Usha Martin*[3], it is submitted by the learned senior counsel that the issuance of 1979 circular shows that two views are possible and, therefore, the view beneficial to the subject must be adopted, particularly, to a case of criminal prosecution/penalty.

30. It is argued by Mr. S. Ganesh that there is no provision in DPCO or in the EC Act which nullifies or sets aside past lawfully completed transaction for sale of goods by the manufacturer to the distributor or by the distributor to the retailer. There is also no provision which requires the manufacturer to reprint products already in the market with the new price. The printing of the price is covered by Section 3(f) of the Drugs and Cosmetics Act, 1940 and, therefore, the reprinting of the price can be done only by the manufacturer in his licence manufacturing premises. The manufacturer has no privity whatsoever with the retailer and may not even know his identity. It is absolutely impossible for the manufacturer to get possession of the goods from large number of retailers, bring them back to his factory, reprint the lower price and then send them back to the retailer with a lower price printed on it, so that the retailer who paid the higher price to the distributor is then compelled to sell the goods at a loss at the lower price. The retailer who has already paid for the goods would never part with them; especially only for having them reprinted with a much lower price. He submits that such an interpretation of the DPCO will be utterly unworkable and impossible to comply with and

3. Collector of Central Excise, Patna v. Usha Martin Industries; [(1997) 7 SCC 47]

any interpretation other than what has been stated in the circular must be summarily rejected.

31. Ms. Indira Jaising, learned Additional Solicitor General, on the other hand, argues that the scheme of the two DPCOs, 1987 and 1995 is very clear and that scheme is that once the price is notified for a formulation, the sale to the consumer can only be at the notified price. Learned Additional Solicitor General submits that para 16 of the DPCO,1995 imposes an absolute obligation on all persons not to sell any formulation to any consumer at a price exceeding the price specified in the "current price list" or price indicated on the label of the container or back thereof, "whichever is less".

32. With reference to the definition of the expression 'price list' in para 2(u) of DPCO,1995 learned Additional Solicitor General submits that the price specified in the current list is nothing but the currently notified price of the bulk drug or formulation under the DPCO. For purpose of interpreting the expression "price specified in the current price list", it is essential that the manufacturer has not defaulted in its obligation to issue price list or supplementary price list. The 'current price list' is, therefore, simply the price list reflecting the currently operating notified price under the DPCO. Moreover, price specified in the current price list is nothing but the MRP reflected in column 11 of Form V. Thus, regardless of the entry in column 11, "effective batch number" the price specified in column 11 is the price specified in the current price list, for the purposes of para 16. Batch number is not relevant for the purpose of identifying this price. It is the submission of the learned Additional Solicitor General that batch number is altogether different concept which may be traced to Rule 96 of the Drugs and Cosmetics Rules, and the reference to effective batch number in Form V is only for internal record related purposes. There is no reference to batch numbers in either, DPCO, 1987 or DPCO, 1995. Such reference can only be found in Form V and Form V does not give any definition of

effective batch number.

33. Learned Additional Solicitor General submits that the plain meaning suggests that revised price must be carried into effect within 15 days. The words "carried into effect" read with "within 15 days" mean that the prices of the drugs are fixed "with effect from" fifteen days from the date of notification. The expression "within 15 days" indicates the outer limit.

34. The contention of the learned Additional Solicitor General is that there cannot be two different prices in the distribution chain. Each of the DPCOs, i.e., DPCO,1979, DPCO, 1987 and DPCO,1995 contains a provision where the benefit of the price reduction will mandatorily have to be passed on to the consumer from the moment the reduction became operative. While there may be several persons in the distribution chain, there is an embargo in the DPCO preventing any person from selling to the end-point consumer at anything above the notified price (once such price became operative). That being the position, there cannot be one price that is operational at the end-point of the distribution chain and another price upstream in the distribution chain. The emphasis by the learned Additional Solicitor General is that DPCOs ensure that consumer is given the benefit of the notified price, upon its notification. The consumer gets the benefit of the notified price, irrespective of batch numbers since the formulation be interpreted with the object of the DPCO as the guiding principle. Reliance is placed on *Cynamide India Limited*[4].

35. It is also argued by the learned Additional Solicitor General that no prejudice is caused to the manufacturer/ distributor as the revised price is also based on a cost plus methodology. The reduction in the price is only to reflect reduced cost and it simply prevents the manufacturers from making windfall gains by charging high prices even though costs

4. Union of India and Another v. Cynamide India Limited and Another; [(1987) 2 SCC 720.

have reduced. As regards distributors or others in the distribution chain, it is submitted that it is possible that certain stock has been purchased at the higher and revised price and is lying with the distributor or wholesaler or retailer but once the revised price comes into effect, this stock becomes unsellable at the higher price, and the losses or reductions need to be absorbed somewhere in the distribution chain. How the manufacturers/distributors and dealers, *inter-se*, make arrangements for these losses to be absorbed, depends on the specific contractual and credit arrangements. It is possible to work out an arrangement where the stock is recalled or necessary adjustments are made to reflect the lower price. The fact that the Chemists and Druggists Federation advocates such a mechanism shows that it is entirely within the realm of possibility. It is emphasised that paramount consideration of the Central Government is that the revised price must be carried into effect insofar as the consumer is concerned. It is for the manufacturers and distributors to make appropriate arrangements how the unsold stock is dealt with.

36. As regards the circular of 28.04.1979, the submission of the learned Additional Solicitor General is that DPCO,1979 stands repealed and the so-called circular is not saved by the saving clause as it is not a thing done or action taken under the DPCO. Rather it is clarification of the DPCO itself and it cannot survive once the DPCO is repealed. The circular of 28.04.1979 was in the context of interpretation of DPCO,1970 and DPCO,1979 whereas the present matters are concerned with DPCO,1987 and DPCO,1995. Relying upon a decision of this Court in *M/s. G.S. Dall and Flour Mills*[5], it is argued that an executive instruction issued in a certain context cannot govern a later notification. Moreover, it is submitted that if a circular provides an interpretation that runs contrary to the provisions of DPCO, the Court may examine the provisions and interpret them in their proper perspective. The circular is not

5. State of Madhya Pradesh and Another v. M/s. G.S. Dall and Flour Mills; [1992 Supp. (1) SCC 150]

binding on the court. The circular is not issued under any statutory authority and cannot be used to interpret the provisions of the statute.

37. It is submitted that the circular is, in any event, inconsistent with the provisions of DPCO,1987 and DPCO,1995. It only represents the department's view at the time which may have been erroneous. There is no estoppel against statute. In this regard, the decision of this Court in *Bengal Iron Corporation and Another*[6] is relied upon.

38. It is also argued by the learned Additional Solicitor General that a circular which is contrary to the statutory provisions has no existence in law. *Ratan Melting & Wire Industries*[7] is pressed into service in this regard. In any case, it is submitted that the manufacturer/distributor have not relied on the circular in good faith. In 1988, there is correspondence in the Glaxo between appellant and respondent where appellant was clearly put to notice that it was required to comply with notified price. Despite this correspondence, the appellant elected not to comply with the notified price. Thus, the appellant can hardly rely on the circular once the respondent has put forward a certain interpretation in 1998. The appellant was fully aware of the interpretation taken by the respondent and willfully elected to act in contravention of the DPCO. That being the case, the appellant cannot now act oblivious of correspondence in 1988 and place reliance on 1979 circular.

39. It is the submission of the learned Additional Solicitor General that the relabeling is permitted under law. Earlier, issue of printing prices was governed by the Standards of Weights and Measures Act, 1976. Now it is governed by Legal Metrology Act, 2009. Legal Metrology (Packaged

6. Bengal Iron Corporation and Another v. Commerical Tax Officer and Others; [1994 Supp. (1) SCC 310]

7. Commissioner of Central Excise, Bolpur v. Ra[illegible]es; [(2008) 13 1.

Commodities) Rules, 2011 (for short, '2011 Rules') contains an exemption for pharmaceuticals being cognizant of the fact that Government can fix prices at any time and such prices would need to be given effect to within the statutorily prescribed period. Therefore, relabeling may be required where there is a revision in price, and prevailing law specifically permits that by exempting price from the rigors of 2011 Rules.

40. The Central Government is empowered by Section 3 of EC Act to make an order providing for controlling the price at which the essential commodity may be bought or sold.

41. A Committee on Drugs and Pharmaceuticals Industry (known as the Hathi Committee) was appointed by the Central Government to examine the various facets of the drug industry in India including the measures taken so far to reduce prices of drugs for the consumer, and to recommend such further measures as may be necessary to rationalize the prices of basic drugs and formulations. The Hathi Committee in its Report observed that there was no justification for the drug industry charging prices and having a production pattern which is based not upon the needs of the community but on aggressive marketing tactics and create demand.

42. Following the Hathi Committee Report, the Government first framed the statement on drug policy and then issued DPCO,1979. The DPCO,1970 was accordingly repealed. DPCO,1979 is repealed by DPCO,1987 and DPCO,1987 is repealed by DPCO,1995.

43. In order to have the proper perspective of the matter, it is necessary that certain provisions of the DPCO,1995 are surveyed. Paragraph 2 is an interpretation clause, it defines certain expressions occurring in DPCO as under:

"2. ....

(a) "bulk drug" means any pharmaceutical, chemical,

biological or plant product including its salts, esters, stereo-isomers and derivatives, conforming to pharmacopoeial or other standards specified in the Second Schedule to the Drugs and Cosmetics Act, 1940(23 of 1940), and which is used as such or as an ingredient in any formulation;

. . . .

(d) "dealer" means a person carrying on the business of purchase or sale of drugs, whether as a wholesaler or retailer and whether or not in conjunction with any other business and includes his agent;

(e) "distributor" means a distributor of drugs or his agent or a stockist appointed by a manufacturer or an importer for stocking his drugs for sale to a dealer;

. . . .

(m) "manufacturer" means any person who manufactures a drug;

. . . .

(r) "price list" means a price list referred to in paras 14 and 15 and includes a supplementary price list;

(s) "retail price" means the retail price of a drug arrived at or fixed in accordance with the provisions of this Order and includes a ceiling price;

(t) "retailer" means a dealer carrying on the retail business of sale of drugs to customers;

(u) "scheduled bulk drug" means a bulk drug specified in the First Schedule;

. . . .

(y) "wholesaler" means a dealer or his agent or a stockist appointed by a manufacturer or an importer for the sale of his drugs to a retailer, hospital, dispensary, medical, educational or research institution purchasing bulk quantities of drugs. . . . ."

44. Under paragraph 3, the Central Government is empowered to fix price of the bulk drugs for regulating the equitable distribution of indigenously manufactured bulk drugs and the maximum price at which the bulk drug shall be sold. Such fixation of maximum sale price of bulk drugs specified in the First Schedule has to be done by notification in the official gazette. Once the Government exercises the power and fixes maximum sale price of bulk drugs specified in the First Schedule, there is ban to sell a bulk drug at a price exceeding the maximum sale price so fixed plus local taxes, if any. It is the obligation of the manufacturer, if he commences production of the bulk drug after the commencement of the order, to furnish the details to the Government in Form I and any such additional information as may be required by the Government within 15 days of the commencement of the production of such bulk drug. If any manufacturer desires revision of the maximum sale price of a bulk drug fixed under sub-paragraph (1) or (4) or as permissible under sub-paragraph (3), it is permitted to make an application to the Government in Form I.

45. Insofar as a retail price of scheduled formulations is concerned, under paragraph 7, the Central Government is empowered to fix the same in accordance with the formula laid down therein. The method of calculation of retail price of formulation is clearly provided in paragraph 7. With a view to enable the manufacturers of similar formulations to sell those formulations in pack size different to the pack size for which ceiling price has been notified under sub-paragraphs (1) and (2) of paragraph 9, manufacturers have to work out the price for their respective formulation packs in accordance with such norms as may be notified by the Government from time to time.

The manufacturer is required to intimate the price of formulation pack, so worked out, to the Government and such formulation pack can be released for sale only after the expiry of 60 days after such intimation. However, Government may, within its power, revise the price so intimated by the manufacturer and upon such revision the manufacturer is not permitted to sell such formulation at a price exceeding the price so revised.

46. Under paragraph 13, the Government has been conferred with the overriding power requiring the manufacturers, importers or distributors to deposit the amount accrued due to charging of prices higher than those fixed or notified by the Government under the DPCO,1987 and so also under DPCO,1995.

47. One finds, therefore, that the price fixation by the Central Government under DPCO is in the nature of legislative measure and the dominant object and purpose of such price fixation is the equitable distribution and availability of commodities at fair price. The whole idea behind such price fixation is to control hoarding, cornering or artificial short supply and give benefit to the consumer. The regulation of drug price being ultimately for the benefit of the consumer, we must now consider the effect of paragraph 14(1),(2) and (3), paragraph 16 (3), paragraph 19 and Form V.

48. Paragraph 14 of DPCO,1995 makes provision for carrying out the effect of the price fixed or revised by the Government. Sub-paragraph (1) of paragraph 14 provides that every manufacturer or importer shall carry into effect the price of a bulk drug or formulation, as fixed by the Government, within fifteen days from the date of notification in the official gazette or receipt of the order of the Government by such manufacturer or importer. Does it mean that during this period of 15 days, it is open to the manufacturer to manufacture and clear the bulk drug or formulation at pre-notification prices? We do not think so. In our view, sub-paragraph (1) of paragraph 14 does not deserve to be given a construction whi[illegible]e

object and scheme of DPCO,1995. It is important to bear in mind that under paragraph 14(2), the manufacturer is required to print the retail price of the formulation on the label of the container of the formulation. This is expressed by the words "retail price not to exceed" preceding it "local taxes extra" succeeding it. In our view, sub-para (2) of para 14 does not, in any manner, support the contention of the manufacturer/ distributor that upto to the expiry of the fifteenth day from the date of notification of the price fixation order in the official gazette or receipt of the price fixation order by the manufacturer, the manufacturer is at liberty to manufacture the formulation and print on them the pre-notification prices.

49. The true import of paragraph 14(1) is that once the price notification is gazetted, it takes effect immediately though its enforcement is postponed by fifteen days to enable the manufacturers and others to make suitable arrangements with regard to unsold stocks. We agree with learned Additional Solicitor General that the period of 15 days is simply a grace period or cooling period allowed to manufacturers to adjust their business in a manner where appropriate arrangements are made with regard to the unsold stocks in the distribution chain. The argument of the manufacturer or distributor, if accepted, that the stocks cleared by the manufacturer before the fifteenth day can be sold to the consumer at the higher unrevised price then, in our view, that may result in same formulation being offered for sale to a consumer at two different prices. This must be avoided and, therefore, we do not think that the interpretation put forth by Mr. S. Ganesh is reasonable. It does not deserve acceptance.

50. Then, the interpretation to sub-paragraph (1) of paragraph 14 urged on behalf of the manufacturer/distributor may also result in misuse by the manufacturer inasmuch as the manufacturer may increase manufacture of the bulk drugs during fifteen-day period of notified price and clear that stock at the unrevised/higher price. We are afraid, this interpretation

will also lead to frustrating the regulatory regime which is sought to be put in place by DPCO.

51. The senior counsel for the manufacturer contends that under paragraph 15 of DPCO,1995, it is incumbent to print the maximum retail price on the product and that too indelibly. There is no provision for reprinting of the labels or of return of drugs once they leave the factory premises. Thus, the batches which have been manufactured and stamped with old prices can continue to be sold at those prices. We do not find any merit in the argument. The DPCO defines 'dealer', 'distributor', 'manufacturer', 'retailer' and 'wholesaler'. The provisions contained in paragraphs 3,8, 9 and other relevant provisions clearly show that DPCO effectively covers the chain from manufacture of the bulk drug by the manufacturer to sale of formulation to consumer though there may be several persons in the distribution chain. The ultimate object of the DPCO is that there is no deception to a consumer and he is sold the formulation at a price not exceeding the price specified in the current price list or price indicated on the label of the container or pack thereof, whichever is less. Logically it follows that there cannot be two prices at the end point of the distribution chain depending on the batch number. A consumer approaching a chemist/retailer can hardly be offered two prices for the very same product based only on the difference in batch numbers. Consumer must get the benefit of the notified price. That is the ultimate objective of DPCO. The batch number cannot override the benefit to which a consumer is entitled on price reduction of a formulation. A fair reading of DPCO leaves no manner of doubt that a formulation cannot be sold to the consumer at the higher price (for earlier batch numbers). In this view of the matter, we find merit in the submission of the learned Additional Solicitor General that the provisions of DPCO requires not just the end point sale to be at the notified price, but also every sale within the distribution chain must be at the notified price, if such sale is made after the date on which sale price is operative.

52. Paragraph 16 of DPCO,1995 bans sale of bulk drug or formulation to a consumer at a price exceeding the price specified in the current price list or price indicated on the label of the container or pack thereof whichever is less, plus all taxes, if any payable. The expressions 'current price list' and 'whichever is less' in paragraph 16 are significant expressions. We find ourselves in agreement with the submission of the learned Additional Solicitor General that the current price list is simply the price reflecting the currently operating notified price under the DPCO. Once a price is notified for a formulation, it takes effect immediately and sale of the formulation to the consumer has only to be at the notified price. This is the plain and ordinary meaning of paragraph 16. The expression, 'whichever is less' further makes it an absolute obligation on all concerned not to sell any formulation to any consumer at a price exceeding price specified in the current price list or price indicated on the label of the container or pack thereof whichever is less.

53. The requirement of issuance of a price list in Form V by the manufacturer to the dealers, State Drugs Controllers and the Government which mentions mandatorily effective batch number and the date thereof is of no real help in construction of paragraph 14. Moreover, if the argument of Mr. S. Ganesh with reference to Form V that every price list is in respect of "effective batch number" only, is accepted, it may have effect of overriding the entire scheme of DPCO. In our view, this cannot be done.

54. In *Cynamide India Limited*[4], though the Court was concerned with challenge to the notifications issued by the Central Government fixing the maximum prices at which various indigenously manufactured bulk drugs could be sold under the DPCO,1979 but the prefatory statement made by this Court in paragraph 2 is worth noticing. In paragraph 2 (Pg. 733) of the Report, the Court observed:

> "2. Profiteering, by itself, is evil. Profiteering in the scarce resources of the community, much needed life-sustaining foodstuffs and life-saving drugs is diabolic. It is a menace which has to be fettered and curbed. One of the principal objectives of the Essential Commodities Act, 1955 is precisely that. It must be remembered that Article 39(*b*) enjoins a duty on the State towards securing 'that the ownership and control of the material resources of the community are so distributed as best to subserve the common good'".

55. We are of the considered view that if an interpretation of paragraph 14(1),(2)(3), paragraph 16(3) and paragraph 19 of DPCO,1995 results in frustrating its object and leads to denial of the benefit of current notified price to the consumer, then such interpretation must be avoided. We, therefore, find it difficult to accept the construction put to the above provisions by Mr. S. Ganesh.

56. We may now deal with the circular dated 28.04.1979 upon which heavy reliance has been placed by Mr. S. Ganesh, learned senior counsel for the manufacturer/distributor. It is true that the principle of *contemporanea expositio* guides that contemporaneous administrative construction, unless clearly wrong, should be given considerable weight and should not be lightly overturned but in light of the construction of the relevant provisions indicated by us above, the view in the circular cannot be followed and upheld.

57. In *Usha Martin Industries*[3], while dealing with exemption notification issued under the Central Excises and Salt Act, 1944, this Court in paragraphs19 and 20 observed as follows:

> "**19.** No doubt the court has to interpret statutory provisions and notifications thereunder as they are with emphasis to the intention of the legislature. But when the Board made all others to understand a notificatio

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and when the latter have acted accordingly, is it open to the Revenue to turn against such persons on a premise contrary to such instructions?

20. Section 37-B of the Act enjoins on the Board a duty to issue such instructions and directions to the excise officers as the Board considers necessary or expedient "for the purpose of uniformity in the classification of excisable goods or with respect to levy of duty excised on such goods". It is true that Section 37-B was inserted in the Act only in December 1985 but that fact cannot whittle down the binding effect of the circulars or instructions issued by the Board earlier. Such instructions were not issued earlier for fancy or as rituals. Even the pre-amendment circulars were issued for the same purpose of achieving uniformity in imposing excise duty on excisable goods. So the circular, whether issued before December 1985 or thereafter should have the same binding effect on the Department."

58. In *Indian Oil Corporation*[8], this Court culled out the following principles in relation to the circulars issued by the Government under the fiscal laws (Income Tax Act and Central Excise Act) as follows:

"1.Although a circular is not binding on a court or an assessee, it is not open to the Revenue to raise a contention that is contrary to a binding circular by the Board. When a circular remains in operation, the Revenue is bound by it and cannot be allowed to plead that is not valid nor that it is contrary to the terms of the statute.

2. Despite the decision of this Court, the Department cannot be permitted to take a stand contrary to the instructions issued by the Board.

8. Commissioner of Customs, Calcutta and Others v. Indian Oil Corporation Limited and Anr; [(2004) 3 SCC 488]

3. A show-cause notice and demand contrary to the existing circulars of the Board are *ab initio* bad.

4. It is not open to the Revenue to advance an argument or file an appeal contrary to the circulars."

59. The above legal position culled out in *Indian Oil Corporation*[8] has been followed in *Arviva Industries*[9].

60. In our view, it is well settled that if the departmental circular provides an interpretation which runs contrary to the provisions of law, such interpretation cannot bind the Court. 1979 circular falls in such category. Moreover, the 1979 circular is with reference to the DPCO,1979 whereas we are concerned with DPCO, 1987 and DPCO,1995. We are not impressed by the argument of Mr. S. Ganesh that in view of the saving clause in DPCO,1987, the circular is saved which is further saved by the saving clause in DPCO,1995.

61. Mr. S. Ganesh, learned senior counsel for the manufacturer/distributor also relied upon a decision of this Court in *Ranbaxy Laboratories*[1], wherein this Court had an occasion to interpret an exemption notification issued under paragraph 25 of the DPCO,1995. By the notification dated 29.08.1995, the exemption was granted to Ranbaxy in respect of Pentazocine and its formulations upto 31.10.1999. This Court held that the said exemption was available in respect of such products manufactured upto 31.10.1999, even though the same might be sold afterwards. It is argued that just as the exemption notification issued under Section 25 of the DPCO,1995 was addressed to the manufacturer, similarly, a price fixation/revision notification is also addressed to the manufacturer who is required to effectuate the same by printing the revised price on all products manufactured and cleared by him from the 15th day after the date of the notification/receipt of the order, and also issuing a revised price list declaring the

9. Union of India v. Arviva Industries (I) Ltd; [20

effective batch number from which the revised price will operate. It is submitted that the reasoning of the Court in *Ranbaxy Laboratories*[1] is directly applicable to the present situation because the conceptual issue arising in both the cases is same.

62. In *Ranbaxy Laboratories*[1], the exemption notification dated 29.08.1995 is reproduced in paragraph 20 of the Report which reads as follows:

> "S.O. No. 7153 (E), in exercise of the powers conferred by sub-para (1) of Para 25 of the Drugs (Prices Control) Order, 1995, the Central Government having regard to the factors specified in clause (*e*) of sub-para (2) of Para 25 of the said Order and also having been satisfied for the need to do so in the public interest hereby exempts the bulk drug and formulations based thereupon specified in Column 2 of the Table below which is manufactured by the Company specified in the corresponding entry in Column 3 from the operation of price control stipulated in sub-para (1) of Para 3, sub-para (1) of Para 8 and sub-para (1) of Para 9 of the said Order, up to the period as indicated in Column 4 thereof.

TABLE

Sl. No.	*Name of the product*	*Name of the company*	*Period up to which the Exemption is granted*
1	*2*	*3*	*4*
1.	Pentazocine and its formulations	M/s Ranbaxy Laboratories Ltd.	31-10-1999"

63. In paragraph 27 of the Report in *Ranbaxy Laboratories1,* this Court held as under:

> "27. The court while construing an exemption notification cannot lose sight of the ground realities including the process of marketing and sale. The exemption order dated 29-8-1995 is clear and unambiguous. By reason thereof what has been exempted is the drug which was manufactured by the Company and the area of exemption is from the operation of the price control. They have a direct nexus. They are correlated with each other. While construing an exemption notification not only a pragmatic view is required to be taken but also the practical aspect of it. A manufacturer would not know as to when the drug would be sold. It has no control over it. Its control over the drug would end when it is dispatched to the distributor. The distributor may dispatch it to the wholeseller. A few others may deal with the same before it reaches the hands of the retailer. The manufacturer cannot supervise or oversee as to how others would be dealing with its product. All statutes have to be considered in light of the object and purport of the Act. Thus, the decisions relied upon by the learned Additional Solicitor General in *Union of India v. Cynamide India Ltd.*; *Prag Ice & Oil Mills v. Union of India*, *Shree Meenakshi Mills Ltd. v. Union of India* and *Panipat Coop. Sugar Mills v. Union of India* will have no application."

64. The issue before us is quite different and, in our view, the judgment of this Court in Ranbaxy *Laboratories1* does not apply to the present controversy for more than one reason. First, in *Ranbaxy Laboratories*[1], the Court was concerned with the exemption notification issued under paragraph 25 of the DPCO,1995 whereas in the present matters, the issue centres around paragraphs 14,16 and 19 of that DPCO. Second, the notification under consideration in *Ranbaxy Laboratories1* was an exemption notification and not a notification for fixation of price. Third, the exemption notification is relatable to the manufacturer to the drugs whereas price fixation notification is related to sale of drug/formulation at a given price.

65. The Delhi High Court in the impugned order has relied upon 1979 circular and further held that 1979 circular was in the context of paragraph 19(1) of DPCO,1979, which is almost identical to paragraph 16(3) of DPCO,1987 and, therefore, the circular explaining the position in respect of the DPCO,1979 would continue to hold the field in respect of the very same provisions in DPCO,1987. We are unable to accept the view of the Delhi High Court for the reasons which we have already discussed above. Moreover, the Delhi High Court has gone more by practical difficulties which a manufacturer may suffer and completely overlooked the scheme of the DPCO which is intended to give benefit to the consumer of the reduced current price of the formulation. It is pertinent to notice that Delhi High Court distinguished the view of the Karnataka High Court and observed as follows:

> "We agree with the submissions made by Mr. Ganesh that the Karnataka High Court decision did not consider Form 5 nor its reference to "Effective Batch No.". Nor did the said decision refer to the Circular of 1979 which we have already indicated to be applicable to the DPCO 1987 also. We, therefore, do not agree with the view adopted by the Karnataka High Court. In fact, the Supreme Court decision cited by Mr. Ganesh clearly recognizes the practical aspects of pricing in the context of time lags. Once the reality of time lags in the process of manufacture, clearance, distribution and sale is recognised, the importance of 'Effective Batch Nos.' as mentioned in Form 5 comes to the fore. The Effective Batch No. represents the cut-off for the new pricing. The seizure memo which is impugned herein relates to Batch No. BT 3104 (for 300mg tablets) which is prior to the "Effective Batch No. BT 3115". The said seizure was, thus, in respect of tablets which had been manufactured prior to the "effective" Batch No. BT 3115 which, we have explained above, is to be taken as the cut-off point insofar as the new prices are concerned."

66. The above view of the Delhi High Court is fundamentally flawed and clearly wrong in light of our foregoing discussion. The Karnataka High Court has taken the correct view and the same is upheld.

67. We, accordingly, dismiss the appeals preferred by the manufacturer/distributor and allow the appeals of the Union of India. The parties shall bear their own costs.

R.P. Appeals disposed of.