KAMLESH C. SHAH & ORS.
v.
STATE OF MAHARASHTRA AND ORS.
I.A. NO. 3 OF 2012
IN
WRIT PETITION (C) NO. 342 OF 1999

JULY 03, 2013

[ALTAMAS KABIR CJI. VIKRAMAJIT SEN AND A.K. SIKRI, JJ.]

Interlocutory Relief – Grant of – Writ petitions u/Art. 32 of the Constitution challenging introduction of Chapter VIII-A in Maharashtra Housing and Area Development Act, 1976 – Chapter VIII-A pertained to acquisition of the cessed properties by the Authority under the Act for co-operative Societies of occupiers – Matter referred to a Bench of Nine-Judges and since pending – Interlocutory application in respect of a building acquired as cessed property – Praying for direction of the Court to declare the acquisition no longer necessary in view of the fact that the owner and tenants of the property entered into an agreement to themselves develop the property instead of waiting for the decision of Nine-Judge Bench – Held: Application liable to be dismissed, as the relief prayed for goes against the very grain of the provisions of Chapter VIII-A of the Act – Maharashtra Housing and Area Development Act, 1976 – Chapter VIII-A.

Chapter VIII-A was introduced in Maharashtra Housing and Area Development Act, 1976, which pertained to acquisition of cessed properties for co-operative societies of occupiers. The validity thereof was challenged in several cases including the present writ petition. The matters were initially referred to a Bench of 7 Judges, but later, the same were referred to Bench of 9 Judges and are still pending.

The writ petitioners have filed the present interlocutory petition seeking interim reliefs in respect of certain property which was acquired by the Maharashtra Housing and Area Development Authority, treating the same as cessed property, as per s. 103B of Chapter VIII-A of the Act.

The petitioner took the plea that as the matter is pending before a Bench of Nine Judges, which is not likely to be taken up in near future, the tenants and the owner of the buildings entered into an agreement by which they themselves agreed to develop the property, instead of waiting for the decision of the nine-Judges Bench. The petitioner prayed that this Court may declare the acquisition of the property to be no longer necessary and relevant for the purposes of Chapter VIII-A and the relationship of the owner and the tenant would continue as before.

Dismissing the petition, the Court

HELD: 1. If the tenants have to wait till a decision is rendered by the Nine-Judge Bench, the entire object with which Chapter VIIIA was introduced in the 1976 Act, would be rendered completely nugatory. May be a situation, such as the present one, was never contemplated by those who wanted to frame a scheme to rehabilitate tenants who were victims of a situation where they had to reside in unhygienic and may be dangerous conditions because of lack of repairs on account of the low rents payable by the tenants which had been frozen from 1st September, 1940, and made it virtually impossible for the landlords to maintain the properties when, at times, the municipal taxes were higher than the rents collected; but the Courts have to interpret the law as it is. [Para 18] [590-D-F]

2. Section 103A was introduce

VIII-A in the 1976 Act, by Maharashtra Act 21 of 1986, when realisation dawned on the administration that many persons who had been occupying buildings either as tenants or otherwise from before 1st September, 1940, were faced with a peculiar dilemma in which on account of the low rents paid by them, which had been frozen, the landlords were unwilling to effect any repairs to the old structures. Section 103A, whereby Chapter VIII-A was made applicable to all "cessed buildings". [Para 19] [590-G-H; 591-A]

3. "Cessed buildings" are buildings in which repairs had not been effected after 1st September, 1940, and were in danger of collapse, but continued to be under the occupation of tenants. In fact, 19,642 cessed and dilapidated buildings have been identified in the island city of Bombay. It is Section 103B, which deals with the procedure for acquisition of cessed property for cooperative societies of occupiers, pursuant to proposals for acquisition submitted under Section 92 of the 1976 Act. In fact, in order to facilitate the repair or reconstruction of the building in question, Section 94 makes provision for temporary and alternative accommodation to be provided to the affected occupiers whose property is acquired. [Para 20] [591-G-H; 592-A]

4. Sub-section (1) of Section 103B begins with a non-obstante clause to the effect that notwithstanding anything contained in any of the provisions of Chapter VIII or any other law for the time being in force or in any agreement, contract, judgment, decree or order of any Court or Tribunal to the contrary, a co-operative society formed or proposed to be formed under the provisions of the Maharashtra Co-operative Societies Act, 1960, by not less than 70% of the occupiers in a cessed building may, by written application, request the Board to move the State Government to acquire the land together with

the existing building thereon or where the owner of the building does not own the land, but holds it as a lessee or licensee, then to acquire the right or interest of such owner or person in or over such building or land or both as lessee or licensee together with the existing building thereon. The latter part of Section 103B and more particularly Sub-section (5A), is relevant and provides that where acquisition proceedings have been initiated as provided in Sub-section (5) and a notification under Sub-section (5) of Section 93 is published, the Collector shall take and hand over the possession of the land to the Board in accordance with the provisions of Sub-section (6) of Section 93. It is at this stage that the land vests absolutely in the Board on behalf of the Authority, free from all encumbrances. At this stage, the Board shall also require the Society to get itself registered, if it is not registered till then, and to deposit the remainder of the amount to be paid to the owner with the Land Acquisition Officer. It is only, thereafter, under Sub-section (7), that the Authority is to convey the land acquired under this Section to the co-operative society of the occupiers thereon, with its right, title and interest therein and execute, without undue delay, the necessary documents in that behalf. [Para 21] [596-C-H; 597-A-B]

5. The tenants had already vacated the building in question in favour of the promoter. Whether they were entitled to do so, once Section 103B of the 1976 Act had already come into operation and symbolic possession of the property had been taken by MHADA, through the Board, under Sub-section (5A) thereof. Sub-section (7) of Section 103B provides for the conveyance of the land acquired under Section 103B to the co-operative society of the occupiers together with its right, title and interest therein, and for MHADA to execute, without undue delay, the necessary documents in that behalf, which presupposes that MHADA had alre[illegible]o

the property. Had the title not vested in MHADA, it could not have been vested with the right to convey the same to the co-operative society. The scheme envisaged in Chapter VIII-A, and in Section 92 of the 1976 Act comes into play, upon an application being made by a registered co-operative society or a proposed co-operative society to undertake the restoration of the building. [Para 22] [597-B-E]

6. In the instant case, except for an application having been made under Section 92 and steps having been taken thereafter under Section 103B, nothing further has happened. But by operation of law, the land has come to be vested in MHADA. The parties to the agreement, which includes the promoter, were fully aware of this situation since in the agreement itself it is indicated that the tenants would withdraw from the acquisition and would apply to MHADA to release the property from acquisition so that the agreement arrived at could be given effect to instantly. Whether MHADA has any obligation to provide similar accommodation to others in respect of the 30% surplus land, is a controversy which need not be gone into and will surely be decided, whenever the Nine-Judge Bench sits to take up these matters. But for the purposes of this case, in spite of the inordinate delay in the working of the provisions of Chapter VIII-A of the 1976 Act, which was intended for the benefit of a certain section of tenants and occupants of cessed buildings, the relief prayed for cannot be granted, as the same goes against the very grain of the provisions of Chapter VIII-A of the 1976 Act. Hence, the I.A.,is dismissed without going into further details, which will have to be settled by the Nine-Judge Bench. [Para 23] [597-F-H; 598-A-C]

CIVIL ORIGINAL JURISDICTION : I.A. No. 3 of 2012.

IN

Writ Petition (Civil) No. 342 of 1999.

Under Article 32 of the Constitution of India.

K.K. Venugopal, Sudhir Gupta, Mukul Rohatgi, Ashok H. Desai, Amarjit Singh Bedi, Rohit Bhat, Mahesh Aggarwal, Aarohi Bhalla, Subodh S. Patil, Sujata Kurdukar, Sanjay V. Kharde, Asha Gopalan Nair, Amar Dave, Narendra Kumar Goyal, Chirag M. Shroff for the appearing parties.

The Judgment of the Court was delivered by

ALTAMAS KABIR, CJI. 1. Chapter VIII-A, which was introduced into the the Maharashtra Housing and Area Development Act, 1976, hereinafter referred to as "the 1976 Act", in 1986, pertains to the acquisition of "cessed properties" for co-operative societies of occupiers. Soon after its introduction, its validity was challenged in several cases, including the present writ petition. The present writ petition was tagged with W.P. No. 934 of 1992, another case pending in this Court on the same issue. In view of the questions raised in the writ petitions, the matter was initially referred to a Bench of 7-Judges, but, thereafter, by order dated 20.02.2002, the matters have been referred to a Bench of Nine-Judges and are still pending decision.

2. Since no final decision seems to be in the offing, the writ petitioners have filed IA No. 3 of 2012, for interim reliefs.

3. The subject matter of the present petition is a property known as "Chhotalal Niwas" situated at Laburnam Road, Gamdevi, Mumbai - 400007, comprising a plot of land bearing Survey No. 7A/492, Malabar Cumbala Hill Division, Mumbai. Treating the said property as a "cessed property", within the meaning of Section 103A of the 1976 Act, the same was acquired by the Maharashtra Housing and Area Development Authority (MHADA), as per Section 103B of Chapter VIII-A of the 1976 Act.

4. The apparent reason for the introduction of Chapter VIII-A into the 1976 Act appears to be the refusal of the owners of the buildings to effect repairs thereto on account of the freezing of rents from 1st September, 1940. The return which the landlord could reasonably expect from time to time having been frozen, a stage was reached when where rents were no longer sufficient to cover even the taxes payable for the said properties. As a result, the landlords stopped effecting repairs to the tenanted properties which resulted in rapid deterioration of the buildings. Realizing the gravity of the matter, the Legislature enacted "the Building Repairs and Reconstruction Board Act, 1969", which enabled levy on buildings in Greater Bombay as the Legislature felt that from the recovery of the cess in addition to the contribution of substantial amounts to be made by the State Government and the Bombay Municipal Corporation, it might be possible for the Board constituted under the Act to carry out structural repairs to the old buildings to make them safe for habitation. The Legislature also felt that in case structural repairs did not improve the condition of the building, then the Board could undertake reconstruction of the building by pulling down the dilapidated structure and raising a new structure thereupon.

5. On 26th February, 1986, the Governor of Maharashtra issued Ordinance No. 1 of 1986 to amend the 1976 Act with effect from 26th February, 1986. The Statement of Objects for enactment of the amendment indicates that there are 19,642 cessed old and dilapidated buildings in the island city of Bombay and, out of these, 16,502 buildings were constructed prior to 1st September, 1940, and the majority of the said buildings are about 80 to 100 years old. To make things worse, the freezing of the rents from 1st September, 1940, made it quite impossible for the owners to look after or maintain the buildings, which is one of the reasons for the introduction of Chapter VIII-A in the 1976 Act.

6. Section 103A of the 1976 Act, which was introduced in

1986 as part of Chapter VIII-A, *inter alia*, provides that the said Chapter would come into force on and from the commencement of the Maharashtra Housing and Area Development (Second Amendment) Act, 1986 and would apply to all cessed buildings, which had been erected before the 1st of September, 1940, and were classified as belonging to Category 'A' under Sub-section (1) of Section 84.

7. Section 103B, which contains the *raison d'etre*, for the introduction of Chapter VIII-A into the 1976 Act, *inter alia*, provides for acquisition of cessed property for co-operative societies of occupiers. The scheme envisaged in the said Section is that notwithstanding anything contained in any of the provisions of Chapter VIII or any other law for the time being in force or in any agreement, contracts, judgment, decree or order of any court or tribunal to the contrary, a co-operative society formed or proposed to be formed, under the provisions of the Maharashtra Co-operative Societies Act, 1960, by not less than 70% of the occupiers in a cessed building, may, by written application, request the Board to move the State Government to acquire the land together with the existing building thereupon and where the owner of the building did not own the land underneath or appurtenant to such building, but held the same as a lessee or licensee, then to acquire the right or interest of such owner or person in or over such building or land or both as lessee or licensee together with the existing building, in the interest of its better preservation or reconstruction of a new building in lieu of the old one. Sub-section (2) of Section 103B provides that on receipt of the application made under Sub-section (1), the Board shall, after due verification and scrutiny, approve the proposal if it considers that it is in the interest of better preservation of the building or to be necessary for reconstruction of a new building and shall direct the co-operative society, whether registered or proposed, to deposit with the Board, within the periods specified by it in that behalf, 30% of the approximate amount that would be required to be paid to the owner in that behalf. Sub-section

103B provides that if, on receipt of an acquisition proposal under Sub-section (3), the State Government is satisfied about the reasonableness of the proposal, it may approve the same and communicate its approval to the Board. On receipt of the government approval, the Board under Sub-section (5) was required to forward the acquisition proposal to the Land Acquisition Officer for taking further proceedings in the matter.

8. An important element of Section 103B is Sub-section (5A), which provides that when acquisition proceedings have been initiated under Sub-section (5) and a notification under Sub-section (5) of Section 93 has been published, the Collector would take and hand over the possession of the acquired property to the Board in accordance with the provisions of Sub-section (6) of Section 93. Sub-section (6) provides that after the land is vested absolutely in the Board on behalf of the Authority, free from all encumbrances, and the amount to be paid to the owner is determined, the Board shall require the society to get itself registered, if it is not registered, till then and to deposit the remainder of the amount to be paid to the owner with the Land Acquisition Officer. The Board is required simultaneously to pass on the amount deposited by the co-operative society to the Land Acquisition Officer, who shall thereupon make payment of the amount for acquisition or deposit the same in the Court, as provided in Section 46. Sub-section (7) provides that, subject to the provisions of Sub-section (6), the Authority shall convey the land acquired under this Section to the co-operative society of the occupiers thereof with its right, title and interest therein and execute, without undue delay, the necessary documents in that behalf.

9. As is clear from the above, the scheme introduced by Chapter VIII-A of the 1976 Act was intended to protect tenants who were compelled to reside in buildings which had been constructed prior to 1940, and had become dilapidated as no repairs were effected thereto. The landlords were not keen to repair the buildings as the rents were very low and often the taxes payable for the property were higher than the rents

collected from the tenants. The scheme provided for the formation of cooperative societies by tenants of such buildings, who were required to deposit 30% of the compensation payable to the owner, whereupon the lands would stand acquired and would vest in the Mumbai Building Repair and Reconstruction Board for the limited purpose of ensuring that after acquisition, the balance 70% would be deposited by the tenants, consequent whereupon, MHADA under Section 103B(7) was bound to convey the land to the cooperative society for construction of the building.

10. Appearing for the writ petitioners, Mr. K.K. Venugopal, learned Senior Advocate, submitted that the very fact that MHADA was required to convey the land to the cooperative society for constructing the building, establishes beyond doubt that the vesting in the Board amounted to holding the property in trust for and on behalf of the tenants forming the cooperative society, who were the beneficiaries of the said scheme.

11. Mr. Venugopal urged that since the issue was pending before a Nine-Judge Bench and it was unlikely that the matter would be heard in the near future, the tenants and the owner of the building entered into an Agreement by which they themselves agreed to develop the property, instead of waiting for the decision of the Nine-Judge Bench. The essence of the understandings arrived at between the landlord and the tenants was that the tenants would withdraw themselves from the acquisition and instead enter into a Development Agreement with landlord to reconstruct the building. Mr. Venugopal urged that should such a course of action be accepted, then there would be no further need for the proceeding under Section 103B to be continued and upon the property being returned to the owner, the tenants could have the benefit of the offer made by the new builder. This would enable the tenants to purchase their own flats and the landlord to also get sufficient consideration so that the purpose of the scheme would stand fully satisfied. Furthermore, the Trust w s

the purpose of acquisition would also cease to exist. Mr. Venugopal urged that the Court may declare the acquisition of the property to be no longer necessary and relevant for the purposes of Chapter VIIIA and the relationship of the owner and the tenant would continue as before. Mr. Venugopal also submitted that since possession has continued with the owner and the tenants and, at no point of time, had such possession been handed over to MHADA, could it be said that the premises in question had vested with MHADA. Mr. Venugopal contended that if the object of the rehabilitation scheme was to be kept in mind, the objective taken on behalf of MHADA that the property had vested in it by virtue of the Notification published at the request of the tenants, was highly technical and was required to be discarded, as the lands were, in fact, being held in trust for the tenants as the beneficiaries thereof.

12. The prayer made on behalf of the Petitioners in I.A. was opposed, on behalf of the State of Maharashtra and its authorities, as being mischievous and was nothing but an attempt to circumvent the challenge thrown to Chapter VIII-A, which was pending before this Court not only in other matters, but in the instant writ petition also. It was urged by Mr. Sanjay V. Kharde, learned Advocate appearing for the Respondent Nos. 1 and 5, that the question to be considered in the context of this interlocutory application is whether the parties can contract out of the statute when they have no *locus standi* or title in respect of the suit property. It was urged that stay prayed for earlier had been refused by this Court and Chapter VIII-A, inserted by the Maharashtra Act (21 of 1986), in the 1976 Act, continues to be valid and operative. It was submitted that the provisions make it very clear that once the suit property stood vested in MHADA, the same could be utilized only for the purpose of the tenants/ co-operative societies and nobody else. It was urged that the relief sought for by the Petitioners in the present application could not be granted since there is a complete bar on such kind of proceedings after vesting, in view of Section 103C(2) of the 1976 Act. Mr. Kharde urged that

symbolic possession of the property had already been taken and the introduction of a third party into the proceedings was with the knowledge that the assignee would approach MHADA for releasing the property for the purpose of development.

13. Mr. Kharde reiterated that once vesting had taken effect under Section 93(5), read with Section 103B(5A), (6) and (7) of the 1976 Act, and the same having been upheld up to this Court, the same could not be released to the owners of the land and would have to be utilized for a purpose similar for which it had been acquired. Mr. Kharde urged that the I.A. filed on behalf of the Petitioners is liable to be dismissed.

14. Mr. Ashok H. Desai, learned Senior Advocate, who appeared for MHADA and the Mumbai Housing Repairs and Reconstruction Board, submitted that the relief prayed for in the instant I.A. was wholly misconceived since the challenge to the notification dated 20.04.1995 issued by the Respondent No. 4 under Section 93(5) of the 1976 Act, thereby vesting the land and building absolutely in MHADA free from all encumbrances, had been repelled up to this Court. It was urged that the vesting of the property in MHADA having been upheld up to this Court, this application seeking release of the property from acquisition has to be dismissed and the Petitioners have to await the decision to the challenge of the constitutional validity of Chapter VIII-A. Mr. Desai submitted that when the matter involving a constitutional challenge to Chapter VIII-A of the 1976 Act was pending consideration before a Bench of Nine-Judges, the present application could not be decided by any Bench of this Court of a strength of less than Nine-Judges.

15. Mr. Desai submitted that the scope of these pending matters relate to the interpretation of the expression “vesting” of the property with MHADA under the scheme of the Act. Mr. Desai also urged that the property having been acquired for the purposes of Section 103B of the 1976 Act, MHADA was also saddled with an obligation to utilize 30% of the acquired land for similar objects. Mr. Desai submi[illegible]d

only be used for the benefit of the tenants, if they had formed a co-operative society and registered the same, but not for the purpose of development by a third party, which was completely alien to the provisions of the 1976 Act. Mr. Desai submitted that I.A. No. 3 was wholly misconceived and was liable to be rejected.

16. Mr. Mukul Rohatgi, learned Senior Advocate, appearing for the Chief Promoter of the UNAT Co-op. Housing Society, Hashmukh B. Gandhi, contended that since the object of the 1976 Act was to rehabilitate those tenants who were living in dilapidated structures, and the end object of the scheme of arrangement arrived at by the landlord with the promoter was for the same purpose, the same should be accepted and implemented for the benefit of the tenants.

17. Countering the submissions made by Mr. Ashok Desai that once the lands had vested in MHADA under Section 103B of the 1976 Act, the same could only be utilised for the purposes of construction/ reconstruction as intended under the Act, Mr. Rohatgi submitted that the acquisition in the instant case was specifically for the purpose of rehabilitation of the members of the proposed Punit Cooperative Housing Society, on whose application the acquisition proceedings had been started. Mr. Rohatgi submitted that the land so acquired for the aforesaid Cooperative Society could not be utilised for any other society/tenants and in the event the tenants chose not to continue with the scheme of rehabilitation by resorting to the provisions of the 1976 Act, MHADA could not obstruct the release of the land, as otherwise the tenants would be rendered homeless and they would be deprived of their residences, which they enjoyed in the premises before the acquisition proceedings were mooted. Mr. Rohatgi urged that the entire logic of the 1976 Act was to rehabilitate the tenants of the building which had become dilapidated on account of non-repair thereof by the landlords and the scheme envisaged under Chapter VIIIA was tenant-specific and any decision to

deprive the tenants, either by taking recourse to the scheme or remaining outside the scheme, would be contrary to the spirit and object of the Act.

18. Since the writ petition is to be heard by a Bench of nine Judges, along with other similar matters, and there is little likelihood of the matter being taken up for final decision in the near future, we have given our serious thoughts to the problem which has been spelt out in the present Interlocutory Application. On the one hand, it is at the request made by a proposed Cooperative Society of the tenants of the building that acquisition proceedings were commenced by the Board under Section 103B of the 1976 Act on 30th October, 1986, on the other, the purpose of the acquisition has not fructified even after 26 years. If, as suggested by Mr. Desai and Mr. Kharde, the tenants have to wait till a decision is rendered by the Nine-Judge Bench, the entire object with which Chapter VIIIA was introduced in the 1976 Act, would be rendered completely nugatory. Maybe a situation, such as this, was never contemplated by those who wanted to frame a scheme to rehabilitate tenants who were victims of a situation where they had to reside in unhygenic and maybe dangerous conditions because of lack of repairs on account of the low rents payable by the tenants which had been frozen from 1st September, 1940, and made it virtually impossible for the landlords to maintain the properties when, at times, the municipal taxes were higher than the rents collected; but the Courts have to interpret the law as it is.

19. As indicated hereinbefore, Section 103A was introduced by way of Chapter VIII-A in the 1976 Act, by Maharashtra Act 21 of 1986, when realisation dawned on the administration that many persons who had been occupying buildings either as tenants or otherwise from before 1st September, 1940, were faced with a peculiar dilemma in which on account of the low rents paid by them, which had been frozen, the landlords were unwilling to e e

old structures. Section 103A, whereby Chapter VIII-A was made applicable to all "cessed buildings", reads as follows:

> **"103A. Application of Chapter VIII-A to certain buildings.**
>
> This Chapter shall come into force on and from the commencement of the Maharashtra Housing and Area Development (Second Amendment) Act, 1986, and shall apply to all the cessed buildings which are erected before the 1st day of September 1940 and are classified as belonging to Category A under subsection (1) of section 84:
>
> Provided that, nothing in this Chapter shall apply to any cessed building belonging to Category A if, on the date of commencement of the Maharashtra Housing and Area Development (Second Amendment)Act, 1986, out of the total number of occupiers of such building, fifty per cent, or more occupiers are using the tenements or premises in their possession for commercial or non-residential purpose.
>
> **Explanation —** For the purposes of this section, any such building where a floor or any part of a building is constructed subsequently and such floor or part is not separable, shall be deemed to be a building belonging to Category A."

20. "Cessed buildings" are buildings in which repairs had not been effected after 1st September, 1940, and were in danger of collapse, but continued to be under the occupation of tenants. In fact, 19,642 cessed and dilapidated buildings have been identified in the island city of Bombay. It is Section 103B, which deals with the procedure for acquisition of cessed property for cooperative societies of occupiers, pursuant to proposals for acquisition submitted under Section 92 of the 1976 Act. In fact, in order to facilitate the repair or

reconstruction of the building in question, Section 94 makes provision for temporary and alternative accommodation to be provided to the affected occupiers whose property is acquired. Since much of the case of the parties depend on Section 103B of the 1976 Act, the same, in its entirety, is extracted hereinbelow:

> **"103B. Acquisition of cessed property for co-operative societies of occupiers.**
>
> (1) Notwithstanding anything contained in any of the provisions of Chapter VIII or any other law for the time being in force or in any agreement, contracts judgement, decree or order of any Court or Tribunal to the contrary, a co-operative society formed or proposed to be formed under the provisions of the Maharashtra Co-operative Societies Act, 1960, by not less than seventy per cent of the occupiers in a cessed building may by written application request the Board to move the State Government to acquire the land together with the existing building thereon or where the owner of the building does not own the land underneath or appurtenant to such building but holds it as a lessee or licensee, or where any person holds the building or the land underneath or appurtenant to such building or both under a lease or licence, then to acquire the right or interest of such owner or person in or over such building or land or both as lessee or licensee together with the existing building thereon (hereinafter in this Chapter referred to as "the land") in the interest of its better preservation or for reconstruction of a new building in lieu of the old one and intimate their willingness to pay the amount of such acquisition as may be determined under the provisions of this Chapter and to carry out the necessary structural and other repairs or, wherever necessary, to reconstruct a new building, as the case may be, at their own cost.
>
> **Explanation I —** In this section th ty

per cent, of the occupiers' means the seventy per cent of the occupiers on the date of commencement of the Maharashtra Housing and Area Development (Second Amendment) Act, 1986, and include their successors-in interest or new tenants inducted in place of such occupiers, but does not include the owner or the occupiers inducted by virtue of creation of any additional tenancies or licences by the owner after the date of commencement of the aforesaid Act.

Explanation II — For the purposes of this sub-section, any suit or proceeding for recovery or possession of tenement or premises or part thereof, initiated against the occupier in any court or before any authority whether, before or after making an application under this sub-section, shall not affect the right of such occupier to join or to continue as a member of the co-operative society of the occupiers of the building, but his membership of such cooperative society shall be subject to the final decision in such suit or proceeding:

Provided that, if, in the meantime before the final decision in such suit or proceeding, the acquisition proceedings under this Chapter are completed and the land is conveyed to the Co-operative society of the occupiers under sub-section (7), the claim for possession made in such suit or proceeding, at any stage where it is pending on the date of execution of such conveyance, shall abate.

(2) On receipt of the application made under sub-section (1), the Board shall after due verification and scrutiny, approve the proposal if it considers that it is in the interest of better preservation of the building or to be necessary for reconstruction of a new building and shall direct the co-operative society, whether registered or proposed, to deposit with the Board within the period specified by it in that behalf thirty per cent of the approximate amount that would be redirected to be paid to the owner if the land is

acquired and give intimation in that behalf to the owner.

(2A) Where after the date of application made under sub-section(1),—

(a) any owner has undertaken the work of any repairs to the Building; or

(b) the percentage of the occupiers who had initially agreed to become members of the co-operative society formed under subsection (1) is reduced to less than seventy per cent of the occupiers as a result of some members opting out, or due to the number of additional tenancies or licences created in the building thereafter or due to any other reason whatsoever,

then the power of Board to approve the proposal shall not be affected, and notwithstanding anything contained in sub-section (1), the Board shall approve the proposal and direct the co-operative society to deposit the approximate amount as required under sub-section (2).

(3) On receipt of the amount of deposit as provided in sub-section (2), the Board shall submit to the State Government a proposal to acquire the land for the aforesaid purpose.

(4) If on receipt of an acquisition proposal under sub-section (3), the State Government is satisfied about the reasonableness of the proposal, it may approve the proposal and communicate its approval to the Board.

(5) On receipt of the Government approval, the Board shall forward acquisition proposal to Land Acquisition Officer for initiating and acquisition proceedings in accordance with the provisions- of sub-sections (3), (4) and (5) of section 93 and section 96 of this Act :

Provided that, where any proceed of

land are so initiated the notice to be published under sub-section (3) of section 93 in respect thereof need not contain any statement regarding provision of any alternative accommodation to occupiers in such land :

Provided further that, where the proposal involves acquisition of the right or interest of the lessee or licensee in or over the building or land as referred to in subsection (1) , then such building or land on its transfer by the Authority to the co-operative society under sub-section (7) shall be held by the co-operative society on lease or licence, as the case may be,subject, however, to the following conditions, namely:—

(i) where there is a subsisting lease or licence, on the same terms and conditions on which the lessee or licensee held it, and

(ii) where the lease or licence has been determined or where the lessee or licensee has committed breach of the terms and conditions of the lease or licence, as the case may be, on the fresh terms and conditions, particularly in regard to the period of lease or licence and rent as may be stipulated by the owner of the land.

(5A) Where acquisition proceedings have been initiated as provided in sub-section (5) and a notification under sub-section (5) of section 93 is published, the Collector shall take and hand over possession of the land to the Board in accordance with the provisions of sub-section (6) of section 93.

(6) After the land is vested absolutely in the Board on behalf of the Authority free from all encumbrances and the amount to be paid to the owner is determined, the Board shall require the society to get itself registered if it is not registered till then and to deposit the remainder of the amount to be paid to the owner with the Land Acquisition

Officer. The Board shall simultaneously pass on the amount deposited by the co-operative society with it to the Land Acquisition officer. The Land Acquisition Officer shall thereupon make the payment of the amount for acquisition or deposit the same in the court as provided in section 46.

(7) Subject to the provisions of sub-section (6), the Authority shall convey the land acquired under this section to the co-operative society of the occupiers thereof with its right, title and interest therein and execute without undue delay the necessary documents in that behalf."

21. Sub-section (1) of Section 103B begins with a non-obstante clause to the effect that notwithstanding anything contained in any of the provisions of Chapter VIII or any other law for the time being in force or in any agreement, contract, judgment, decree or order of any Court or Tribunal to the contrary, a co-operative society formed or proposed to be formed under the provisions of the Maharashtra Co-operative Societies Act, 1960, by not less than 70% of the occupiers in a cessed building may, by written application, request the Board to move the State Government to acquire the land together with the existing building thereon or where the owner of the building does not own the land, but holds it as a lessee or licensee, then to acquire the right or interest of such owner or person in or over such building or land or both as lessee or licensee together with the existing building thereon. The latter part of Section 103B and more particularly Sub-section (5A), is relevant for our purpose and provides that where acquisition proceedings have been initiated as provided in Sub-section (5) and a notification under Sub-section (5) of Section 93 is published, the Collector shall take and hand over the possession of the land to the Board in accordance with the provisions of Sub-section (6) of Section 93. It is at this stage that the land vests absolutely in the Board on behalf of the Authority, free from all encumbrances. At this stage, the Board shall also require the Society to get itself registered, if it is not registered till the

remainder of the amount to be paid to the owner with the Land Acquisition Officer. It is only, thereafter, under Sub-section (7), that the Authority is to convey the land acquired under this Section to the co-operative society of the occupiers thereon, with its right, title and interest therein and execute, without undue delay, the necessary documents in that behalf.

22. As submitted by Mr. Desai and Mr. Kharde, the tenants had already vacated the building in question in favour of the promoter. The million dollar question is whether they were entitled to do so, once Section 103B of the 1976 Act had already come into operation and symbolic possession of the property had been taken by MHADA, through the Board, under Sub-section (5A) thereof. Sub-section (7) of Section 103B provides for the conveyance of the land acquired under Section 103B to the co-operative society of the occupiers together with its right, title and interest therein, and for MHADA to execute, without undue delay, the necessary documents in that behalf, which presupposes that MHADA had already acquired title to the property. Had the title not vested in MHADA, it could not have been vested with the right to convey the same to the co-operative society. The scheme envisaged in Chapter VIII-A, and in Section 92 of the 1976 Act comes into play, upon an application being made by a registered co-operative society or a proposed co-operative society to undertake the restoration of the building.

23. In the instant case, except for an application having been made under Section 92 and steps having been taken thereafter under Section 103B, nothing further has happened. But by operation of law, the land has come to be vested in MHADA. The parties to the agreement, which includes the promoter, were fully aware of this situation since in the agreement itself it is indicated that the tenants would withdraw from the acquisition and would apply to MHADA to release the property from acquisition so that the agreement arrived at could be given effect to instantly. Whether MHADA has any obligation

to provide similar accommodation to others in respect of the 30% surplus land, is a controversy which we need not go into and will surely be decided, whenever the Nine-Judge Bench sits to take up these matters. But for the purposes of this case, we regret that in spite of the inordinate delay in the working of the provisions of Chapter VIII-A of the 1976 Act, which was intended for the benefit of a certain section of tenants and occupants of cessed buildings, we are unable to grant the relief prayed for, as the same goes against the very grain of the provisions of Chapter VIII-A of the 1976 Act. Accordingly, we have no other option, but to dismiss the I.A., without going into further details, which will have to be settled by the Nine-Judge Bench.

24. Having regard to the nature of the facts of the case, the parties shall bear their own costs.

Kalpana K. Tripathy Petition dismissed.

SHRI LAL MAHAL LTD.
v
PROGETTO GRANO SPA
(Civil Appeal No. 5085 of 2013)

JULY 3, 2013

[R.M. LODHA, MADAN B. LOKUR AND KURIAN JOSEPH, JJ.]

Arbitration and Conciliation Act, 1996 – s.48(2)(b) – Foreign award – Enforcement of – Challenge to – Award passed by the Board of Appeal of the Grain and Feed Trade Association, London in respect of a transaction relating to 20,000 MT (+/- 5%) of Durum wheat, Indian Origin in favour of respondent-buyers – Appellant-sellers challenged the award passed by Board of Appeal in the High Court of Justice at London which found no ground or justification for setting aside the award – Whether foreign award in question enforceable u/s.48 – Held: If a ground supported by the decisions of the foreign country concerned was not good enough for setting aside the award by the court competent to do so, a fortiori, such ground can hardly be a good ground for refusing enforcement of the award – Moreover, s.48 of the Act does not give an opportunity to have a 'second look' at the foreign award in the award - enforcement stage – Scope of inquiry u/s.48 does not permit review of the foreign award on merits – Procedural defects in the course of foreign arbitration do not lead necessarily to excuse an award from enforcement on the ground of public policy – Even if it be assumed that the Board of Appeal made some errors, such errors would not bar the enforceability of the appeal awards passed by the Board of Appeal – While considering the enforceability of foreign awards, the court does not exercise appellate jurisdiction over the foreign award nor does it enquire as to whether, while rendering foreign award, some

error has been committed – Under s.48(2)(b), enforcement of a foreign award can be refused only if such enforcement is found to be contrary to (1) fundamental policy of Indian law; or (2) the interests of India; or (3) justice or morality – On facts, objections raised by appellant not falling in any of these categories and, therefore, the foreign awards cannot be held to be contrary to public policy of India as contemplated u/s.48(2)(b) – Awards in question can be enforced.

Appeal award nos. 3782 and 3783 both dated 21.09.1998 were passed by the Board of Appeal of the Grain and Feed Trade Association, London in respect of a transaction relating to 20,000 MT (+/- 5%) of Durum wheat, Indian Origin in favour of respondent-buyers. After both the foreign awards attained finality, the respondent-buyers instituted suit in the Delhi High Court for enforcement of the same. The appellant-sellers raised diverse objections to enforcement of the said two foreign awards. The High Court overruled the objections raised by the sellers and held that the said foreign awards were enforceable under Part II of the Arbitration and Conciliation Act, 1996.

The appellant contended before this Court that the awards by the Board of Appeal cannot be enforced on the touchstone that they are contrary to public policy of India, as both the Arbitral Tribunal, GAFTA and the Board of Appeal went beyond the terms of the contract between the sellers and the buyers. It was contended that despite the contract being FOB contract between the parties which specifically sets out that the certificate of quality obtained at the load port from the buyers' nominated certifying agency, i.e., S.G.S. would be final and the certifying agency in fact issued such a certificate, the Arbitral Tribunal, GAFTA as well as the Board of Appeal relied upon evidence procured unilaterally by the buyers from other certifying agencies beyo[illegible]e

contract which was based on quality specifications of a forward contract which the buyers had signed with OAIC Algiers. The appellant contended that the Board of Appeal dealt with the questions not referred to it and which were never in dispute and, therefore, award cannot be enforced because it is contrary to Section 48(1)(c) of the 1996 Act as well.

The appellant contended that in light of the two decisions of this Court in *Saw Pipes* and *Phulchand Exports*, the Court can refuse to enforce a foreign award if it is contrary to the contract between the parties and/or is patently illegal. It was argued on behalf of the appellant, that the expression "public policy of India" in Section 48(2)(b) of the 1996 Act is an expression of wider import than the expression "public policy" in Section 7(1)(b)(ii) of the Foreign Awards (Recognition and Enforcement) Act, 1961 and the expansive construction given by this Court to the term "public policy of India" in *Saw Pipes* must also apply to the use of the same term "public policy of India" in Section 48(2)(b) of the 1996 Act.

Dismissing the appeal, the Court

HELD:1.1. From the discussion made by this Court in *Saw Pipes*, it can be safely observed that while accepting the narrow meaning given to the expression "public policy" in *Renusagar* in the matters of enforcement of foreign award, there was departure from the said meaning for the purposes of the jurisdiction of the Court in setting aside the award under Section 34. What has been stated by this Court in *Renusagar* with reference to Section 7(1)(b)(ii) of the Foreign Awards Act must equally apply to the ambit and scope of Section 48(2)(b) of the 1996 Act. In *Renusagar* it has been expressly exposited that the expression "public policy" in Section 7(1)(b)(ii) of the Foreign Awards Act refers to the public policy of India. The expression "public policy"

used in Section 7(1)(b)(ii) was held to mean "public policy of India". A distinction in the rule of public policy between a matter governed by the domestic law and a matter involving conflict of laws has been noticed in *Renusagar*. For all this there is no reason why *Renusagar* should not apply as regards the scope of inquiry under Section 48(2)(b). For the purposes of Section 48(2)(b), the expression "public policy of India" must be given narrow meaning and the enforcement of foreign award would be refused on the ground that it is contrary to public policy of India if it is covered by one of the three categories enumerated in *Renusagar*. Although the same expression 'public policy of India' is used both in Section 34(2)(b)(ii) and Section 48(2)(b) and the concept of 'public policy in India' is same in nature in both the Sections but, its application differs in degree insofar as these two Sections are concerned. The application of 'public policy of India' doctrine for the purposes of Section 48(2)(b) is more limited than the application of the same expression in respect of the domestic arbitral award. [Paras 24, 25] [620-F; 621-A; 622-A-E; 623-A-B]

1.2. The submission on behalf of the appellant that the expression "public policy of India" in Section 48(2)(b) is an expression of wider import than the "public policy" in Section 7(1)(b)(ii) of the Foreign Awards Act, cannot be accepted. *Renusagar* must apply for the purposes of Section 48(2)(b) of the 1996 Act. Insofar as the proceeding for setting aside an award under Section 34 is concerned, the principles laid down in *Saw Pipes* would govern the scope of such proceedings. [Para 26] [623-C-D]

1.3. Enforcement of foreign award would be refused under Section 48(2)(b) only if such enforcement would be contrary to (i) fundamental policy of Indian law; or (2) the interests of India; or (3) justice or morality. The wider meaning given to the expression "public policy of India" occurring in Section 34(2)(b)(ii) i

applicable where objection is raised to the enforcement of the foreign award under Section 48(2)(b). [Para 27] [623-E-F]

Oil and Natural Gas Corporation Limited v. Saw Pipes Limited **(2003) 5 SCC 705: 2003 (3) SCR 691;** *Phulchand Exports Limited v. O.OO. Patriot*; **(2011) 10 SCC 300: 2011 (15) SCR 1129** *Renusagar Power Co. Limited v. General Electric Company* **1994 Supp (1) SCC 644: 1993 (3) Suppl. SCR 22 – referred to.**

2.1. In the instant case, the challenge to the enforceability of the foreign awards passed by the Board of Appeal is mainly laid by the sellers on the ground that the Board of Appeal has gone beyond the terms of the contract by ignoring the certificate of quality obtained at the load port from the buyers' nominated certifying agency, i.e., SGS India which was final under the contract. The Board of Appeal, while dealing with the question whether the SGS India certificate was issued by the contractual party and in contractual form, noticed the clause in the contract in respect of quality and condition and it held that SGS India was an acceptable certifying party under the contract. As regards the other part of that clause that provided, "certificate and quality showed in the certificate will be the result of an average samples taken jointly at port of loading by the representatives of the sellers and the buyers", the Board of Appeal recorded its finding that the sampling procedure was not in conformity with the requirements of the Contract, which required the result to be of an average sample taken at port of loading, not the weighted average of pre-shipment and shipment samples; and accordingly the certificate is uncontractual and its results are not final. [Para 40] [628-E-G; 629-E]

2.2. Having held that SGS India was the contractual agency, the Board of Appeal further held that the sellers

failed to establish that the SGS India certificate was in contractual form. Two fundamental flaws in the certification by SGS India were noted by the Board of Appeal, one, SGS India's certification did not follow the contractual specified mode of sampling and the other, the analysis done by SGS India was doubtful. The Board of Appeal then sifted the documentary evidence let in by the parties and finally concluded that wheat loaded on the vessel Haci Resit Kalkavan was soft wheat and the sellers were in breach of the description condition of the contract. [Para 41] [629-G-H; 630-A-B]

2.3. The sellers had challenged the award (no. 3782) passed by the Board of Appeal in the High Court of Justice at London. The three decisions; (i) ***Agroexport*** **by Queen's Bench Division, (ii)** ***Toepfer*** **by Court of Appeal, and (iii)** ***Gill & Duffus*** **by House of Lords, were holding the field at the time of consideration of sellers' appeal by the High Court of Justice at London. In** ***Agroexport*** **, it has been held that an award founded on evidence of analysis made other than in accordance with contract terms cannot stand and deserves to be set aside as evidence relied upon was inadmissible. The Court of Appeal in** ***Toepfer*** **has laid down that where seller and buyer have agreed that a certificate at loading as to the quality of goods shall be final and binding on them, the buyer will be precluded from recovering damages from the seller, even if, the person giving the certificate has been negligent in making it.** ***Toepfer*** **has been approved by the House of Lords in** ***Gill & Duffus*****. The High Court of Justice at London can be assumed to have full knowledge of the legal position exposited in** ***Agroexport*** **,** ***Toepfer*** **and** ***Gill & Duffus*** **yet it found no ground or justification for setting aside the award (no. 3782) passed by the Board of Appeal. If a ground supported by the decisions of that country was not good enough for setting aside the award by the court competent to do so,** ***a*** **d**

can hardly be a good ground for refusing enforcement of the award. [Para 42] [630-C-G]

2.4. Moreover, Section 48 of the 1996 Act does not give an opportunity to have a 'second look' at the foreign award in the award - enforcement stage. The scope of inquiry under Section 48 does not permit review of the foreign award on merits. Procedural defects (like taking into consideration inadmissible evidence or ignoring/ rejecting the evidence which may be of binding nature) in the course of foreign arbitration do not lead necessarily to excuse an award from enforcement on the ground of public policy. [Para 43] [631-B-C]

2.5. Even if it be assumed that the Board of Appeal erred in relying upon the report obtained by buyers from Crepin which was inconsistent with the terms on which the parties had contracted in the contract dated 12.05.1994 and wrongly rejected the report of the contractual agency, such errors would not bar the enforceability of the appeal awards passed by the Board of Appeal. [Para 44] [631-C-D]

2.6. While considering the enforceability of foreign awards, the court does not exercise appellate jurisdiction over the foreign award nor does it enquire as to whether, while rendering foreign award, some error has been committed. Under Section 48(2)(b) the enforcement of a foreign award can be refused only if such enforcement is found to be contrary to (1) fundamental policy of Indian law; or (2) the interests of India; or (3) justice or morality. The objections raised by the appellant do not fall in any of these categories and, therefore, the foreign awards cannot be held to be contrary to public policy of India as contemplated under Section 48(2)(b). The contention of the appellant that the Board of Appeal dealt with the questions not referred to it and which were never in dispute and, therefore, these awards cannot be enforced being contrary to Section 48(1)(c) is devoid of any substance and is noted to be rejected. [Para 45, 46] [631-E-H; 632-A]

Contship Container Lines Limited v. D.*K. Lall and Others;* **(2010) 4 SCC 256: 2010 (3) SCR 460 – referred to.**

Agroexport Enterprise D'etat Pour Le Commerce Exterieur v. N.V. Goorden Import CY. U.S.A; **(1956) 1 Q.B. 319;** *Alfred C. Toepfer v. Continental Grain Co* **(1974) 1 Lloyds Law Reports 11; and** *Gill & Duffus S.A. v. Berger & Co. Inc.* **(1984) 1 Lloyd's Law Reports 227 – referred to.**

Case Law Reference:

2003 (3) SCR 691	**referred to**	**Para 20**
2011 (15) SCR 1129	**referred to**	**Para 20**
1993 (3) Suppl. SCR 22	**referred to**	**Para 22**
2010 (3) SCR 460	**referred to**	**Para 31**
(1956) 1 Q.B. 319	**referred to**	**Para 32**
(1974) 1 LLR 11	**referred to**	**Para 32**
(1984) 1 LLR 227	**referred to**	**Para 32**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5085 of 2013.

From the Judgment & Order dated 09.02.2012 in the High Court of Delhi at New Delhi in CS No. 2594 of 2000.

R.F. Nariman, Nidhesh Gupta, Rachna Golcha, Sanjay Jain, Nakul Dewan, Vishrut Raj, Rajesh Gupta, Sandeep Singh for the Appellant.

Jayant K. Mehta, Bharti Badesra, Tanya Khare (for O.P. Khaitan & Co.) for the Respondent.

The Judgment of the Court was delivered by

R.M. LODHA, J. 1. Leave granted

2. The question for consideration in this appeal by special leave is whether appeal award no. 3782 and appeal award no. 3783 both dated 21.09.1998 passed by the Board of Appeal of the Grain and Feed Trade Association, London (for short, "Board of Appeal") in favour of the respondent are enforceable under Section 48 of the Arbitration and Conciliation Act, 1996 (for short, "1996 Act")?

3. By a contract dated 12.05.1994 between Shiv Nath Rai Harnarain (India) Company, New Delhi (sellers) and Italgrani Spa, Naples, Italy (buyers) a transaction relating to 20,000 MT (+/- 5%) of Durum wheat, Indian Origin (for short, "goods") for a price at US$ 162 Per MT was concluded. Some of the salient terms of the contract are as follows:

"Commodity	Durum Wheat Indian Origine new crop	
	Test Weight	80 KG/HL.MIN
	Moisture	12 PCT.MAX
	Vitrious	80 PCT. MIN
	Broken	3 PCT. MAX
	Proteine	12 PCT. MIN
	Foreign Matter	2 PCT MAX
	Sprouted/Spotted	1 PCT. MAX
	Soft Wheat	1.5 PCT. MAX
"Quantity	20,000 MT With 5%+/- Sellers Option in 1 single shipment	
Shipment	1-30/June 1994 Quantity final at loading	
Quality, Conditions	All final at time and place of loading As per first class Intl Company Cert. "S.G.S.", nominated by the buyers certificate and quality showed at the certificate will be the result of an average samples taken jointly at port of loading by the representatives of the sellers and the buyers.	
Price	US Dlrs 162,00 Per M. Ton FOB stowed Kandla, Buyers to give 10 days preadvise of vessels arrival	
Payment	Against 100 PCT L/Credit irrevocable and confirmed for 100 PCT payable at sight against Foll. Shipping docs	
Other conditions	All other terms and conditions not in contradictions with the above to be as per G.A.F.T.A Rules, 64/125 and its successive Amendments (In force at time and place of shipment date) which the parties admit that they have knowledge and notice."	

4. The buyers opened a letter of credit (L/C) on 17.06.1994 in favour of the sellers. The sellers claim that all documents required under the L/C, including the S.G.S India Limited certificate, were submitted by them which were accepted by the buyers' bankers and payment was duly released to the sellers.

5. The buyers nominated M.V. Haci Resit Kalkavan as the vessel for loading of the goods. There was delay in shipment but that is not material for the purposes of this appeal. The ship completed loading on 13.08.1994 and sailed for discharge port. The Bill of Lading was dated 08.0

6. The sellers faxed a copy of SGS India certificate of weight, quality and packing to the buyers on 16.08.1994. The buyers passed a copy of that certificate to SGS, Geneva with the request to them to issue the necessary certificate under the sale contract which the buyers had entered with 'Office Alegerien Interprofessional das cereals' (OAIC). After the goods had reached the destination, the buyers sent a fax to the sellers on 23.08.1994 advising that analysis carried out by S.G.S. Geneva showed the wheat loaded was soft common wheat and not durum wheat as required under the contract. The buyers considered the sellers to be in breach of the contract for shipping uncontractual goods and held sellers responsible for all losses/damages both direct and indirect arising out of and the consequence of such breach.

7. The sellers on 31.08.1994 responded to the above communication and asserted that S.G.S. India was an inspection agency; the wheat supplied was inspected by S.G.S. India at the time of procurement and also before loading the vessel and the inspection agency had confirmed that the wheat supplied met typical characteristics of Indian durum wheat and complied with the specifications provided in the contract.

8. The buyers claimed arbitration on 04.11.1994 which was registered as case no. 11715A. The Arbitral Tribunal, GAFTA proceeded to arbitrate the dispute. The Arbitral Tribunal, GAFTA in its award dated 04.12.1997 accepted the buyers' case that in appointing S.G.S. Geneva, their aim was to safeguard the performance of both contracts by having one company to coordinate all operations regarding inspection, control and the issue of certificate relating to the cargo and rejected the sellers' assertion that having loaded the goods, and presented a certificate provided by an international superintendence company, they had fulfilled their contractual obligations. The sellers' contention that S.G.S. India were nominated by the buyers and they were agents for buyers was rejected. The Arbitral Tribunal, GAFTA, concluded that wheat

described on the certificate of quality and condition presented by the sellers as durum wheat of Indian origin was, in fact, soft wheat. The certificate was held to be uncontractual and with regard to description, it was held that sellers were in breach of contract and the buyers were entitled to damages based on the difference between the contract price and the FOB value of the goods as delivered and buyers were also entitled to any further proven loss directly and naturally resulting in the ordinary course of events from the breach. The Arbitral Tribunal, GAFTA passed the final award in the following terms:

> "We do hereby award that Sellers shall pay Buyers forthwith the sum of US $ 1,023,750.00 (One million twenty three thousand seven hundred and fifty United States dollars) being the difference between the FOB contract price-US $ 162.00 per tonne less US $ 2.00 per tonne penalty for extending the shipment period, i.e. US $ 160.00 per tonne, and the FOB price of the Soft wheat shipped on m.v. "HACI RESIT KALKAVAN" i.e. US$ 111.25 per tonne amounting to US $ 48.75 per tonne on 21,000 tonnes, equating to US $ 1023.750 together with interest thereon at the rate of 7% (Seven percent) per annum from 24th August 1994 to the date of this Award.
>
> We do further award that Sellers shall pay Buyers forthwith the sum of US $ 303,007.60 (Three Hundred and three thousand and seven United States dollars and 60 cents.) being the loss incurred in replacing the wheat shipped on m.v. "HACI RESIT KALKAVAN" with Durum wheat shipped on M.V. "EUROBULKER 1" and M.V. "SEA DIAMOND H" together with interest thereon at 7% (Seven percent) per annum on:
>
> US$ 276,512.40 (the loss on M.V. "EUROBULKER 1") from 1st October, 1994 to the date of this Award.
>
> AND

US$ 26,495.20 (the loss on M.V. "SEA DIAMOND H") from 5th December, 1994 to the date of this Award.

We do further award that sellers shall pay Buyers forthwith the sum of US $ 138,590.28 (One hundred and thirty eight thousand five hundred and ninety United States dollars and 28 cents) being demurrage incurred on M.V. "HACI RESIT KALKAVAN" amounting to 19 days 10 minutes at US $ 7,000 per day/pro-rata equating to US $ 138.590.28 together with interest thereon at a rate of 7% (Seven percent) per annum from 30th September 1994 to the date of this Award.

We do further award that Sellers claim for the return of US $ 42,000 fails."

9. It appears that following the commencement of arbitration proceedings, the sellers contested the jurisdiction of the Arbitral Tribunal, GAFTA. The sellers filed a petition in Delhi High Court for a declaration that there was no arbitration agreement between the parties. They also prayed for an order restraining the Arbitral Tribunal, GAFTA from proceeding with the arbitration initiated by the buyers. Although initially interim order was granted but the petition was finally dismissed by Delhi High Court. The special leave petition from that order was dismissed by this Court. In the meanwhile, the Arbitral Tribunal, GAFTA had passed an interim award on 16.10.1995 holding, inter-alia, that the arbitration claim was properly made and it had jurisdiction to decide both the preliminary and substantive issues. On 05.02.1997, buyers made a separate claim for arbitration for sellers' alleged breach of the arbitration agreement in bringing legal proceedings in India concerning the first dispute before it had been determined under the GAFTA Rules. As regards this claim also, the Arbitral Tribunal, GAFTA was constituted and an award No. 12159 dated 04.12.1997 came to be passed by the Arbitral Tribunal, GAFTA.

10. From the above two awards, namely, award no.

11715A and award no. 12159, the two appeals being appeal award no. 3782 and appeal award no. 3783 were filed by the sellers before the Board of Appeal. The Board of Appeal disposed of appeal award no. 3782 (arising out of award No. 11715A) on 21.09.1998 and passed the award in the following terms:

"We do hereby award that Sellers shall forthwith pay to Buyers the sum of US$ 1,023,750.00 (one million, twenty three thousand seven hundred and fifty United States Dollars) being the difference in value of US$ 48.75 per tonne between the goods supplied and goods of the contractual description calculated on 21,000 tonnes, together with interest thereon at 7% (Seven per centum) per annum from 24th August, 1994 to the date of this Award.

We further award that Sellers shall forthwith pay to Buyers the sum of US $ 138,590.28 (one hundred and thirty eight thousand five hundred and ninety United States Dollars and twenty eight cents), being demurrage incurred at load, together with interest thereon at 7% (seven per centum) per annum from 30th September 1994 to the date of this Award.

We further award that Buyers' claim for consequential damages fails.

We further award that Sellers shall forthwith pay to Buyers the sum of £ 4,340.00 (four thousand three hundred and forty pounds sterling only), being the fees and expenses of Arbitration 11715A.

We further award that Sellers shall forthwith pay to Buyers the sum of £ 1,750 (one thousand seven hundred and fifty pounds only), being the costs and expenses of Buyers' Representative in preparing and presenting this case."

11. Appeal award no. 3783 (aris

12159) was disposed of also on the same day by the following award:

> "We do hereby award that sellers shall forthwith pay to Buyers as part of their damages the sum of £ 1,762.90 (one thousand seven hundred and sixty two pounds and ninety pence), being the reasonable charges and disbursements of Middleton Potts incurred in considering and responding to the proceedings taken by Sellers in India.
>
> We further award that Sellers shall pay to Buyers as the balance of their damages the sum of £ 15,924.00 (fifteen thousand nine hundred and twenty four pounds), being the total of O.P. Khaitan's four invoices nos. ATP/804 of 1995/6, ATP/206 of 1996/7, ATP/286 of 1996/7 and ATP/767 of 1996/7, or such lesser sum as shall be agreed by the parties or assessed by an appropriate officer or person in India, in either Indian rupees or sterling as being the reasonable fees, expenses, etc. incurred in considering and responding to the proceedings taken by Sellers in India. But we reserve to ourselves the right to assess these fees, expenses, etc. upon application of one or both of the parties, in the event that the parties are neither able to agree them, nor able to agree upon an appropriate officer or person in India to assess them.
>
> We further award that Sellers shall forthwith pay to Buyers the costs and expenses of the first tier arbitration no. 12159 in the amount of £2,190.00 (two thousand one hundred and ninety pounds) together with £ 85.00 (eighty five pounds), being the fee for appointment of an arbitrator on Sellers' behalf.
>
> We further award that Sellers shall forthwith pay to Buyers the sum of £ 500 (five hundred pounds only) being the costs and expenses of Buyers' Representative in preparing and presenting this case."

12. The sellers challenged the appeal award no. 3782 in the High Court of Justice at London. The appeal was dismissed on 21.12.1998. The sellers did not challenge the award passed by the Board of Appeal in appeal award no. 3783. Both awards, thus, have attained finality.

13. It was then that buyers instituted a suit in the Delhi High Court for enforcement of the awards both dated 21.09.1998 passed by the Board of Appeal in appeal award no. 3782 and appeal award no. 3783. The sellers raised diverse objections to the enforcement of the above awards.

14. The appellant, Shri Lal Mahal Limited, is successor in interest of the sellers while the respondent Progetto Grano SPA is the successor in interest of buyers. When the proceedings were pending before the Delhi High Court, the substitution in the proceedings took place. This is how the parties are now described in the appeal. For the sake of convenience, we shall continue to refer the appellant as 'sellers' and the respondent as 'buyers'.

15. Inter alia, the submission of the sellers before the High Court was that the appeal awards passed by the Board of Appeal which are sought to be enforced are contrary to the public policy of India inasmuch as they are contrary to the express provisions of the contract entered into between the parties. The sellers submitted before the Delhi High Court that the Board of Appeal erred in accepting the test report by S.G.S. Geneva whereas under the contract, it was the test report of S.G.S.India that was material. The goods in question were inspected at the port of discharge in the absence of the sellers. In terms of the contract between the parties, the inspection certificate was given by S.G.S. India which was nominated by the buyers themselves. There was no requirement for any inspection at the point of discharge of the consignment. Responsibility of the sellers ceased after the said obligation was fulfilled.

16. On the other hand, it was submitted on behalf of the buyers before Delhi High Court that the plea raised before the Board of Appeal on the certificate issued by the S.G.S. Geneva was a matter of appreciation of evidence and determination of question of fact which is beyond the scope of the proceedings under Section 48 of the 1996 Act. The buyers submitted that the sellers cannot be permitted to reopen questions of fact as already decided by the Board of Appeal which were affirmed by the High Court of Justice at London. Seeking enforcement of the awards of the Board of Appeal, it was submitted that there was nothing in the awards which could be said to be against the public policy of India.

17. Dealing with the submissions made on behalf of the parties, the High Court considered the objections of the sellers and recorded its conclusion as follows:

> "23. The above conclusion of the GAFTA Arbitral Tribunal is based on an appreciation of the evidence produced by the parties. The stark finding, confirmed by the reports of three independent analysts, two in Greece (one a private lab and another State lab) and the FMBRA in England, was that the consignment sent by the Defendant contained only 9% durum wheat. 90% was soft wheat. In the circumstances, the only conclusion possible was the one arrived at by the Arbitral Tribunal viz., "the wheat, described on the Certificate of Quality and Condition presented by Sellers as Durum wheat of Indian origin, was soft wheat." This conclusion has been affirmed by the impugned Appeal Award No. 3782 by the Board of Appeal, GAFTA. It has been further affirmed by the rejection by the High Court of Justice at London of the Defendant's petition challenging the Appeal Award No. 3782. The above conclusion cannot be held to be contrary to the terms of the contract or to the public policy of India. Further, this Court is not expected in enforcement proceedings, re-determine questions of fact. The grounds enumerated in Section 48 of the Act are meant to be construed narrowly and does not permit a review of the foreign award on merits."

18. Then in paragraph 25 of the impugned judgment, the High Court observed that there was no serious defence in opposition to the enforcement of two foreign awards. The High Court overruled the objections raised by the sellers to the enforcement of foreign awards and held that they were enforceable under Part II of the 1996 Act.

19. We have heard Mr. Rohinton F. Nariman, learned senior counsel for the appellant (sellers) and Mr. Jayant K. Mehta, learned counsel for the respondent (buyers) at quite some length.

20. Having regard to clause (b) of sub-section (2) of Section 48 of the 1996 Act, we shall immediately examine what is the scope of enquiry before the court in which foreign award, as defined in Section 44, is sought to be enforced. This has become necessary as on behalf of the appellant it was vehemently contended that in light of the two decisions of this Court in *Saw Pipes*[1] and *Phulchand Exports*,[2] the Court can refuse to enforce a foreign award if it is contrary to the contract between the parties and/or is patently illegal. It was argued by Mr. Rohinton F. Nariman, learned senior counsel for the appellant, that the expression "public policy of India" in Section 48(2)(b) is an expression of wider import than the expression "public policy" in Section 7(1)(b)(ii) of the Foreign Awards (Recognition and Enforcement) Act, 1961. The expansive construction given by this Court to the term "public policy of India" in *Saw Pipes*[1] must also apply to the use of the same term "public policy of India" in Section 48(2)(b).

---

1. *Oil and Natural Gas Corporation Limited. v. Saw Pipes Limited;* (2003) 5 SCC 705.
2. *Phulchand Exports Limited v. O.OO. Patriot* (

21. Mr. Jayant K. Mehta, learned counsel for the respondent, on the other hand, placed heavy reliance upon the decision of this Court in *Renusagar*[3] and submitted that what has been stated by this Court while interpreting Section 7(1)(b)(ii) of the Foreign Awards Act in that case is equally applicable to Section 48(2)(b) of the 1996 Act and the expression "public policy of India" in Section 48(2)(b) must receive narrow meaning than Section 34. *Saw Pipes1* never meant to give wider meaning to the expression, "public policy of India" insofar as Section 48 was concerned. According to Mr. Jayant K. Mehta, *Phulchand Exports2* does not hold that all that is found in paragraph 74 in *Saw Pipes*[1] is applicable to Section 48(2)(b). He argued that in any case both *Saw Pipes*[1] and *Phulchand Exports*[2] are decisions by a two-Judge Bench of this Court whereas *Renusagar* is a decision of three-Judge Bench and if there is any inconsistency in the decisions of this Court in *Saw Pipes*[1] and *Phulchand Exports*[2] on the one hand and *Renusagar*[3] on the other, *Renusagar*[3] must prevail as this is a decision by the larger Bench.

22. The three decisions of this Court in *Renusagar*[3], *Saw Pipes1* and *Phulchand Exports*[2] need a careful and close examination by us. We shall first deal with *Renusagar*[3]. It is not necessary to narrate in detail the facts in *Renusagar*[3] . Suffice it to say that Arbitral Tribunal, GAFTA in Paris passed an award in favour of General Electric Company (GEC) against Renusagar. GEC sought to enforce the award passed in its favour by filing an arbitration petition under Section 5 of the Foreign Awards Act in the Bombay High Court. Renusagar contested the proceedings for enforcement of the award filed by GEC in the Bombay High Court on diverse grounds. Inter alia, one of the objections raised by Renusagar was that the enforcement of the award was contrary to the public policy of India. The Single Judge of the Bombay High Court overruled the objections of Renusagar. It was held that the award was

3. *Renusagar Power Co. Limited. v. General Electric Company;* 1994 Supp (1) SCC 644.

enforceable and on that basis a decree in terms of the award was drawn. Renusagar filed an intra-court appeal but that was dismissed as not maintainable. It was from these orders that the matter reached this Court. On behalf of the parties, multifold arguments were made. A three-Judge Bench of this Court noticed diverse provisions, including Section 7(1)(b)(ii) of the Foreign Awards Act which provided that a foreign award may not be enforced if the court dealing with the case was satisfied that the enforcement of the award would be contrary to public policy. Of the many questions framed for determination, the two questions under consideration were; one, "Does Section 7(1)(b)(ii) of the Foreign Awards Act preclude enforcement of the award of the Arbitral Tribunal, GAFTA for the reason that the said award is contrary to the public policy of the State of New York?" and the other "what is meant by public policy in Section 7(1)(b)(ii) of the Foreign Awards Act?". This Court held that the words "public policy" used in Section 7(1)(b)(ii) of the Foreign Awards Act meant public policy of India. The argument that the recognition and enforcement of the award of the Arbitral Tribunal, GAFTA can be questioned on the ground that it is contrary to the public policy of the State of New York was negated. A clear and fine distinction was drawn by this Court while applying the rule of public policy between a matter governed by domestic laws and a matter involving conflict of laws. It has been held in unambiguous terms that the application of the doctrine of "public policy" in the field of conflict of laws is more limited than that in the domestic law and the courts are slower to invoke public policy in cases involving a foreign element than when purely municipal legal issues are involved. Explaining the concept of "public policy" vis-à-vis the enforcement of foreign awards in *Renusagar*[3] , this Court in paras 65 and 66 (pgs. 681-682) of the Report stated:

> 65. This would imply that the defence of public policy which is permissible under Section 7(1)(*b*)(*ii*) should be construed narrowly. In this context, it would also be of relevance to mention that under Ar[illegible] a

Convention Act of 1927, it is permissible to raise objection to the enforcement of arbitral award on the ground that the recognition or enforcement of the award is contrary to the public policy or to the principles of the law of the country in which it is sought to be relied upon. To the same effect is the provision in Section 7(1) of the Protocol & Convention Act of 1937 which requires that the enforcement of the foreign award must not be contrary to the public policy or the law of India. Since the expression "public policy" covers the field not covered by the words "and the law of India" which follow the said expression, contravention of law alone will not attract the bar of public policy and something more than contravention of law is required.

66. . . . . This would mean that "public policy" in Section 7(1)(*b*)(*ii*) has been used in a narrower sense and in order to attract the bar of public policy the enforcement of the award must invoke something more than the violation of the law of India. Since the Foreign Awards Act is concerned with recognition and enforcement of foreign awards which are governed by the principles of private international law, the expression "public policy" in Section 7(1)(*b*)(*ii*) of the Foreign Awards Act must necessarily be construed in the sense the doctrine of public policy is applied in the field of private international law. Applying the said criteria it must be held that the enforcement of a foreign award would be refused on the ground that it is contrary to public policy if such enforcement would be contrary to (*i*) fundamental policy of Indian law; or (*ii*) the interests of India; or (*iii*) justice or morality.

(Emphasis supplied by us)

23. In *Saw Pipes*[1], the ambit and scope of the court's jurisdiction under Section 34 of the 1996 Act was under consideration. The issue was whether the court would have jurisdiction under Section 34 to set aside an award passed by the Arbitral Tribunal, GAFTA which was patently illegal or in

contravention of the provisions of the 1996 Act or any other substantive law governing the parties or was against the terms of the contract. This Court considered the meaning that could be assigned to the phrase "public policy of India" occurring in Section 34(2)(b)(ii). Alive to the subtle distinction in the concept of 'enforcement of the award' and 'jurisdiction of the court in setting aside the award' and the decision of this Court in *Renusagar*[3], this Court held in *Saw Pipes*[1] that the term "public policy of India" in Section 34 was required to be interpreted in the context of the jurisdiction of the court where the validity of the award is challenged before it becomes final and executable in contradistinction to the enforcement of an award after it becomes final. Having that distinction in view, with regard to Section 34 this Court said that the expression "public policy of India" was required to be given a wider meaning. Accordingly, for the purposes of Section 34, this Court added a new category – patent illegality – for setting aside the award. While adding this category for setting aside the award on the ground of patent illegality, the Court clarified that illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against public policy. Award could also be set aside if it was so unfair and unreasonable that it shocks the conscience of the court.

24. From the discussion made by this Court in *Saw Pipes*[1] in paragraph 18* (pgs. 721-722), paragraph 22** (pgs. 723-

*18. Further, in *Renusagar Power Co. Ltd. v. General Electric Co.* this Court considerded Section 7(1) of the Arbitration (Protocol and Convention) Act, 1937 which *inter alia* provided that a foreign award may not be enforced under the said Act, if the court dealing with the case is satisfied that the enforcement of the award will be contrary to the public policy. After elaborate discussion, the Court arrived at the conclusion that public comprehended in Section 7(1)(b)(ii) of the Foreign Award (Recognition and Enforcement) Act, 1961 is the "public policy of India" and does not cover the public policy of any other counrty. For giving meaning to the term "public policy", the Court observed thus: (SCC p. 682, para) 66.....

**22. The aforesaid submission of the learned Senior Counsel requires to be accepted. From the judgments discussed above, it can be held that the term "public policy of India" is required to be [illegible]f

724) and paragraph 31*** (pgs. 727-728) of the Report, it can

the jurisdiction of the court where the validity of award is challenged before it becomes final and excutable. The concept of enforcement of the award after it becomes final is different and the jurisdiction of the court at that stage could be limited. Similar is the position with regard to the execution of a decree. It is settled law as well as it is provided under the Code of Civil Procedure that once the decree has attained finality, in an execution proceeding, it may be challenged only on limited grounds such as the decree being without jurisdiction or a nullity. But in a case where the judgment and decree is challenged before the appellate court or the court exercising revisional jurisdiction, the jurisdiction of such court would be wider. Therefore, in a case where the validity of award is challenged, there is no necessity of giving a narrower meaning to the term "public policy of India". On the contrary, wider meaning is required to be given so that the "patently illegal award" passed by the Arbitral Tribunal could be set aside. If narrow meaning as contended by the learned Senior Counsel Mr. Dave is given, some of the provisions of the Arbitration Act would become nugatory.Take for illustration a case wherein there is a specific provision in the contract that for delayed payment of the amount due and payable, no interest would be payable, still however, if the arbitrator has passed an award granting interest, it would be against the terms of the contract and thereby against the provision of Section 28(3) of the Act which specifically provides that "Arbitral Tribunal shall decide in accordance with the terms of the contract". Further, where there is a specific usage of the trade that if the payment is made beyond a period of one month, then the party would be required to pay the said amount with interest at the rate of 15 per cent. Despite the evidence being produced on record for such usage, if the arbitrator refuses to grant such interest on the ground of equity, such award would also be in violation of sub-sections (2) and (3) of Section 28. Section 28(2) specifically provides that the arbitrator shall decide ex aequo et bono (according to what is just and good) only if the parties have expressly authorised him to do so. Similarly, if the award is patently against the statutory provisions of substantive law which is in force in India or is passed without giving an opportunity of hearing to the parties as provided under Section 24 or without giving any reason in a case where parties have not agreed that no reasons are to be recorded, it would be against the statutory provisions. In all such cases, the award is required to be set aside on the ground of "patent illegality".

***31. Therefore, in our view, the phrase "public policy of India" used in Section 34 in context is required to be given a wider meaning. It can be stated that the concept of public policy connotes some matter which concerns public good and the public interest. What is for public good or in public interest or what would be injurious or harmful to the public good or public interest has varied from time to time. However, the award which is, on the face of it, patently in violation of statutory provisions cannot be said to be in public

be safely observed that while accepting the narrow meaning given to the expression "public policy" in *Renusagar*[3] in the matters of enforcement of foreign award, there was departure from the said meaning for the purposes of the jurisdiction of the Court in setting aside the award under Section 34.

25. In our view, what has been stated by this Court in *Renusagar3* with reference to Section 7(1)(b)(ii) of the Foreign Awards Act must equally apply to the ambit and scope of Section 48(2)(b) of the 1996 Act. In *Renusagar3* it has been expressly exposited that the expression "public policy" in Section 7(1)(b)(ii) of the Foreign Awards Act refers to the public policy of India. The expression "public policy" used in Section 7(1)(b)(ii) was held to mean "public policy of India". A distinction in the rule of public policy between a matter governed by the domestic law and a matter involving conflict of laws has been noticed in *Renusagar*[3]. For all this there is no reason why *Renusagar3* should not apply as regards the scope of inquiry under Section 48(2)(b). Following *Renusagar*[3], we think that for the purposes of Section 48(2)(b), the expression "public policy of India" must be given narrow meaning and the enforcement of foreign award would be refused on the ground that it is contrary to public policy of India if it is covered by one of the

interest. Such award/judgment/decision is likely to adversely affect the administration of justice. Hence, in our view in addition to narrower meaning given to the term "public policy" in Renusagar case it is required to be held that the award could be set aside if it is patently illegal. The result would be - award could be set aside if it is contrary to:

(a) fundamental policy of Indian law; or

(b) the interests of India; or

(c) justice or morality, or

(d) in addition, if it is patently illegal

Illegality must go to the root of the matter and if the illegality is of trivial nature it cannot be held that award is against the public policy. Award could also be set aside if it is so unfair and unreasonable that it shocks the conscience of the court. Such award is opposed to public policy and is required to be adjudged void.

three categories enumerated in *Renusagar*[3]. Although the same expression 'public policy of India' is used both in Section 34(2(b)(ii) and Section 48(2)(b) and the concept of 'public policy in India' is same in nature in both the Sections but, in our view, its application differs in degree insofar as these two Sections are concerned. The application of 'public policy of India' doctrine for the purposes of Section 48(2)(b) is more limited than the application of the same expression in respect of the domestic arbitral award.

26. We are not persuaded to accept the submission of Mr. Rohinton F. Nariman that the expression "public policy of India" in Section 48(2)(b) is an expression of wider import than the "public policy" in Section 7(1)(b)(ii) of the Foreign Awards Act. We have no hesitation in holding that *Renusagar3* must apply for the purposes of Section 48(2)(b) of the 1996 Act. Insofar as the proceeding for setting aside an award under Section 34 is concerned, the principles laid down in *Saw Pipes1* would govern the scope of such proceedings.

27. We accordingly hold that enforcement of foreign award would be refused under Section 48(2)(b) only if such enforcement would be contrary to (i) fundamental policy of Indian law; or (2) the interests of India; or (3) justice or morality. The wider meaning given to the expression "public policy of India" occurring in Section 34(2)(b)(ii) in *Saw Pipes1* is not applicable where objection is raised to the enforcement of the foreign award under Section 48(2)(b).

28. It is true that in *Phulchand Exports*[2], a two-Judge Bench of this Court speaking through one of us (R.M. Lodha, J.) accepted the submission made on behalf of the appellant therein that the meaning given to the expression "public policy of India" in Section 34 in *Saw Pipes*[1] must be applied to the same expression occurring in Section 48(2)(b) of the 1996 Act. However, in what we have discussed above it must be held that the statement in paragraph 16 of the Report that the expression

"public policy of India used in Section 48(2)(b) has to be given a wider meaning and the award could be set aside, if it is patently illegal" does not lay down correct law and is overruled.

29. Having regard to the above legal position relating to the scope of "public policy of India" under clause (b) of sub-section (2) of Section 48, we shall now proceed to consider the submissions of the parties.

30. Mr. Rohinton F. Nariman, learned senior counsel for the appellant, argued that the appeal awards by the Board of Appeal cannot be enforced on the touchstone that they are contrary to public policy of India. It is so as both the Arbitral Tribunal, GAFTA and the Board of Appeal have gone beyond the terms of the contract between the sellers and the buyers. Despite the contract being FOB contract between the parties which specifically sets out that the certificate of quality obtained at the load port from the buyers' nominated certifying agency, i.e., S.G.S. would be final and the certifying agency in fact issued such a certificate, the Arbitral Tribunal, GAFTA as well as the Board of Appeal relied upon evidence procured unilaterally by the buyers from other certifying agencies beyond the terms of the contract which was based on quality specifications of a forward contract which the buyers had signed with OAIC Algiers. In this regard, learned senior counsel referred to the certificate issued by S.G.S. India which confirmed that weight, quality and packing of the goods met the contractual specifications both in terms of description and quality. The Merchandise was found to be sound, loyal, merchantable, free from living insects, defects, diseases and contamination of any nature. However, the buyers appointed Crepin Analysis and Controls, Rouen for testing the sample of the goods for their forward contract with OAIC Algiers. The said agency tested the goods on a completely different set of parameters as stipulated under the contract. Crepin did not even test the goods for their contents of vitreous and moisture.

31. Learned senior counsel for the a[illegible]t

being an FOB contract the title of the goods and risk is passed on to the buyers the moment the goods were loaded on the ship. The goods were admittedly loaded on 08.08.1994 after which the risk fell on the buyers. In this regard reliance was placed on a decision of this Court in *D.K. Lall*[4].

32. Mr. Rohinton F. Nariman vehemently contended that once parties had agreed that certification by an inspecting agency would be final, it was not open to the Arbitral Tribunal, GAFTA as well as Board of Appeal, to go behind that certificate and disregard it even if the certificate was inaccurate (which was not the case). In this regard, reliance was placed on two judgments of the English courts, namely, *Agroexport*[5] and *Alfred C. Toepfer.*[6]. He submitted that House of Lords in *Gill & Duffus* has affirmed the decision in *Alfred C. Toepfer*[6]. It was, thus, submitted that the Arbitral Tribunal, GAFTA and the Board of Appeal having disregarded the finality of the certificate issued by S.G.S. India, the awards were plainly contrary to contract and, therefore, not enforceable in India. It was submitted on behalf of the appellant that it was not an issue in dispute and not the buyers' case before the Arbitral Tribunal, GAFTA and/or the Board of Appeal that the procedure adopted by SGS India was not in conformity with the contract. It was, therefore, not open to the Board of Appeal to render a finding which went beyond the scope of the buyers' very case. Accordingly, it was argued that the Board of Appeal dealt with the questions not referred to it and which were never in dispute and, therefore, award cannot be enforced because it is contrary to Section 48(1)(c) of the 1996 Act as well.

4. *Contship Container Lines Limited v. D.K. Lall and Others;* (2010) 4 SCC 256.

5. *Agroexport Enterprise D'etat Pour Le Commerce Exterieur v. N.V. Goorden Import CY. U.S.A;* (1956) 1 Q.B. 319.

6. *Alfred C. Toepfer v. Continental Grain Co* (1974) 1 Lloyds Law Reports 11.

7. *Gill & Duffus S.A. v. Berger & Co.Inc.* (1984) 1 Lloyd's Law Reports 227.

33. Learned senior counsel for the appellant highlighted that the real problem in the present case was not that S.G.S. India did not properly certify the goods and/or that they did not meet the contractual specifications provided for under the contract between the buyers and sellers but because the buyers were unable to use it for their forward contract with OAIC Algeria. This is further fortified from the fact that the buyers entered into a further contract with the sellers on 09.09.1994 for a much larger quantity of the goods with the very same specifications. He, thus, submitted that the judgment of the High Court should be set aside and the appeal awards must be held to be not enforceable in India.

34. Mr. Jayant K. Mehta, learned counsel for the respondent, on the other hand, supported the impugned judgment and submitted that the High Court was justified in dismissing the objections of the appellant as no ground was established or proved by the appellant on which enforcement of the foreign awards could be refused under Section 48 of the 1996 Act.

35. Learned counsel submitted that the FOB contract has no relevance to the liability of a seller to sell the contractual goods or to the quality of the goods sold. It is only relevant for determination of risk and liability during transportation of the goods which is not the issue in the present case. With reference to *D.K. Lall*[4] relied upon by the learned senior counsel for the appellant, it was submitted that *D.K. Lall*[4] was only on issue of insurance liability and in that context the nature of FOB contract had been discussed. *D.K. Lall*[4] does not concern with the issue of sellers' breach in selling uncontractual goods.

36. Mr. Jayant K. Mehta submitted that the findings of the Arbitral Tribunal, GAFTA, as upheld by the Board of Appeal, are that (a) the contract specified that the certification of quality is final at the time and place of loading; (b) as per the contract certification by S.G.S. India was to be conclusive based on sampling at the time and place of lo[illegible]ct

aspects were required to be considered whether S.G.S. India was the contractual party and, if yes, whether S.G.S. India certificate was in the contractual form. While it was found that S.G.S. India was the contractual agency, the sellers failed to establish that the S.G.S. India certificate was in contractual form. Buyers, on the other hand, did establish that the S.G.S. India certificate was not in contractual form, (d) S.G.S. India's certification was uncontractual as there were two fatal errors in the certification, firstly, it did not follow the contractual specified mode of sampling in that the contract required the result to be of an average sample taken at the port of loading, not the weighted average of pre-shipment and shipment, secondly, the analysis done by S.G.S. India was doubtful; (e) as the buyers held the sellers to be in breach on the grounds of defective sampling and certification by S.G.S. India, the buyers requested the sellers to attend at discharge for joint sampling which was not accepted by the sellers and (f) the method used for determining soft wheat used by S.G.S. India obviously produced very different results to the methods used by Crepin and other laboratories. On the balance of probabilities, the Arbitral Tribunal, GAFTA found and the Board of Appeal agreed that the wheat described in the certificate of quality and condition was soft wheat and, therefore, buyers were entitled to damages.

37. Learned counsel submitted that the findings recorded by the Arbitral Tribunal, GAFTA and the Board of Appeal were in the realm of interpretation of the contract and appreciation of the evidence which cannot be reopened by arguing that the foreign award is contrary to the contract and, therefore, its enforcement would offend public policy of India. About the decisions of the English courts in *Agroexport*[5] and *Alfred C. Toepfer*[6], learned counsel submitted that decisions of English courts cannot form part of public policy of India. This Court does not exercise appellate jurisdiction over the foreign awards and cannot be called upon to enquire as to whether foreign awards are contrary to the principles of English law. Learned counsel

submitted that in any case the judgments of the English courts in *Agroexport*[5] and *Alfred C. Toepfer*[6] do not apply to the fact situation of the present case. Learned counsel also submitted that the decision of House of Lords in *Gill & Duffus*[7] has no application to the present case.

38. Learned counsel for the respondent argued that once the sampling by S.G.S. India has been found to be uncontractual, that certificate cannot bind the buyers and, therefore, no error or illegality was committed by the Arbitral Tribunal, GAFTA, or the Board of Appeal to look into the certificate issued by Crepin. Learned counsel for the respondent thus, submitted that the Delhi High Court was justified in rejecting the objections of the appellant.

39. It is not necessary to advert to the findings recorded by the Arbitral Tribunal, GAFTA as what is sought to be enforced by the buyers is the two awards of the Board of Appeal.

40. The challenge to the enforceability of the foreign awards passed by the Board of Appeal is mainly laid by the sellers on the ground that the Board of Appeal has gone beyond the terms of the contract by ignoring the certificate of quality obtained at the load port from the buyers' nominated certifying agency, i.e., SGS India which was final under the contract. The Board of Appeal, while dealing with the question whether the SGS India certificate was issued by the contractual party and in contractual form, noticed the clause in the contract in respect of quality and condition and it held that SGS India was an acceptable certifying party under the contract. As regards the other part of that clause that provided, "certificate and quality showed in the certificate will be the result of an average samples taken jointly at port of loading by the representatives of the sellers and the buyers", the Board of Appeal recorded its finding as follows:

"The SGS India certificate shows t k

place at the suppliers godowns inland, and representative samples taken. Sealed samples were inspected lotwise and the cargo meeting the contractual specifications was allowed to be bagged for dispatch to Kandla.

Continuous supervision of loading into the vessel was also carried out at the port. The samples drawn periodically were reduced and composite samples were sealed; one sealed sample of each lot was handed over to the supplier, one sealed sample of each lot was analysed by SGS and the remaining samples were retained by SGS for a period of three months unless and until instructions to the contrary were given.

The analysis section of the certificate states that "The above samples have been analysed and the weighted average Pre-shipment and Shipment results are as under:

We find that this procedure was not in conformity with the requirements of the Contract, which required the result to be of an average sample taken at port of loading, not the weighted average of pre-shipment and shipment samples. Accordingly the certificate is uncontractual and its results are not final.

In consequence the Board is obliged to evaluate all the evidence presented, including the evidence of the uncontractual SGS India certificate to decide whether or not the goods were of the contractual description, i.e. Durum wheat Indian origin."

(Emphasis supplied by us)

41. Thus, having held that SGS India was the contractual agency, the Board of Appeal further held that the sellers failed to establish that the SGS India certificate was in contractual form. Two fundamental flaws in the certification by SGS India were noted by the Board of Appeal, one, SGS India's certification did not follow the contractual specified mode of

sampling and the other, the analysis done by SGS India was doubtful. The Board of Appeal then sifted the documentary evidence let in by the parties and finally concluded that wheat loaded on the vessel Haci Resit Kalkavan was soft wheat and the sellers were in breach of the description condition of the contract.

42. It is pertinent to state that the sellers had challenged the award (no. 3782) passed by the Board of Appeal in the High Court of Justice at London. The three decisions; (i) *Agroexport5* by Queen's Bench Division, (ii) *Toepfer6* by Court of Appeal, and (iii) *Gill & Duffus7* by House of Lords, were holding the field at the time of consideration of sellers' appeal by the High Court of Justice at London. In *Agroexport5* , it has been held that an award founded on evidence of analysis made other than in accordance with contract terms cannot stand and deserves to be set aside as evidence relied upon was inadmissible. The Court of Appeal in *Toepfer6* has laid down that where seller and buyer have agreed that a certificate at loading as to the quality of goods shall be final and binding on them, the buyer will be precluded from recovering damages from the seller, even if, the person giving the certificate has been negligent in making it. *Toepfer6* has been approved by the House of Lords in *Gill & Duffus7*. The High Court of Justice at London can be assumed to have full knowledge of the legal position exposited in *Agroexport5* , *Toepfer6* and *Gill & Duffus7* yet it found no ground or justification for setting aside the award (no. 3782) passed by the Board of Appeal. If a ground supported by the decisions of that country was not good enough for setting aside the award by the court competent to do so, *a fortiori*, such ground can hardly be a good ground for refusing enforcement of the award. Accordingly, we are not persuaded to accept the submission of Mr. Rohinton F. Nariman that Delhi High Court ought to have refused to enforce the foreign awards as the Board of Appeal has wrongly rejected the certificate of quality obtained from the buyers' nominated certifying agency and taken into consideration inadmissible ev of

certificates obtained by the buyers' for the purposes of forwarding contract.

43. Moreover, Section 48 of the 1996 Act does not give an opportunity to have a 'second look' at the foreign award in the award - enforcement stage. The scope of inquiry under Section 48 does not permit review of the foreign award on merits. Procedural defects (like taking into consideration inadmissible evidence or ignoring/rejecting the evidence which may be of binding nature) in the course of foreign arbitration do not lead necessarily to excuse an award from enforcement on the ground of public policy.

44. In what we have discussed above, even if it be assumed that the Board of Appeal erred in relying upon the report obtained by buyers from Crepin which was inconsistent with the terms on which the parties had contracted in the contract dated 12.05.1994 and wrongly rejected the report of the contractual agency, in our view, such errors would not bar the enforceability of the appeal awards passed by the Board of Appeal.

45. While considering the enforceability of foreign awards, the court does not exercise appellate jurisdiction over the foreign award nor does it enquire as to whether, while rendering foreign award, some error has been committed. Under Section 48(2)(b) the enforcement of a foreign award can be refused only if such enforcement is found to be contrary to (1) fundamental policy of Indian law; or (2) the interests of India; or (3) justice or morality. The objections raised by the appellant do not fall in any of these categories and, therefore, the foreign awards cannot be held to be contrary to public policy of India as contemplated under Section 48(2)(b).

46. The contention of the learned senior counsel for the appellant that the Board of Appeal dealt with the questions not referred to it and which were never in dispute and, therefore,

these awards cannot be enforced being contrary to Section 48(1)(c) is devoid of any substance and is noted to be rejected.

47. In the circumstances, we hold that appeal has no merit. It is dismissed with no order as to costs.

Bibhuti Bhushan Bose Appeal dismissed.

RANJIT SINGH

v.

STATE OF PUNJAB

(Criminal Appeal No. 1853 of 2009)

JULY 4, 2013

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

Penal Code, 1860 – ss. 302 and 307 r/w 149 – Murder – Attempt to murder – Unlawful assembly – Common object – Mob comprising several persons allegedly armed with guns and sharp-edged weapons started firing and also launched assault – Two persons died – Held: Prosecution story as narrated by PWs12 and 13 clearly implicated appellant 'B' and proved that he had fired from his gun – That deceased was hit by a shot fired from the gun by 'B', corroborated not only from ocular testimony of the witnesses but also by forensic evidence of the Ballistics Expert and seizures from the spot – 'B' rightly convicted by the Courts below and sentenced to imprisonment for life – But prosecution failed to prove that five other appellants i.e.'M', 'G', 'A', 'J' and 'R' were armed with guns when they came to the place of occurrence – Reasoning of the trial Court that the said five appellants were not carrying guns but carrying arms which they used to cause sharp edged and blunt injuries to the deceased, not sustainable – All that prosecution evidence may prove is that the said five appellants were also present on the spot – But, being present on the spot, by itself may not in the peculiar facts and circumstances of the case be enough to implicate them u/s.149 IPC – Commission of an overt act, is not an essential ingredient for attracting s.149 IPC but given the exaggerations and embellishments in the prosecution story, the said five appellants cannot be held guilty of murder with the help of s.149 IPC or even in regard to offence u/s.307 r/w s.149 IPC also – Arms Act – s.27.

The prosecution case was that a mob comprising several persons armed with guns and sharp-edged weapons like *Gandasi, Kirpan* and *dangs* came and started firing at the complainant party and also assaulted them. It was alleged that the assailants came to the spot to dispossess the complainant party from the land in their cultivating occupation and to prevent them by criminal force from harvesting the wheat crop that the later had grown in the same. Two persons from the complainant side, Amrik Singh and his son Vikramjit Singh, died because of firearm injuries. Shavinderjit Singh, another son of Amrik Singh and nephew of informant (PW11 – Ranjit Singh), received a gunshot injury.

Thirty one persons were arrayed as accused, of which one was acquitted while twenty one persons were convicted under Section 148 IPC for the offence of rioting. As regards the remaining nine accused, the trial Court convicted eight who were alleged to be armed with firearms under Sections 302 and 307 and the provisions of Arms Act sentencing them to life imprisonment for murder and imprisonment for a period of ten years for attempt to murder under Section 307 IPC. The ninth accused viz. Harbans Kaur wife of Mohinder Singh was convicted under Section 302 read with Section 149 IPC and sentenced to life imprisonment.

In the cross case registered on basis of the statement of Mohinder Singh, the trial Court held that even when the disputed plot of land was in possession of the accused in the cross case (Complainant party in the main case), yet they were not justified in using firearms to cause injuries to the opposite party. The trial Court accordingly convicted Shavinderjit Singh under Section 307 IPC, while Ramandeep Singh was found guilty under Section 307 read with Section 149 of the IPC. Zora Singh who was added as an ac

319 of the Cr.P.C. was convicted under Section 148 IPC while Ranjit Singh was given benefit of doubt and acquitted.

Both parties appealed to the High Court. By that time, Binder Singh, one of the nine convicts (from the accused side in the main case), had passed away. Insofar as the conviction and sentence of six other convicts, Amrik Singh, Rajinder Singh and Jaswinder Singh, Makhan Singh, Gurdial Singh and Balwinder Singh are concerned, the High Court held, the charges framed against them to have been proved and accordingly affirmed the order of conviction passed by the trial Court.

The appeals filed by the remaining two convicts Mohinder Singh and Harbans Kaur were allowed and they were acquitted. That order of acquittal was assailed before this Court in Criminal Appeal No.1853 of 2009 filed by Ranjit Singh.

The conviction of Shavinderjit Singh (from the complainant side in the main case) under Section 307 IPC was affirmed by the High Court. That order was challenged before this Court in Criminal Appeal No.1855 of 2009. Besides, Criminal Appeals No.17-18 of 2010 were filed before this Court by Amrik Singh, Rajinder Singh and Jaswinder Singh whereas Criminal Appeals No.2434-35 of 2009 were filed by Makhan Singh, Gurdial Singh and Balwinder Singh.

Disposing of all the appeals, the Court

HELD:1. Since Mohinder Singh passed away during the pendency of proceedings before this Court, and since counsel for the appellant- Ranjit Singh in Criminal Appeal No.1853 of 2009 made a statement on instructions that he does not propose to pursue the appeal against Harbans Kaur, Criminal Appeal No.1853 of 2009 shall have to be

dismissed as abated *qua* Mohinder Singh and as not pressed against Harbans Kaur. [Para 16] [649-A-B]

2. The prosecution story as narrated by PW12-Shavinderjit Singh and PW13-Ramandeep Singh clearly implicates Balwinder Singh and proves that he had fired from his gun. That Amrik Singh was hit by a shot fired from the gun by Balwinder Singh, gets support not only from ocular testimony of the witnesses but by the forensic evidence of the Ballistics Expert and the seizures from the spot. There is in that view no manner of doubt that Balwinder Singh has been rightly convicted by the two Courts below and sentenced to imprisonment for life. [Para 28] [656-E-G]

Amrita alias Amritlal v. State of MP **(2004) 12 SCC 224;** *Balaka Singh and Ors. v. State of Punjab* **(1975) 4 SCC 511: 1975 (0) Suppl. SCR 129** *Ganesh v. State of Karnataka* **2008 (11) SCALE 567;** *Sucha Singh and Anr. v. State of Punjab* **(2003) 7 SCC 643: 2003 (2) Suppl. SCR 35 and** *Ugar Ahir and Ors. v. The State of Bihar* **AIR 1965 SC 277 – referred to.**

3.1. Makhan Singh, Gurdial Singh, Amrik Singh, Jasvinder Singh and Rajinder Singh were accused of having come to the spot armed with guns and shot at the deceased Amrik Singh and Vikramjit Singh. The prosecution case is that these accused persons had freely used their weapons to kill Amrik Singh and Vikramjit Singh. However, except the depositions of PWs Shavinderjit Singh and Ramandeep Singh, there is no other evidence to prove that allegation. The guns, allegedly carried by these accused persons have also not been seized, nor is there any other independent corroborative evidence regarding the use of the guns such as recovery or seizure of the empty cartridges fired from the guns. That apart if these accused had also

carried and fired guns as alleged, the number of causalities on the complainant side would have been much higher and so would be the number of injuries on the victims of the assault. Superadded to all these is the fact that appellants Amrik Singh, Ranjinder Singh and Jaswinder Singh were not even challaned by the investigating officer. They were added as accused persons subsequently under Section 319 Cr.P.C. based on the exaggerated version of the prosecution witnesses about which the High Court has been rightly so critical. The High Court was it appears, aware of all these features, which render the prosecution case suspect, but in order to overcome the difficulty arising out of the absence of recovery of guns allegedly used by these appellants or the absence of any other evidence to support the theory of their use, the High Court has made out a new case in favour of the prosecution by holding that the appellants except Balwinder Singh were armed with sharp and blunt weapons used for causing injuries to the deceased and not guns as claimed by the witnesses examined at the trial. [Para 29] [656-G-H; 657-A-F]

3.2. The High Court was not correct in holding that while three persons viz. Mohinder Singh (deceased), Binder Singh (deceased) and Balwinder Singh were armed with guns, Makhan Singh, Gurdial Singh, Amrik Singh, Jasvinder Singh and Rajinder Singh were armed with other weapons. There is no evidence to support the finding that remaining accused/appellants were armed with other weapons. The High Court ostensibly held so, keeping in view the fact that apart from the gunshot injuries found on the bodies of the dead, there were other injuries caused by sharp and blunt weapons also. The presence of these injuries could not, however, be used to place other weapons in the hands of persons who were according to the prosecution case, carrying guns, which they used freely in the incident that saw two

persons dead. While the High Court was correct in accepting that three guns were carried by the three accused named above, it was wrong in attributing without any evidence to support that finding that injuries to the deceased Amrik Singh and Vikramjit Singh were caused by Makhan Singh, Gurdial Singh, Amrik Singh, Jasvinder Singh and Rajinder Singh with the help of weapons other than firearms. [Para 30] [658-H; 659-A-D]

4. The essence of Section 149 IPC is that a member of an unlawful assembly is responsible for the acts committed by any other member of the assembly in the same measure as the persons committing such an act himself is. The section thereby creates a vicarious or constructive liability for all those who share the common object of the unlawful assembly provided the acts constituting the offence are done in pursuit of the common object of the unlawful assembly or are acts which the members of the unlawful assembly knew to be likely to be committed in pursuance of that object. [Para 33] [660-A-C]

Baladin and Ors. v. State of U.P. **AIR 1956 SC 181;** *Masalti v. State of U.P.* **AIR 1965 SC 202: 1964 SCR 133 and** *Bajwa and Ors. v. State of U.P.* **(1973) 1 SCC 714: 1973 (3) SCR 571 – referred to.**

5. In the case at hand, the prosecution story is that while the complainant party was harvesting the crop in the fields in their possession, the accused including the appellants came to the spot and started firing upon them. In the first information report lodged by Ranjit Singh, no specific roles were given to the accused, but at the trial the witness attributed specific roles to each one of the appellants. The High Court found the improved version to be full of exaggerations and embellishments resulting in the acquittal of the majority of the accused in the case. [Para 37] [662-C-D]

6.1. That in a faction ridden village community, there is a tendency to implicate innocents also along with the guilty, especially when a large number of assailants are involved in the commission of an offence is a matter of common knowledge. Evidence, in such cases is bound to be partisan, but while the Courts cannot take an easy route to rejecting out of hand such evidence only on that ground, what ought to be done is to approach the depositions carefully and scrutinise the evidence more closely to avoid any miscarriage of justice. [Para 38] [662-G-H; 663-A]

6.2. In this case, apart from certain vague and general allegations that the members of the accused party fired at the complainant party, there is no other overt act attributed to them. The allegation that they were carrying guns having been held not proved, the question of their firing from such guns does not arise. So also the finding of the High Court that they were armed with other weapons being contrary to the prosecution case itself has been rejected by this Court. If that be so, all that the prosecution evidence may prove is that Makhan Singh, Gurdial Singh, Amrik Singh, Jasvinder Singh and Rajinder Singh were also present on the spot. But, being present on the spot, by itself may not in the peculiar facts and circumstances of the case be enough to implicate them under Section 149 of the IPC. It is true that commission of an overt act, is not an essential ingredient for attracting Section 149 of the IPC but given the exaggerations and embellishments in the prosecution story, it is unsafe to find the five appellants i.e. Amrik Singh, Rajinder Singh and Jaswinder Singh, Makhan Singh, Gurdial Singh to be guilty of murder with the help of Section 149 of the IPC. The same is true even in regard to an offence under Section 307 read with Section 149 of the IPC also. [Paras 39, 40] [663-B-E]

7. Shavinderjit Singh (PW-12) and Ramandeep Singh (PW-13) have attributed the injuries received by them to other accused persons who stand acquitted and whose acquittal has attained finality. According to Shavinderjit Singh (PW12), he was attacked by Sharanjit Singh @ Kalu who gave him a *dang* blow on the left arm while Charan Singh *alias* Charanu gave him a *kirpan* blow on his head. Shamsher Singh Mal gave him a *Gandasi* blow on his head and so did Pammi d/o Charan Singh with a *Gandasi* (sharp edge weapon). All these blows were according to the witness given when he tried to save Vikramjit Singh and Amrik Singh. The medical evidence led in the case, however, does not support the above version. According to Dr. Harminder Singh (PW3), all the injuries found on the body of Shavinderjit Singh were found to be simple in nature. The medical evidence does not support the allegation that a murderous assault was made on this witness. Even otherwise the witness has made an improvement in his deposition before the Court, as the version regarding the assault on him was not disclosed in the statement under Section 161 of the Cr.P.C. which omission has been duly confronted to him. [Para 41] [663-G-H; 664-A-C]

8. Similar is the case with the injuries allegedly received by Ranjit Singh (PW-11) which have also been described as simple by Dr. Harminder Singh. The statement of Ramandeep Singh (PW13) makes no qualitative addition to the prosecution case, in so far as an attempt on the lives of Ranjit Singh or Shavinderjit Singh is concerned. This witness does not give the details of the overt acts of the accused persons named by Shavinderjit Singh (PW12) in his deposition. The entire case of the prosecution regarding an attempt to murder, Shavinderjit Singh and Ranjit Singh is rendered suspect, with the kind of contradictions, improvements and embellishments noticed by the High[illegible]y

this Court. That being so, the conviction of appellants Amrik Singh, Rajinder Singh, Jaswinder Singh, Makhan Singh and Gurdial Singh cannot be sustained even under Section 307 read with Section 149 of the IPC, assuming that these appellants were members of an unlawful assembly and not innocent bystanders unaware of the alleged common object of the assembly. That holds good even in regard to the charges for offences under Section 324 read with Section 149 & 379 read with Section 149 of the IPC also. [Para 42] [664-D-H; 665-A]

9. It is also abundantly proved that the appellant Shavinderjit Singh was injured, no matter the injuries were found to be simple in nature. What is important is that in an atmosphere surcharged as it was in the instant case, firing from both sides, appear to have taken place, in which while Amrik Singh and his son Vikramjit Singh, were killed a shot fired by Shavinderjit Singh appears to have hit Harbans Kaur in the arm. [Para 44] [665-G-H; 666-A]

10. The version given by the injured witness Mohinder Singh and his wife Harbans Kaur regarding the cause for their injuries is supported by the medical evidence also. The High Court has held that the appellant could not claim the right of private defence because Mohinder Singh was not armed with a gun when appellant Shavinderjit Singh fired at him. There is no basis for that finding. If Mohinder Singh was not carrying his gun, it is difficult to see how the same travelled to the place of occurrence and was used for firing as many as six rounds from the same. Seizure of the empty cartridges and the Ballistic Expert's report establish the use of the gun belonging to Mohinder Singh. Though the view taken by the High Court regarding Mohinder Singh's acquittal is doubtful, but since Mohinder Singh is dead, the matter is allowed to rest at that. The Courts below were not, in the facts and circumstances of the case as also the

confusion and doubts that arise regarding the truthfulness of the version advanced by the prosecution against appellant Shavinderjit Singh, justified in convicting the appellant Shavinderjit Singh and sentencing him to imprisonment. [Para 45] [666-D-G]

11. In the result: (i) Criminal Appeal No.1853 of 2009 is dismissed as abated qua respondent Mohinder Singh and as not pressed qua respondent Harbans Kaur; (ii) Criminal Appeal No.1855 of 2009 filed by appellant Shavinderjit Singh is also allowed and the appellant acquitted of the charges framed against him giving him the benefit of doubt; (iii) Criminal Appeals No.17-18 of 2010 filed by Amrik Singh, Rajinder Singh and Jaswinder Singh are also allowed and the appellants acquitted of the charges framed against them giving them the benefit of doubt and (iv) Criminal Appeals No.2434-35 of 2009, filed by Makhan Singh, Gurdial Singh and Balwinder Singh are similarly allowed in so far as appellants Makhan Singh and Gurdial Singh are concerned but dismissed qua appellant-Balwinder Singh. [Para 46] [667-H; 667-A-D]

Case Law Reference:

(2004) 12 SCC 224	referred to	Para 20
1975 (0) Suppl. SCR 129	referred to	Para 21
2008 (11) SCALE 567	referred to	Para 22
2003 (2) Suppl. SCR 35	referred to	Para 23
AIR 1965 SC 277	referred to	Para 24
AIR 1956 SC 181	referred to	Para 34
1964 SCR 133	referred to	Para 35
1973 (3) SCR 571	referred to	Para 36

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1853 of 2009.

From the Judgment & Order dated 17.03.2009 of the High Court of Punjab & Haryana at Chandigarh in Crl. Appeal No. 585-DB/04.

WITH

Crl. A.N. 1855 of 2009, 17-18 of 2010 and 2434-2435 of 2009.

Rishi Malhotra, Kawaljit Kochar, Neelam Saini, Kusum Chaudhary, D.P. Singh, Shuchita Srivastav, Salil Bhattacharya, Rajkiran Vats, Sudarshan Singh Rawat, Sanjay Jain for the Appellant.

Kuldip Singh, Mohit Mudgal for the Respondents.

The Judgment of the Court was delivered by

T.S. THAKUR, J. 1. These appeals by special leave arise out of a common judgment and order dated 17th March, 2009, passed by a Division Bench of the High Court of Punjab and Haryana whereby Criminal Appeals No. 572-DB of 2004, 603-DB of 2004, 646-DB of 2004 and Crl. Revision No.2410 of 2004 have been dismissed while Crl. Appeals No.1362-SB of 2004, and 1388-SB of 2004 have been allowed. Criminal Appeals No.585-DB of 2004 and 1314-SB of 2004 have been similarly allowed by the High Court but only in part and to the extent indicated in the judgment under appeal.

2. The factual backdrop in which FIR No.412 dated 3rd May, 2001, under Sections 302, 307, 148 and 149 IPC and Sections 25, 27, 54 and 49 of the Arms Act came to be registered at Police Station Sadar, Patiala and a charge sheet based on the investigation conducted in the said case and in cross case No.SC No.58T/FTC dated 23rd April, 2004 came to be filed before the Additional Sessions Judge (Ad hoc), Patiala, have been set out at length by the Trial Court as also

the High Court in the judgments impugned before us. It is, therefore, unnecessary to recapitulate the same overagain except to the extent it is absolutely essential to do so for the disposal of these appeals.

3. Briefly stated, FIR No.412 dated 3rd May, 2001 was registered on the basis of a statement made by Ranjit Singh (PW 11) to the effect that on 3rd May, 2001 at about 4.30/5.00 A.M. the informant was along with his brother, Amrik Singh and nephews, Vikramjit Singh, Shavinderjit Singh, Ramandeep Singh and Gobind Singh harvesting the wheat crop grown by Amrik Singh over a parcel of land in their possession situate in village Chuharpur Kalan, District Patiala, when a mob comprising several persons named by the informant armed with guns and other weapons like Gandasi, Kirpan and dangs came from the village side shouting that they should not allow the complainant party to escape and should teach them a lesson. Those with guns in the mob started firing at the complainant party. Gunshot injuries sustained by Amrik Singh and his son Vikramjit Singh felled them to the ground. The informant's nephew Shavinderjit Singh also received a gunshot injury. The mob then assaulted the complainant party including Amrik Singh and his son Vikramjit Singh with sharp-edged weapons no matter the two had already collapsed to the ground because of the firearm injuries. They also attacked the informant and Shavinderjit Singh. The informant further stated that Ramandeep Singh and Gobind Singh who had concealed themselves behind the harvesting combine raised an alarm and cried for help whereupon the accused fled away from the spot with their respective weapons.

4. The informant's father and other people from the village in the meantime came to the spot hearing the noise and found Amrik Singh and his son Vikramjit Singh dead due to gunshot and other injuries received by them. They arranged vehicles to remove the informant and Shavinderjit Singh to Rajindra Hospital, Patiala for treatment leaving b

of Amrik Singh and Vikramjit Singh in the fields where the occurrence had taken place. According to the informant the complainant party were in possession of 2½ acres of land situated in the vicinity of the village. The girdawari/revenue entries regarding the land were also in the name of Amrik Singh the deceased. The assailants had come to the spot to dispossess the complainant party from the parcel of land in connivance with the Sarpanch of the village.

5. A rival version regarding the genesis of the incident was given by the accused party in the statement of Mohinder Singh recorded by SI Bhag Singh in the Rajindra Hospital at 2.00 p.m. on 4th May, 2001. According to that version the informant was on the night intervening 2nd/3rd May, 2001 sleeping along with his wife, Harbans Kaur on the roof of his house. At about 3.00 a.m. they heard the noise of a harvesting combine machine in the fields which had been taken on lease by the informant from the Gram Panchayat and in which he had grown wheat crop. The wheat crop was being harvested by the complainant party Zora Singh, Amrik Singh, Ranjit Singh sons of Gurdial Singh, Vikramjit Singh, Shavinderjit Singh sons of Amrik Singh and grandsons of Gurdial Singh besides 4-5 other persons with the help of a combine. According to the statement of Mohinder Singh the informant and his wife restrained the driver of the combine from harvesting the crop and questioned him as to why he was doing so. At this stage Amrik Singh the deceased who was carrying a gun fired at him. The gunshot hit the informant on his left leg whereupon his wife raised an alarm. But Shavinderjit Singh fired another gunshot which hit Harbans Kaur on her left arm. Gurdial Singh, Zora Singh, and Ranjit Singh raised a lalkara that Mohinder Singh and his wife should not be allowed to escape. Mohinder Singh at that stage fell unconscious on the ground whereupon Gurdial Singh and his family members forcibly harvested the crop in connivance with each other. Based on the above statement of Mohinder Singh a cross case was registered against Shavinderjit Singh, Zora Singh, Ramandeep Singh and Ranjit Singh under Sections 307,

447, 379, 511, 148 and 149 IPC and under Sections 25, 27, 54 and 59 of the Arms Act.

6. The police investigated both the versions in which process, the investigating officer collected blood-stained earth from near the dead bodies of Amrik Singh and Vikramjit Singh, besides two live cartridges and fourteen empty cartridges seized from the place of occurrence. One combine harvester along with its engine was also seized from the spot besides a kirpan along with its cover, one Toka, one Gandasa (Sharp edged cutting weapons), one Dang (lathi), one iron pipe and a stick.

7. Certain recoveries were made from the accused persons allegedly on the basis of disclosure statements made by them including a .12 bore DBBL Gun that was seized from the house of Balwinder Singh @ Bindi. Another .12 bore DBBL Gun was seized from accused Binder Singh. Similarly, DBBL Gun along with its licence was also seized from the house of Mohinder Singh, accused just as a .315 bore rifle was recovered from the house of Shavinderjit Singh.

8. Post-mortem examination of the dead bodies, ballistics report regarding the use of the weapons and the statements of the witnesses recorded under Section 161 Cr.P.C. completed the investigation and culminated in the filing of a charge sheet against twelve accused persons in the main case and framing of charges against them. In the course of trial, nineteen other persons were added as accused under Section 319 of the Cr.P.C. all of whom pleaded not guilty and claimed a trial.

9. A cross case was similarly filed against Shavinderjit Singh, Ramandeep Singh and Ranjit Singh, but in the course of trial the Court added Zora Singh, Gobind Singh and Gurdial Singh as accused persons under Section 319 Cr.P.C. Gobind Singh and Gurdial Singh having died during the trial, the proceedings abated qua them.

10. The Trial Court recorded the statements of sixteen prosecution witnesses in the main case including PW11-Ranjit Singh, PW12-Shavinderjit Singh who were injured eyewitnesses besides PW13-Ramandeep Singh who also claimed to be present on the spot but escaped any injury. Besides these witnesses the prosecution also examined PW14-O.P. Aggarwal, PW15-Inspector Sewa Singh and PW16-Bhupinder Singh Virk.

11. In the cross case twelve prosecution witnesses were examined including PW1-Mohinder Singh, PW3-Dr. Gian Singh, PW4-Ashok Kumar, PW5-Harbans Kaur (injured), PW7-Charanjot Singh Walia, PW8-Dr. Gurinder Singh Mann, PW9-Bhupinderjit Singh Virk and PW10-Bhag Singh.

12. Accused in both the cases pleaded innocence and false implication in their statements under Section 313 of the Cr.P.C. DW1-Dr. Ruby Oberoi, DW2-Dr. Gian Singh and DW3-Dr. Gurinder Singh Mann were examined in defence in the main case and DW1-Satish Grover, DW-2 Jang Singh, DW-3 Dr. O.P. Aggarwal, DW-4 Dr.Harminder Singh, DW-5 Ashok Kumar and DW-6 Shavinder Singh in the cross case.

13. The Trial Court appraised the evidence adduced before it and held that Gurdial Singh was in cultivating possession of the disputed parcel of land which became the proverbial bone of contention between the rival groups. The trial Court further found that the incident had taken place in two parts. In the first part, twenty two accused persons who were not armed with any firearms participated and committed an offence of rioting punishable under Section 148 of the IPC. One of the accused, Amarjit Kaur, Sarpanch had the right of private defence to protect the property of the Gram Panchayat and was accordingly acquitted. The rest of the twenty one accused persons found guilty under Section 148 were sentenced to imprisonment for a period of three years.

14. As regards the remaining nine accused, the trial Court

convicted eight who were alleged to be armed with firearms under Sections 302 and 307 and the provisions of Arms Act sentencing them to life imprisonment for murder and imprisonment for a period of ten years for attempt to murder under Section 307 of the IPC besides fine and sentence in default of payment thereof. The ninth accused viz. Harbans Kaur wife of Mohinder Singh was convicted under Section 302 read with Section 149 IPC and sentenced to life imprisonment. Appellants in the Criminal Appeals No.17-18 of 2010 and Criminal Appeals No. 2434-35 of 2009 were among those convicted for murder and attempt to murder and sentenced as indicated above.

15. In the cross case the trial Court held that even when the disputed plot of land was in possession of the accused in the cross case (Complainant party in the main case), yet they were not justified in using firearms to cause injuries to the opposite party. The trial Court accordingly convicted Shavinderjit Singh under Section 307 of the IPC, while Ramandeep Singh was found guilty under Section 307 read with Section 149 of the IPC. Zora Singh who was added as an accused under Section 319 of the Cr.P.C. was convicted under Section 148 IPC while Ranjit Singh was given benefit of doubt and acquitted.

16. Aggrieved by the judgment and order of conviction and sentence awarded by the trial Court, both the parties appealed to the High Court of Punjab and Haryana. The High Court, as noticed earlier, has dismissed some of those appeals while allowing some others in full or part as we shall presently indicate. Insofar as the conviction and sentence of six accused persons, appellants before us in Criminal Appeals No.17-18 of 2010 and 2434-2435 of 2009 are concerned, the High Court has held, the charges framed against them to have been proved and accordingly affirmed the order of conviction and sentence passed by the trial Court. The appeals filed by Mohinder Singh and Harbans Kaur against their conviction and sentence have been allowed and the said two pers e charges framed against them. That orde n

assailed in Criminal Appeal No.1853 of 2009 filed by Ranjit Singh. We may straightaway point out that since Mohinder Singh has passed away during the pendency of these proceedings, and since learned counsel for the appellant-Ranjit Singh in the said Criminal Appeal has made a statement on instructions that he does not propose to pursue the appeal against Harbans Kaur, Criminal Appeal No.1853 of 2009 shall have to be dismissed as abated qua Mohinder Singh and as not pressed against Harbans Kaur. This would also mean that qua the said two accused the proceedings stand concluded finally, leaving us with the Criminal Appeals filed on behalf of the six accused in the two sets of appeals filed by them and referred to above, and Criminal Appeal No.1855 of 2009, filed by Shavinderjit Singh against his conviction under Section 307 IPC read with Section 25 of the Arms Act, and the sentence of seven years imprisonment awarded by the High Court. The conviction of the rest of the accused in the two cases, having been set aside, by the High Court, the absence of any challenge to the acquittal has gained finality for the view taken qua them.

17. Coming then to Criminal Appeals No.17-18 of 2010 and 2434-2435 of 2009, we must at the threshold mention that the High Court has on a reappraisal of the evidence adduced at the trial come to the following conclusions:

(i) Amrik Singh and Vikramjit Singh, two victims who got killed in the incident, died because of haemorrhage and shock resulting from the gunshot and other injuries suffered by them. In the case of Amrik Singh, nine injuries were found on his body out of which injuries 1 to 3 were caused by firearms whereas injuries 4 to 9 were caused by sharp edged and blunt weapons. In the case of Vikramjit Singh, eleven injuries were found on his body out of which injuries 1 to 4 were caused by firearms, whereas injuries 5 to 9 and 11 were caused by sharp edged weapons, while injury no. 10 was caused by a blunt weapon.

(ii) From out of the complainant party in the main case, Ranjit Singh and Shavinderjit Singh were also injured. In so far as Ranjit Singh was concerned, PW3-Dr. Harminder Singh found six simple injuries on his person. In the case of Shavinderjit Singh there were five injuries on his body which were also found to be simple in nature. None of these injuries, it is obvious, were caused by firearms.

(iii) Two of the accused persons namely, Mohinder Singh and Harbans Kaur had also sustained gunshot injuries.

(iv) Neither the complainant party nor the accused have offered any explanation leave alone an acceptable one for the injuries received by the opposite side.

(v) The rival versions as to the genesis of the incident were both highly exaggerated and that both the parties had embellished the actual occurrence by adding embroideries to the same which made it difficult for the Court to believe the two versions in toto.

(vi) Despite such exaggerations and embellishments the case was not one in which the Court could not separate the grain from the chaff and discover the truth.

(vii) The incident had started in the early hours of 3rd May, 2001 when the complainant party comprising Amrik Singh, Vikramjit Singh, Shavinderjit Singh, Gurdial Singh besides four to five other persons started harvesting the crop with the help of a combine in the field. Mohinder Singh and Harbans Kaur appeared on the scene to object to the harvesting of the crop and in the altercation that followed, the deceased

Shavinderjit Singh fired shots at them with their guns. Two of these guns were recovered from the complainant party. Immediately after this incident, Amrik Singh, son of Gurdial Singh, his son Rajindra Singh @ Raju, Binder Singh and Balwinder Singh appear to have come on the scene with deadly weapons and caused injuries to Amrik Singh and Vikramjit Singh.

(viii) The High Court further held that all the eight persons were not armed with guns as stated by the prosecution witnesses. Some of them were armed with blunt weapons like Gandasi and Lathi. In the opinion of the High Court, in the latter part of the incident only seven persons participated, who caused injuries to the deceased as well as the two injured persons from the complainant party. The involvement of thirty one persons by the complainant side was an exaggeration, just as the allegation that all the thirty one accused were armed with deadly weapons was an exaggeration.

18. Learned counsel for the appellants in Criminal Appeals No.17-18 of 2010 and 2434-2435 of 2009, strenuously argued that since the High Court had recorded a finding that the versions given by both sides were dubious in nature with several exaggerations and embellishments, made to conceal the truth from the Court, the High Court was not justified in holding the appellants guilty. It was contended that the grain was so irretrievably glued to the chaff that any attempt to separate the two was bound to fail or lead to injustice as has happened in the instant case. It was also contended that the version given by the eye witnesses namely, Ranjit Singh (PW11), Shavinderjit Singh (PW12) and Ramandeep Singh (PW13) was not reliable and that in the absence of any reliable and cogent evidence as to what exactly transpired on the spot, it was unsafe to convict the accused, leave alone half a dozen of them.

19. On behalf of the respondents it was contended that embellishments and exaggerations do not prevent the Court from looking for and discovering the truth, no matter the Courts in this country have often noticed a tendency among the aggrieved party to use an incident involving commission of a crime for implicating as many members of the opposite side as possible. That is what appears to have happened in the instant case also, inasmuch as the prosecution alleged that as many as thirty people came on to the land with deadly weapons, including several firearms. The High Court was, therefore, perfectly justified in acquitting those falsely implicated but that did not prevent the High Court from closely scrutinising and appraising the evidence led in the case to discover the truth and to do justice keeping in view the fact that two persons had lost their lives in the incident.

20. We have given our anxious consideration to the submission made at the Bar. It is true that there is at times a tendency among people affected by a crime to spread the net wider and implicate even those who were not directly concerned with the incident. That tendency has been often deprecated by this Court. Dealing with a similar situation this Court in *Amrita alias Amritlal v. State of MP,* (2004) 12 SCC 224, observed:

> *"…The tendency of the closely related witnesses to involve all family members in the commission of offence, when there is severe enmity between the deceased and the accused does not mean that the entire testimony shall be rejected and, thus, acquitting even those who committed the crime. The extent to which the evidence is worthy of acceptance depends upon facts of each case. In such cases, it is the duty of the courts to separate the grain from the chaff where it is so possible and to convict the accused if called for on the basis of evidence despite the fact that the same witness also falsely implicated others. Mere acquittal o[illegible]d*

on the same evidence by itself does not lead to a conclusion that all deserve to he acquitted in case appropriate reasons have been given on appreciation of evidence both in regard to acquittal and conviction of the accused…."

21. To the same effect is the order of this Court in *Balaka Singh and Ors. v. State of Punjab,* (1975) 4 SCC 511, where this Court said:

"…the Court must make an attempt to separate grain from the chaff, the truth from the falsehood, yet this could only be possible when the truth is separable from the falsehood. Where the grain cannot be separated from the chaff because the grain and the chaff are so inextricably mixed up that in the process of separation the Court would have to reconstruct an absolutely new case for the prosecution by divorcing the essential details presented by the prosecution completely from the context and the background against which they are made, then this principle will not apply. "

22. In *Ganesh v. State of Karnataka,* 2008 (11) SCALE 567, this Court held that :

"… When the prosecution is able to establish its case by acceptable evidence, though in part, the accused can be convicted even if the co-accused have been acquitted on the ground that the evidence led was not sufficient to fasten guilt on them…"

23. In *Sucha Singh and Anr. v. State of Punjab,* (2003) 7 SCC 643, again this Court pointed out the approach to be adopted in situations where the Courts are dealing with partly true and partly false depositions. The following passage is apposite:

"…Where chaff can be separated from grain, it would be open to the Court to convict an accused

notwithstanding the fact that evidence has been found to be deficient to prove guilt of other accused persons. Falsity of particular material witness or material particular would not ruin it from the beginning to end. The maxim "falsus in uno falsus in omnibus" has no application in India and the witnesses cannot be branded as liar. The maxim "falsus in uno falsus in omnibus" has not received general acceptance nor has this maxim come to occupy the status of rule of law…"

24. Reference may also be made to the decision of this Court *Ugar Ahir and Ors. v. The State of Bihar,* AIR 1965 SC 277, where the Court once again reiterated that the maxim falsus in uno, falsus in omnibus is not a sound rule of law or practice. This Court stated:

"…The maxim falsus in uno, falsus in omnibus (false in one thing, false in everything) is neither a sound rule of law nor a rule of practice. Hardly one comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggerations, embroideries or embellishments. It is, therefore, the duty of the court to scrutinize the evidence carefully and, in terms of the felicitous metaphor, separate the grain from the chaff…"

25. It is trite that even when exaggerations and embellishments are galore the Courts can and indeed are expected to undertake a forensic exercise aimed at discovering the truth. The very fact that a large number of people were implicated in the incident in question who now stand acquitted by the High Court need not have deterred the High Court from appreciating the evidence on record and discarding what was not credible while accepting and relying upon what inspired confidence. That exercise was legitimate for otherwise the Court would be seen as abdicating and surrendering to distortions and/or embellishments whether made out of bitterness or any other reason including shoddy investigation by the agencies concerned. The ultimat at

all times remains 'discovery of the truth' and unless the Court is so disappointed with the difficulty besetting that exercise in a given case, as to make it impossible for it to pursue that object, it must make an endeavour in that direction. Inasmuch as the High Court made an attempt in that direction in the case at hand, it did not, in our opinion, commit any mistake. The question whether the conclusions drawn by the High Court as to the guilt of the appellants before us are reasonably supported by the evidence on record, is a different matter to which we must turn immediately.

26. It is important to note that out of thirty one persons arrayed as accused in the case, Mohinder Singh (since deceased), Binder Singh (since deceased) and Balwinder Singh the appellant before us were the only three charged with murder punishable under Sections 302, 307 IPC and Section 27 of the Arms Act. The remaining appellants namely Makhan Singh, Rajinder Singh, Amrik Singh and Jaswinder Singh were charged under Section 302 read with Section 149 IPC and Section 307 read with Section 149 IPC. The second and equally significant circumstance that needs to be kept in view is the fact that according to the FSL report, out of the empty cartridges seized from the place of occurrence, five cartridges had been fired from the gun recovered from Mohinder Singh (since deceased) while six other cartridges were fired from the weapon recovered from appellant-Balwinder Singh. No opinion was, however, given about any cartridges having been fired from the gun recovered from Binder Singh (since deceased). The High Court has acquitted Mohinder Singh (deceased) on the ground that he had fallen unconscious after he sustained a gunshot injury fired from the weapon held by the deceased Amrik Singh. It has on that basis rejected the prosecution case that Mohinder Singh had fired his gun to shoot at Amrik Singh or his son Vikramjit Singh.

27. We are not concerned with the correctness of view taken by the High Court regarding the complicity of Mohinder

Singh. We say so because the Mohinder Singh has passed away resulting in the abatement of the appeal filed by Ranjit Singh against his acquittal. Even so the acquittal may leave a question mark about the circumstances in which six empty cartridges fired, according to the FSL report from the gun of Mohinder Singh have been seized from the place of occurrence. It is nobody's case that Mohinder Singh's weapon was actually fired by somebody else to explain the presence of empty cartridges on the spot. The grounds on which Mohinder Singh was acquitted and the seizure of empty cartridges fired from his weapon appear to be in conflict with each other. Beyond that we do not think it necessary to say more at this stage.

28. That leaves us with the remaining two persons namely Binder Singh (since deceased) and Balwinder Singh who were also directly charged with murder under Section 302 IPC and who were found guilty by the Trial Court. By the time the matter travelled to the High Court the former had passed away. His involvement in the occurrence, therefore, is no longer under scrutiny, which leaves us with the case of the third accused Balwinder Singh who was charged with Section 302 IPC and from whose gun six cartridges are proved to have been fired. The prosecution story as narrated by PW12-Shavinderjit Singh and PW13-Ramandeep Singh clearly implicates Balwinder Singh and proves that he had fired from his gun. That Amrik Singh was hit by a shot fired from the gun by Balwinder Singh, thus gets support not only from ocular testimony of the witnesses named above but by the forensic evidence of the Ballistics Expert and the seizures from the spot. There is in that view no manner of doubt that Balwinder Singh has been rightly convicted by the two Courts below and sentenced to imprisonment for life.

29. That brings us to the remainder of the accused persons namely, Makhan Singh, Gurdial Singh, Amrik Singh, Jasvinder Singh and Rajinder Singh all of whom were accused of having come to the spot armed with guns and shot at the deceased Amrik Singh and Vikramjit Singh. The p[illegible]t

these accused persons had freely used their weapons to kill Amrik Singh and Vikramjit Singh. Except the depositions of PWs Shavinderjit Singh and Ramandeep Singh, there is no other evidence to prove that allegation. The deposition of Ranjit Singh (PW11) is of no assistance to the prosecution as he could not be cross examined by the defence on account of his poor medical condition because of which he was declared unfit to depose as a witness. The guns, allegedly carried by these accused persons have also not been seized, nor is there any other independent corroborative evidence regarding the use of the guns such as recovery or seizure of the empty cartridges fired from the guns. That apart if these accused had also carried and fired guns as alleged, the number of causalities on the complainant side would have been much higher and so would be the number of injuries on the victims of the assault. Superadded to all these is the fact that appellants Amrik Singh, Ranjinder Singh and Jaswinder Singh were not even challaned by the investigating officer. They were added as accused persons subsequently under Section 319 Cr.P.C. based on the exaggerated version of the prosecution witnesses about which the High Court has been rightly so critical. The High Court was it appears, aware of all these features, which render the prosecution case suspect, but in order to overcome the difficulty arising out of the absence of recovery of guns allegedly used by these appellants or the absence of any other evidence to support the theory of their use, the High Court has made out a new case in favour of the prosecution by holding that the appellants except Balwinder Singh were armed with sharp and blunt weapons used for causing injuries to the deceased and not guns as claimed by the witnesses examined at the trial. The High Court has observed:

> *"In the present case, the prosecution witnesses have exaggerated the version and appeared to have implicated all the family members and close relative of Mohinder Singh. When initially the FIR was registered, no specific arm was attributed to any particular person*

> *and only omnibus allegations were levelled, but while appearing n the court, each of the accused has been attributed a weapon. Ranjit Singh (complainant) in his statement before the police, on the basis of which the formal FIR was registered, levelled omnibus allegations regarding firing against the accused armed with fire arms. According to him, they fired shot hitting Amrik Singh, Vikramjit Singh and Shavinderjit Singh. Regarding other accused, who were armed with other weapons, he did not attribute any specific weapon or role to anyone. In the court while appearing as PW11, Ranjit Singh improved his version and attributed specific weapon to each of the accused. He improved his version to the effect that he along with Amrik Singh, Vikramjit Singh and Shavinderjit Singh received gun shot injuries, whereas as per the medical evidence neither Shavinderjit Singh or Ranjit Singh suffered any gun shot injuries. Further, Shavinderjit Singh while appearing in the Court as PW 12 as injured eye-witness, stated that Mohinder Singh and Binder Singh gave rifle shots on the heart of deceased Amrik Singh and Gurdial Singh gave rifle shot on the back of Vikramjit Sihgh. This witness has attributed specific injuries to both the deceased and injured by all the eight accused, though no such attribution was made in the initial statement before the police. Thus, in our opinion, out of nine persons initially named, who came on the spot with fire arm, only three persons were having the arms and the rest appear to have been armed with other weapons. Out of them, Mohinder Singh and Harbans Kaur were already present at the time of occurrence and they were lying unconscious due to the fire arm injuries received by them. In our opinion, twenty one persons from whom no arm was recovered, did not cause any injury either to the deceased or the injured or any person."*

30. The High Court was in our view g

that while three persons viz. Mohinder Singh (deceased), Binder Singh (deceased) and Balwinder Singh were armed with guns the rest of the appellants were armed with other weapons. There is no evidence to support the finding that remaining accused/appellants were armed with other weapons. The High Court has ostensibly held so, keeping in view the fact that apart from the gunshot injuries found on the bodies of the dead, there were other injuries caused by sharp and blunt weapons also. The presence of these injuries could not, however, be used to place other weapons in the hands of persons who were according to the prosecution case, carrying guns, which they used freely in the incident that saw two persons dead. Suffice it to say that while the High Court was correct in accepting that three guns were carried by the three accused named above, it was wrong in attributing without any evidence to support that finding that injuries to the deceased Amrik Singh and Vikramjit Singh were caused by the five appellants mentioned above with the help of weapons other than firearms.

31. The charge against the five appellants viz. Makhan Singh, Gurdial Singh, Jaswinder Singh, Rajinder Singh and Amrik Singh is one under Section 302 read with Section 149, 307 read with Section 149 and 324, 379 both read with Section 149 IPC.

32. The prosecution, therefore, attempts to implicate these appellants on the basis of their constructive liability arising out of them being members of an unlawful assembly. The object of the unlawful assembly according to the prosecution was to dispossess the complainant party from the land in their cultivating occupation and to prevent them by criminal force from harvesting the wheat crop that the later had grown in the same.

33. We may, before turning to the facts of the case, briefly refer to the legal position as regards the applicability of Section 149 of the IPC, which has fallen for interpretation on numerous occasions in the past before this Court and has been

comprehensively dealt with in several pronouncements. The essence of Section 149 IPC is that a member of an unlawful assembly is responsible for the acts committed by any other member of the assembly in the same measure as the persons committing such an act himself is. The section thereby creates a vicarious or constructive liability for all those who share the common object of the unlawful assembly provided the acts constituting the offence are done in pursuit of the common object of the unlawful assembly or are acts which the members of the unlawful assembly knew to be likely to be committed in pursuance of that object.

34. *Baladin and Ors. v. State of U.P.* AIR 1956 SC 181 was one of the early cases in which this Court dealt with Section 149 IPC. This Court held that mere presence in an assembly does not make a person a member of the unlawful assembly, unless it is shown that he had done or omitted to do something which would show that he was a member of the unlawful assembly or unless the case fell under Section 142 of the IPC. Resultantly, if all the members of a family and other residents of the village assembled at the place of occurrence all such persons could not be condemned ipso facto as members of the unlawful assembly. The prosecution in all such cases shall have to lead evidence to show that a particular accused had done some overt act to establish that he was a member of the unlawful assembly. This would require the case of each individual to be examined so that mere spectators who had just joined the assembly and who were unaware of its motive may not be branded as members of the unlawful assembly.

35. The observations made in *Baladin's* case (supra) were considered in *Masalti v. State of U.P.* AIR 1965 SC 202 where this Court explained that cases in which persons who are merely passive witnesses and had joined the assembly out of curiosity, without sharing the common object of the assembly stood on a different footing; otherwise i[illegible]o

prove that the person had committed some illegal act or was guilty of some omission in pursuance of the common object of the assembly before he could be fastened with the consequences of an act committed by any other member of the assembly with the help of Section 149 IPC. The following passage is apposite in this regard:

> *"…..The crucial question to determine in such a case is whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects as specified by s. 141. While determining this question, it becomes relevant to consider whether the assembly consisted of some persons who were merely passive witnesses and had joined the assembly as a matter of idle curiosity without intending to entertain the common object of the assembly. It is in that context that the observations made by this Court in the case of Baladin assume significance; otherwise, in law, it would not be correct to say that before a person is held to be a member of an unlawful assembly, it must be shown that he had committed some illegal overt act or had been guilty of some illegal omission in pursuance of the common object of the assembly. In fact, s. 149 makes it clear that if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence; and that emphatically brings out the principle that the punishment prescribed by s. 149 is in a sense vicarious and does not always proceed on the basis that the offence has been actually committed by every member of the unlawful assembly…."*
>
> (emphasis supplied)

36. Again in *Bajwa and Ors. v. State of U.P.* (1973) 1 SCC 714 this Court held that while in a faction ridden society there is always a tendency to implicate even the innocent with the guilty, the only safeguard against the risk of condemning the innocent with the guilty lies in insisting upon acceptable evidence which in some measure implicates the accused and satisfies the conscience of the Court.

37. Coming then to the case at hand, the prosecution story is that while the complainant party was harvesting the crop in the fields in their possession, the accused including the appellants herein, came to the spot and started firing upon them. In the first information report lodged by Ranjit Singh, no specific roles were given to the accused, but at the trial the witness attributed specific roles to each one of the appellants. The High Court found the improved version to be full of exaggerations and embellishments resulting in the acquittal of the majority of the accused in the case. We have in the earlier part of this judgment held that the prosecution has failed in its attempt to prove that the appellants except appellant Balwinder Singh were armed with guns when they came to the place of occurrence. We have also turned down the reasoning of the trial Court that while the appellants except Balwinder Singh were not carrying guns they were carrying arms which they used to cause sharp edged and blunt injuries to the deceased. The question then is whether the appellants except Balwinder Singh were members of an unlawful assembly as alleged by the prosecution or have been falsely implicated in that charge because of village factionalism.

38. That in a faction ridden village community, there is a tendency to implicate innocents also along with the guilty, especially when a large number of assailants are involved in the commission of an offence is a matter of common knowledge. Evidence, in such cases is bound to be partisan, but while the Courts cannot take an easy route to rejecting out of hand such evidence only on that gro[illegible]e

done is to approach the depositions carefully and scrutinise the evidence more closely to avoid any miscarriage of justice.

39. Keeping the above in view, if we examine the evidence in this case, we find that apart from certain vague and general allegations that the members of the accused party fired at the complainant party, there is no other overt act attributed to them. The allegation that they were carrying guns having been held not proved, the question of their firing from such guns does not arise. So also the finding of the High Court that they were armed with other weapons being contrary to the prosecution case itself has been rejected by us. If that be so, all that the prosecution evidence may prove is that these five appellants were also present on the spot. But, being present on the spot, by itself may not in the peculiar facts and circumstances of the case be enough to implicate them under Section 149 of the IPC. It is true that commission of an overt act, is not an essential ingredient for attracting Section 149 of the IPC but given the exaggerations and embellishments in the prosecution story as noticed by the Courts below and even by us, we consider it unsafe to find the five appellants named earlier to be guilty of murder with the help of Section 149 of the IPC.

40. The same is true even in regard to an offence under Section 307 read with Section 149 of the IPC also. That offence was sought to be alleged and proved against the five appellants on the premise that these appellants shared the common object of Mohinder Singh, Binder Singh and Balwinder Singh of causing death of Shavinderjit Singh by causing injuries to him with the help of deadly weapon like fire arms.

41. Shavinderjit Singh (PW-12) and Ramandeep Singh (PW-13) have attributed the injuries received by them to other accused persons who stand acquitted and whose acquittal has attained finality. What is important is that according to Shavinderjit Singh (PW12), he was attacked by Sharanjit Singh @ Kalu who gave him a dang blow on the left arm while Charan

Singh alias Charanu gave him a kirpan blow on his head. Shamsher Singh Mal gave him a Gandasi blow on his head and so did Pammi d/o Charan Singh with a Gandasi (sharp edge weapon). All these blows were according to the witness given when he tried to save Vikramjit Singh and Amrik Singh. The medical evidence led in the case, however, does not support the above version. According to Dr. Harminder Singh (PW3), all the injuries found on the body of Shavinderjit Singh were found to be simple in nature. The medical evidence does not support the allegation that a murderous assault was made on this witness. Even otherwise the witness has made an improvement in his deposition before the Court, as the version regarding the assault on him was not disclosed in the statement under Section 161 of the Cr.P.C. which omission has been duly confronted to him.

42. Similar is the case with the injuries allegedly received by Ranjit Singh (PW-11) which have also been described as simple by Dr. Harminder Singh. The statement of Ramandeep Singh (PW13) makes no qualitative addition to the prosecution case, in so far as an attempt on the lives of Ranjit Singh or Shavinderjit Singh is concerned. This witness does not give the details of the overt acts of the accused persons named by Shavinderjit Singh (PW12) in his deposition. He, on the contrary, shifts the focus to the appellants and accuses them of firing at Ranjit Singh and Shivinderjit Singh from the guns and rifles that they were allegedly carrying. Suffice it to say that the entire case of the prosecution regarding an attempt to murder, Shavinderjit Singh and Ranjit Singh is rendered suspect, with the kind of contradictions, improvements and embellishments noticed by the High Court and even by us. That being so, the conviction of appellants Amrik Singh, Rajinder Singh, Jaswinder Singh, Makhan Singh and Gurdial Singh cannot be sustained even under Section 307 read with Section 149 of the IPC, assuming that these appellants were members of an unlawful assembly and not innocent bystanders unaware of the alleged common object of the assembly. Tha n

regard to the charges for offences under Section 324 read with Section 149 & 379 read with Section 149 of the IPC also.

43. We are then left with Criminal Appeal No.1855 of 2009 filed by Shavinderjit Singh, against his conviction under Section 307 IPC read with Section 25 of the Arms Act. The High Court has, while holding the complainant party to be in possession of the land, held that the appellant Shavinderjit Singh was not justified in causing gunshot injuries to Mohinder Singh and Harbans Kaur. The trial Court held on an appraisal of the oral and documentary evidence adduced before it that the parcel of land in dispute was in the cultivating occupation of the complainant party in the main case. That being so, if the scene of crime is reconstructed, we find that, Mohinder Singh's gun is proved to have fired at least six cartridges, empties whereof were recovered from the spot. The Ballistic Expert's report leaves no manner of doubt in this regard. That being so, we have a situation in which both sides were armed with firearms. The prosecution may have in the main case alleged that as many as thirty one persons comprised the aggressor mob at least nine out of whom were armed with guns yet the High Court has accepted that version only in part and to the extent that at only three of the accused viz. Balwinder Singh, Binder Singh and Mohinder Singh were carrying guns. The High Court has while dealing with the main case observed:

> *"Thus, in our opinion, out of nine persons initially named, who came on the spot with fire arm, only three persons were having the arms and the rest appear to have been armed with other weapons."*

44. It is also abundantly proved that the appellant Shavinderjit Singh was injured, no matter the injuries were found to be simple in nature. What is important is that in an atmosphere surcharged as it was in the instant case, firing from both sides, appear to have taken place, in which while Amrik Singh and his son Vikramjit Singh, were killed a shot fired by Shavinderjit Singh appellant appears to have hit Harbans Kaur

in the arm. The statement of Dr. Gian Sigh (PW3) examined in this case, has proved that injury sustained by Harbans Kaur was a firearm injury. That witness has after describing the injuries on the lateral aspect of left arm middle, said:

> *"Injuries no.1 and 2 were subject to x-ray and surgical opinion. The probable time of duration was within 6 hours. The weapon used for these injuries was fire arm. Ex. P4 is the correct carbon of the MIR the original of which I have brought today in the court. It bears my signatures and is correct. Ex.P-4/A is the pictorial diagram showing the sea of injuries."*

45. The version given by the injured witness Mohinder Singh and his wife Harbans Kaur regarding the cause for their injuries is supported by the medical evidence also. The question, however, is whether the gunshot was fired by the appellant in private defence. The High Court has held that the appellant could not claim the right of private defence because Mohinder Singh was not armed with a gun when appellant Shavinderjit Singh fired at him. We see no basis for that finding. If Mohinder Singh was not carrying his gun, it is difficult to see how the same travelled to the place of occurrence and was used for firing as many as six rounds from the same. Seizure of the empty cartridges and the Ballistic Expert's report establish the use of the gun belonging to Mohinder Singh. We have already expressed our doubts about the view taken by the High Court regarding Mohinder Singh's acquittal, but since Mohinder Singh is dead, we allow the matter to rest at that. The least that can be said, however, is that the Courts below were not, in the facts and circumstances of the case as also the confusion and doubts that arise regarding the truthfulness of the version advanced by the prosecution against appellant Shavinderjit Singh, justified in convicting the appellant Shavinderjit Singh and sentencing him to imprisonment.

46. In the result:

(i) Criminal Appeal No.1853 of 2009 is dismissed as abated qua respondent Mohinder Singh and as not pressed qua respondent Harbans Kaur.

(ii) Criminal Appeal No.1855 of 2009 filed by appellant Shavinderjit Singh is also allowed and the appellant acquitted of the charges framed against him giving him the benefit of doubt.

(iii) Criminal Appeals No.17-18 of 2010 filed by Amrik Singh, Rajinder Singh and Jaswinder Singh are also allowed and the appellants acquitted of the charges framed against them giving them the benefit of doubt.

(iv) Criminal Appeals No.2434-35 of 2009, filed by Makhan Singh, Gurdial Singh and Balwinder Singh are similarly allowed in so far as appellants Makhan Singh and Gurdial Singh are concerned but dismissed qua appellant-Balwinder Singh.

47. Appellants Makhan Singh, Jaswinder Singh, Rajinder Singh, Amrik Singh and Gurdial Singh who are currently undergoing imprisonment shall be released from jail with immediate effect unless otherwise required in any other case. In so far as the appellant Shavinderjit Singh is concerned, he being on bail, the bail bonds shall stand discharged.

Bibhuti Bhushan Bose Appeals disposed of.

S. SUBRAMANIAM BALAJI
v.
THE GOVERNMENT OF TAMIL NADU & ORS.
(Civil Appeal No. 5130 of 2013)

JULY 5, 2013

[P. SATHASIVAM AND RANJAN GOGOI, JJ.]

Representation of the People Act, 1951 – s.123 – Elections – Promises made by political parties in their election manifesto – If amounts to 'corrupt practices' as per s.123 – Held: Promises in the election manifesto cannot be read into s.123 for declaring it to be a corrupt practice – Promises in the election manifesto do not constitute as a corrupt practice under the prevailing law – However, reality cannot be ruled out that distribution of freebies of any kind, undoubtedly, influences all people – It shakes the root of free and fair elections to a large degree – Considering that there is no enactment that directly governs the contents of the election manifesto, the Election Commission is directed to frame guidelines for the same in consultation with all the recognized political parties – Generally political parties release their election manifesto before the announcement of election date, in that scenario, strictly speaking, the Election Commission will not have the authority to regulate any act done before announcement of the date – Nevertheless, an exception can be made in this regard as the purpose of election manifesto is directly associated with the election process – Election Commission directed to take up this task as early as possible owing to its utmost importance – Also, there is need for a separate legislation to be passed by the legislature in this regard for governing the political parties – Constitution of India, 1950 – Art. 324.

Policy – Government policy – State Largesse – Scheme framed by State for free distribution of Colour Television Sets

(CCTVs) to eligible families in the State – Scheme challenged in writ petition – Whether the scheme was within the ambit of public purpose and if yes, was it violative of Art.14 of the Constitution – Held: The mandate of the Constitution provides various checks and balances before a Scheme can be implemented – Therefore, as long as a scheme comes within the realm of public purpose and monies withdrawn for implementation of the scheme by passing suitable Appropriation Bill, the Court has limited jurisdiction to interfere in such scheme – Judicial interference is permissible only when action of the government is unconstitutional or contrary to a statutory provision and not when such action is not wise or that the extent of expenditure is not for the good of the State – The scheme in question fell within the realm of fulfilling the Directive Principles of State Policy thereby falling within the scope of public purpose and was also in consonance with Art.14 of the Constitution – Scope for application of the principle laid down in Vishaka case did not arise as there was no legislative vacuum in the case on hand –Constitution of India, 1950 – Art. 14 – Representation of the People Act, 1951 – s.123.

Constitution of India, 1950 – Art. 148 – Comptroller and Auditor General of India (CAG) – Role and duties of – Held: CAG is a constitutional functionary appointed u/Art.148 of the Constitution – His main role is to audit the income and expenditure of the Governments, Government bodies and State-run corporations – CAG examines the propriety, legality and validity of all expenses incurred by the Government – Comptroller and Auditor General's (Duties, Powers etc.) Act, 1971.

Constitution of India, 1950 – Art. 148 – Comptroller and Auditor General of India (CAG) – Whether CAG has a duty to examine expenditures even before they are deployed – Held: The office of CAG exercises effective control over the government accounts and expenditure incurred on schemes

only after implementation of the same – Duty of the CAG arises only after the expenditure is incurred.

Respondent No.8-Dravida Munnetra Kazhagam (DMK), while releasing the election manifesto for the 2006 Assembly Elections, announced a Scheme of free distribution of Colour Television Sets (CTVs) to each and every household which did not possess the same, if the said party/its alliance were elected to power. This Scheme was challenged by the appellant, by filing writ petition before the High Court on the ground that the expenditure to be incurred by the State Government for its implementation out of the State Exchequer was unauthorized, impermissible and *ultra vires* the Constitutional mandate. The appellant filed complaint to the Election Commission of India seeking initiation of action in respect of the said promise under Section 123 of the Representation of People Act, 1951. The appellant also forwarded the complaint to the Chief Election Officer, Tamil Nadu.

The DMK and its political allies emerged victorious in the State Assembly Election held in the month of May, 2006. In pursuit of fulfilling the promise made in the election manifesto, a policy decision was taken by the then government to provide one 14" CTV to all eligible families in the State. It was further decided by the Government to implement the Scheme in a phased manner and a provision of Rs. 750 crores was made in the budget for implementing the same. Being aggrieved by the implementation of the Scheme, the appellant filed another complaint to the Chief Secretary and the Revenue Secretary pointing out the unconstitutionality of the Scheme. He also preferred Writ Petition before the High Court alleging the Scheme a corrupt practice to woo the gullible electorates with an eye on the vote bank. The High Court dismissed both the writ

appellant holding that the action of the Government in distributing free CTVs cannot be branded as a waste of exchequer.

In the instant appeal, the following questions arose for consideration in the present appeal.

(i) Whether the promises made by the political parties in the election manifesto would amount to 'corrupt practices' as per Section 123 of the Representation of People Act, 1951?

(ii) Whether the schemes under challenge are within the ambit of public purpose and if yes, is it violative of Article 14?

(iii) Whether the Supreme Court has inherent power to issue guidelines by application of the principle laid down in *Vishaka* case?

(iv) Whether the Comptroller and Auditor General of India has a duty to examine expenditures even before they are deployed?

(v) Whether the writ jurisdiction will lie against a political party?

Dismissing the appeal and the transferred cases, the Court

Issue No. 1

Whether the promises made by the political parties in their election manifestos would amount to 'corrupt practices' as per Section 123 of the Representation of the People Act, 1951?

1. The purpose of incorporating Section 123 of the RP Act is to ensure that elections are held in a free and fair manner. A perusal of sub-sections 1-8 of Section 123

of the Act makes it clear that it speaks only about a candidate or his agent or any other person. There is no word about political parties. [Paras 47, 49 and 50] [709-D; 715-G; 716-B]

2.1. If every kind of promise made in the election manifesto is declared as a corrupt practice, this will be flawed, since all promises made in the election manifesto are not necessarily promising freebies *per se,* for instance, the election manifesto of a political party promising to develop a particular locality if they come into power, or promising cent percent employment for all young graduates, or such other acts. Therefore, it will be misleading to construe that all promises in the election manifesto would amount to corrupt practice. Likewise, it is not within the domain of this Court to legislate what kind of promises can or cannot be made in the election manifesto. [Para 53] [716-H; 717-A-C]

2.2. Secondly, the manifesto of a political party is a statement of its policy. The question of implementing the manifesto arises only if the political party forms a Government. It is the promise of a future Government. It is not a promise of an individual candidate. Section 123 and other relevant provisions, upon their true construction, contemplate corrupt practice by individual candidate or his agent. Moreover, such corrupt practice is directly linked to his own election irrespective of the question whether his party forms a Government or not. The provisions of the RP Act clearly draw a distinction between an individual candidate put up by a political party and the political party as such. The provisions of the said Act prohibit an individual candidate from resorting to promises, which constitute a corrupt practice within the meaning of Section 123 of the RP Act. The provisions of the said Act place no fetter on the power of the political parties to make promises in the election manifesto. [Para 54] [717-C-F]

2.3. Thirdly, the provisions relating to corrupt practice are penal in nature and, therefore, the rule of strict interpretation must apply and hence, promises by a political party cannot constitute a corrupt practice on the part of the political party as the political party is not within the sweep of the provisions relating to corrupt practices. As the rule of strict interpretation applies, there is no scope for applying provisions relating to corrupt practice contained in the said Act to the manifesto of a political party. [Para 55] [717-G-H; 718-A]

2.4. Lastly, it is settled law that the courts cannot issue a direction for the purpose of laying down a new norm for characterizing any practice as corrupt practice. Such directions would amount to amending provisions of the said Act. The power to make law exclusively vests in the Union Parliament and as long as the field is covered by parliamentary enactments, no directions can be issued as sought by the appellant. As an outcome, it cannot be held that the promises made by the political parties in their election manifesto as corrupt practice under Section 123 of the RP Act. [Para 56] [718-B-C]

Patangrao Kadam vs. Prithviraj Sayajirao Yadav Deshmukh and Ors. **(2001) 3 SCC 594: 2001 (2) SCR 118 – relied on.**

Union of India & Anr. vs. International Trading Co. & Anr. **2003 (5) SCC 437: 2003 (1) Suppl. SCR 55;** *K.T. Moopil Nair vs. State of Kerala* **AIR 1961 SC 552: 1961 SCR 77;** *Bhim Singh vs. Union of India and Ors.* **(2010) 5 SCC 538: 2010 (6) SCR 218;** *Federal Bank Ltd. vs. Sagar Thomas and Others* **(2003) 10 SCC 733: 2003 (4) Suppl. SCR 121;** *Aruna Ramachandra Shanbaug vs. Union of India and Others* **(2011) 4 SCC 454: 2011 (4) SCR 1057;** *Union of India vs. Association for Democratic Reforms and Another* **(2002) 5 SCC 294: 2002 (3) SCR 696;** *People's Union for Civil Liberties (PUCL) and Anr. vs. Union of India and Anr.* **(2003)**

4 SCC 399: 2003 (2) SCR 1136; *M.J. Jacob vs. A. Narayanan and Others* **(2009) 14 SCC 318: 2009 (4) SCR 305;** *Baldev Singh Mann vs. Surjit Singh Dhiman* **(2009) 1 SCC 633: 2008 (16) SCR 540;** *Samatha vs. State of A.P. and Others* **(1997) 8 SCC 191: 1997 (2) Suppl. SCR 305;** *Keshavanand Bharati vs. State of Kerala* **(1973) 4 SCC 1461 and** *Deepak Theatre, Dhuri vs. State of Punjab and Others* **1992 Supp (1) SCC 684: 1991 (3) Suppl. SCR 242 – referred to.**

Coates vs. *Campbell and Others* **37 Minn. 498 ((USA);** *Roberts vs. Hopwood & Ors.* **1925 AC 578;** *Bromley London Borough Council, London vs. Greater Council & Anr.* **1982 (2) WLR 62;** *R vs. Secretary of State for Foreign Affairs* **(1995) 1 All ER 611;** *Richardson-Garnder vs. Ekykn* (1869) 19 LT 613 and *Kingston Cotton Mills Co. Re* **[1896] 2 Ch 279 – referred to.**

Issue No. 2

Whether the schemes under challenge are within the ambit of public purpose and if yes, is it violative of Article 14?

3.1. The concept of State largesse is essentially linked to Directive Principles of State Policy. Whether the State should frame a scheme, which directly gives benefits to improve the living standards or indirectly by increasing the means of livelihood, is for the State to decide and the role of the court is very limited in this regard. [Para 57] [718-D, E]

3.2. The concepts of livelihood and standard of living are bound to change in their content from time to time. It is factual that what was once considered to be a luxury has become a necessity in the present day. It is well settled that the concept of livelihood is no longer confined to bare physical surviva[illegible]d,

clothing and shelter but also now necessarily includes basic medicines, preliminary education, transport, etc. Hence, the State distrusting largesse in the form of distribution of colour TVs, laptops, etc. to eligible and deserving persons is directly related to the directive principles of the State policy. [Para 61] [743-B-C]

3.3. It cannot be said that giving of colour TVs, laptops, mixer-grinders etc. by the Government after adhering to due process is not an expense for public purpose. Judicial interference is permissible when the action of the government is unconstitutional and not when such action is not wise or that the extent of expenditure is not for the good of the State. All such questions must be debated and decided in the legislature and not in court. [Para 62] [743-D-E]

3.4. More so, the functioning of the Government is controlled by the Constitution, the laws of the land, the legislature and the Comptroller and Auditor General of India. [Para 63] [743-F]

3.5. There are various checks and balances within the mandate of the Constitution before a scheme can be implemented. As long as the schemes come within the realm of public purpose and monies for the schemes is withdrawn with appropriate Appropriation bill, the court has limited power to interfere in such schemes. [Para 68] [745-E-F]

3.6. The purpose of the schemes is to enforce the Directive principles of State Policy. In what way the State chooses to implement the Directive principles of State policy is a policy decision of the State and this Court cannot interfere with such decisions. Ordinarily, this Court cannot interfere with policy decisions of the government unless they are clearly in violation of some statutory or Constitutional provision or is shockingly

arbitrary in nature. In the given case no such circumstances prevail as envisaged for judicial enquiry; this Court is not persuaded to interfere with the policy decision. [Para 69] [745-G-H; 746-A, F]

3.7. The principle of not to treat unequals as equal has no applicability as far as State largesse is concerned. This principle applies only where the law or the State action imposes some burden on the citizen either financial or otherwise. Besides, while implementing the directive principles, it is for the Government concerned to take into account its financial resources and the need of the people. There cannot be a straight jacket formula. If certain benefits are restricted to a particular class that can obviously be on account of the limited resources of the State. All welfare measures cannot at one go be made available to all the citizens. The State can gradually extend the benefit and this principle has been recognized by this Court in several judgments. [Para 70] [746-H; 747-A-C]

Ekta Shakti Foundation vs. Government of NCT of Delhi **(2006) 10 SCC 337: 2006 (3) Suppl. SCR 631 – relied on.**

Issue No. 3

Whether this Court has inherent power to issue guidelines by application of Vishaka principle?

4. It is the stand of the appellant that there is legislative vacuum in the given case, hence, the judiciary is warranted to legislate in this regard to fill the gap by application of the principle in *Vishaka* case. In *Vishaka*, there was no legislation to punish the act of sexual harassment at work place, therefore, the judiciary noting the legislative vacuum framed temporary guidelines until the legislatures passed a bill in that regard. However, in the case at hand, there is a specia[illegible],

the Representation of People Act wherein Section 123 enumerates exhaustively a series of acts as "corrupt practice". Therefore, this is not a case of legislative vacuum where the judiciary can apply its inherent power to frame guidelines. [Para 71] [747-D-G]

Vishaka and Others vs. State of Rajasthan and Others **(1997) 6 SCC 241: 1997 (3) Suppl. SCR 404 – referred to.**

Issue No. 4:

Whether Comptroller and Auditor General of India has a duty to examine expenditures even before they are deployed?

5. The Comptroller and Auditor General of India is a constitutional functionary appointed under Article 148 of the Constitution. His main role is to audit the income and expenditure of the Governments, Government bodies and state-run corporations. The extent of his duties is listed out in the Comptroller and Auditor General's (Duties, Powers etc.) Act, 1971. The functioning of the Government is controlled by the Constitution, the laws of the land, the legislature and the Comptroller and Auditor General of India. CAG examines the propriety, legality and validity of all expenses incurred by the Government. The office of CAG exercises effective control over the government accounts and expenditure incurred on these schemes only after implementation of the same. As a result, the duty of the CAG will arise only after the expenditure has incurred. [Para 72] [747-H; 748-A-D]

Issue No. 5

Whether the writ jurisdiction will lie against a political party?

6. The respondents never raised any objection relating to the jurisdiction in the High Court or even in the

pleadings before this Court. It is only in the oral submissions that this issue has been raised. In the matters relating to pecuniary jurisdiction and territorial jurisdiction, the objection as to jurisdiction has to be taken at the earliest possible opportunity. But, this case relates to the jurisdiction over the subject matter. This is totally distinct and stands on a different footing. As such, the question of subject matter jurisdiction can be raised even in the appeal stage. However, as this petition is fit for dismissal *de hors* the jurisdiction issue, the jurisdiction issue is left open. [Paras 74, 75] [748-E, G-H; 749-A-B]

7. Summary:

(i) After examining and considering the parameters laid in Section 123 of RP Act, it is clear that the promises in the election manifesto cannot be read into Section 123 for declaring it to be a corrupt practice. Thus, promises in the election manifesto do not constitute as a corrupt practice under the prevailing law.

Prof. Ramchandra G. Kapse vs. Haribansh Ramakbal Singh **(1996) 1 SCC 206: 1995 (6) Suppl. SCR 471 – referred to.**

(ii) Further, it has been decided that the schemes challenged in this writ petition falls within the realm of fulfilling the Directive Principles of State Policy thereby falling within the scope of public purpose.

(iii) The mandate of the Constitution provides various checks and balances before a Scheme can be implemented. Therefore, as long as the schemes come within the realm of public purpose and monies withdrawn for the implementation of schemes by passing suitable Appropriation

limited jurisdiction to interfere in such schemes.

(iv) Judicial interference is permissible only when the action of the government is unconstitutional or contrary to a statutory provision and not when such action is not wise or that the extent of expenditure is not for the good of the State.

(v) It is also asserted that the schemes challenged under this petition are in consonance with Article 14 of the Constitution.

(vi) As there is no legislative vacuum in the case on hand, the scope for application of *Vishaka* principle does not arise.

(vii) The duty of the CAG will arise only after the expenditure has incurred.

(viii) Since this petition is fit for dismissal *dehors* the jurisdiction issue, the issue of jurisdiction is left open. [Para 76] [749-C-H; 750-A-C]

8. Directions:

8.1. Although, the law is that the promises in the election manifesto cannot be construed as 'corrupt practice' under Section 123 of RP Act, the reality cannot be ruled out that distribution of freebies of any kind, undoubtedly, influences all people. It shakes the root of free and fair elections to a large degree. The Election Commission through its counsel also conveyed the same feeling both in the affidavit and in the argument that the promise of such freebies at government cost disturbs the level playing field and vitiates the electoral process and thereby expressed willingness to implement any directions or decision of this Court in this regard. [Para 77] [750-D-E]

8.2. This Court has limited power to issue directions to the legislature to legislate on a particular issue. However, the Election Commission, in order to ensure level playing field between the contesting parties and candidates in elections and also in order to see that the purity of the election process does not get vitiated, as in past been issuing instructions under the Model Code of Conduct. The fountainhead of the powers under which the commission issues these orders is Article 324 of the Constitution, which mandates the commission to hold free and fair elections. It is equally imperative to acknowledge that the Election Commission cannot issue such orders if the subject matter of the order of commission is covered by a legislative measure. [Para 78] [750-F-H; 751-A]

8.3. Considering that there is no enactment that directly governs the contents of the election manifesto, the Election Commission is hereby directed to frame guidelines for the same in consultation with all the recognized political parties as when it had acted while framing guidelines for general conduct of the candidates, meetings, processions, polling day, party in power etc. In the similar way, a separate head for guidelines for election manifesto released by a political party can also be included in the Model Code of Conduct for the Guidance of Political Parties & Candidates. Generally political parties release their election manifesto before the announcement of election date, in that scenario, strictly speaking, the Election Commission will not have the authority to regulate any act which is done before the announcement of the date. Nevertheless, an exception can be made in this regard as the purpose of election manifesto is directly associated with the election process. [Para 79] [751-B-D]

8.4. The Election Commission is

this task as early as possible owing to its utmost importance. Also, there is the need for a separate legislation to be passed by the legislature in this regard for governing the political parties. [Para 80] [751-E]

Case Law Reference:

37 Minn. 498 (USA)	**referred to**	**Para 10**
1925 AC 578	**referred to**	**Para 10**
1982 (2) WLR 62	**referred to**	**Para 10**
(1995) 1 All ER 611	**referred to**	**Para 10**
2003 (1) Suppl. SCR 55	**referred to**	**Para 17**
1961 SCR 77	**referred to**	**Para 18**
(1869) 19 LT 613	**referred to**	**Para 20**
[1896] 2 Ch 279	**referred to**	**Para 27**
2010 (6) SCR 218	**referred to**	**Para 28**
2003 (4) Suppl. SCR 121	**referred to**	**Para 32**
1997 (3) Suppl. SCR 404	**referred to**	**Paras 34, 71**
2011 (4) SCR 1057	**referred to**	**Para 34**
2002 (3) SCR 696	**referred to**	**Para 35**
2003 (2) SCR 1136	**referred to**	**Para 35**
2009 (4) SCR 305	**referred to**	**Para 36**
2008 (16) SCR 540	**referred to**	**Para 37**
1997 (2) Suppl. SCR 305	**referred to**	**Para 39**
(1973) 4 SCC 1461	**referred to**	**Para 41**
1991 (3) Suppl. SCR 242	**referred to**	**Para 42**
2001 (2) SCR 118	**relied on**	**Para 51**
2006 (3) Suppl. SCR 631	**relied on**	**Para 69**

1995 (6) Suppl. SCR 471 referred to Para 76

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5130 of 2013.

From the Judgment & Order dated 25.06.2007 of the Court of Madras, Madurai Bench in W.P. No. 9013 of 2006.

WITH

T.C. No. 112 of 2011.

P.P. Malhotra, ASG, Arvind P. Datar, Shekhar Naphade, Abhay Kumar, Rupesh Kumar Pandey, Upendra Pratap Singh, Neetu Jain, Vineet Kumar Singh, Shubhangi Tuli, R. Rakesh Sharma, P. Krishnamoorthy, B. Balaji, Rachana Joshi Issar, D.K. Thakur, Sushma Suri, D.S. Mahra, Meenakshi Arora for the appearing parties.

The Judgment of the Court was delivered by

P. SATHASIVAM, J.

SLP (C) No. 21455 of 2008

1. Leave granted.

2. This appeal is directed against the final judgment and order dated 25.06.2007 passed by the Madurai Bench of the Madras High Court in Writ Petition (C) Nos. 9013 of 2006 and 1071 of 2007 whereby the High Court dismissed the petitions filed by the appellant herein.

3. **Brief Facts:**

(a) The case relates to distribution of free gifts by the political parties (popularly known as 'freebies'). The Dravida Munnetra Kazhagam (DMK)- Respondent No. 8 herein, while releasing the election manifesto for the Assembly Elections 2006, announced a Scheme of free

Television Sets (CTVs) to each and every household which did not possess the same, if the said party/its alliance were elected to power. The Party justified the decision of distribution of free CTVs for the purpose of providing recreation and general knowledge to the household women, more particularly, those living in the rural areas. In pursuance of the same, follow up actions by way of enlisting the households which did not have a CTV set and door to door identification and distribution of application forms were initiated.

(b) This Scheme was challenged by one S. Subramaniam Balaji-the appellant herein, by way of filing writ petition before the High Court on the ground that the expenditure to be incurred by the State Government for its implementation out of the State Exchequer is unauthorized, impermissible and *ultra vires* the Constitutional mandates. The appellant herein filed a complaint dated 24.04.2006 to the Election Commission of India seeking initiation of action in respect of the said promise under Section 123 of the Representation of People Act, 1951 (in short 'the RP Act'). The appellant herein also forwarded the complaint to the Chief Election Officer, Tamil Nadu.

(c) The DMK and its political allies emerged victorious in the State Assembly Election held in the month of May, 2006. In pursuit of fulfilling the promise made in the election manifesto, a policy decision was taken by the then government to provide one 14" CTV to all eligible families in the State. It was further decided by the Government to implement the Scheme in a phased manner and a provision of Rs. 750 crores was made in the budget for implementing the same. A Committee was constituted, headed by the then Chief Minister and eight other legislative members of various political parties, in order to ensure transparency in the matter of implementation of the Scheme.

(d) For implementing the first phase of the Scheme, the work of procurement of around 30,000 CTVs was entrusted to Electronic Corporation of Tamil Nadu Ltd. (ELCOT), a State

owned Corporation. The first phase of the Scheme was implemented on 15/17th September, 2006 by distributing around 30,000 CTVs to the identified families in all the districts of the State of Tamil Nadu.

(e) Being aggrieved by the implementation of the Scheme, the appellant herein filed another complaint to the Chief Secretary and the Revenue Secretary pointing out the unconstitutionality of the Scheme. He also preferred Writ Petition being Nos. 9013 of 2006 and 1071 of 2007 before the Madurai Bench of the High Court of Madras alleging the Scheme a corrupt practice to woo the gullible electorates with an eye on the vote bank. By order dated 25.06.2007, the High Court dismissed both the writ petitions filed by the appellant herein holding that the action of the Government in distributing free CTVs cannot be branded as a waste of exchequer. Being aggrieved, the appellant herein has preferred this appeal by way of special leave before this Court.

Transferred Case (C) No. 112 of 2011

(f) In the month of February 2011, pursuant to the elections to the Tamil Nadu State Assembly, the ruling party (DMK) announced its manifesto with a volley of free gifts. In the same manner, the opposite party-All India Anna Dravida Munnetra Kazhagam (AIADMK) and its alliance also announced its election manifesto with free gifts to equalize the gifts offered by the DMK Party and promised to distribute free of cost the following items, viz., grinders, mixies, electric fans, laptop computers, 4 gms gold thalis, Rs. 50,000/- cash for women's marriage, green houses, 20 kgs. rice to all ration card holders even to those above the poverty line and free cattle and sheep, if the said party/its alliance were elected to power during the Tamil Nadu Assembly Elections 2011.

(g) The very same Scheme was also challenged by the appellant herein on the ground that such promises by the parties are unauthorized, impermissible e

Constitutional mandates. The appellant herein also filed a complaint dated 29.03.2011 to the Election Commission of India seeking initiation of action in respect of the said Scheme under Section 123 of the RP Act.

(h) The AIADMK and its political allies won the State Assembly Elections held in 2011. In order to fulfill the promise made in the election manifesto, a policy decision was taken by the then government to distribute the gifts and, pursuant to the same, tenders were floated by the Civil Supplies Department for mixies, grinders, fans etc., as well as by ELCOT for lap top computers.

(i) On 06.06.2011, the appellant herein filed another complaint to the Comptroller and Auditor General of India and the Accountant General of Tamil Nadu (Respondent Nos. 3 and 4 therein respectively) pointing out the unconstitutionality of the Scheme and transfer of consolidated funds of the State for the same. In the meanwhile, the appellant herein preferred a Writ Petition being No. 17122 of 2011 before the High Court of Madras alleging the Scheme a corrupt practice and to restrain the government from in any way proceeding with the procurement, placement of tenders or making free distributions under various Schemes introduced to woo the voters. In view of the pendency of SLP (C) No. 21455 of 2008 in this Court relating to the similar issue, the appellant preferred a Transfer Petition (C) No. 947 of 2011 before this Court praying for the transfer of the said writ petition. By order dated 16.09.2011, this Court allowed the said petition and the same has been numbered as T.C No. 112 of 2011 and tagged with the abovesaid appeal.

4. Heard Mr. Arvind P. Datar, learned senior counsel for the appellant/petitioner, Mr. Shekhar Naphade, learned senior counsel for the State of Tamil Nadu, Mr. P.P. Malhotra, learned Additional Solicitor General for the Union of India and Ms. Meenakshi Arora, learned counsel for the Election Commission of India.

5. **Prayer/Relief Sought For:**

(a) When DMK started distribution of CTVs, the appellant/petitioner herein approached the High Court of Judicature at Madras, Bench at Madurai, by way of filing Writ Petition (C) No. 9013 of 2006 with a prayer to issue a writ of *mandamus* to forbear the respondents therein from incurring any expenditure out of the public exchequer for the purchase and distribution of colour Televisions within the State of Tamil Nadu.

(b) After 5 years, when AIADMK elected to power, pursuant to their election manifesto, they started distributing various freebies, which was also challenged by the very same person – the appellant/petitioner herein by filing a writ petition being No. 17122 of 2011 before the High Court of Judicature at Madras praying for issuance of a writ to declare the free distribution of (i) grinders (ii) mixies (iii) electric fans (iv) laptop computers (v) 4 gm. gold thalis (vi) free green houses (vii) free 20 kgs. rice to all ration card holders even to those above the poverty line and (viii) free cattle and sheep *ultra* vires the provisions of Articles 14, 41, 162, 266(3) and 282 of the Constitution of India and Section 123(1) of the RP Act.

Contentions by the Appellant:

6. Mr. Datar, learned senior counsel for the appellant submitted that a "gift", "offer" or "promise" by a candidate or his agent, to induce an elector to vote in his favour would amount to "bribery" under Section 123 of the RP Act. He further pointed out that to couch this offer/promise to give away a gift whose worth is estimable in money and that too from the consolidated fund of the State under the head "promise of publication" or "public policy" or "public good" is to defeat the purposes of the above Section viz., Section 123(1) of the RP Act. While elaborating his submissions, Mr. Datar raised his objections under the following heads:

(I) Article 282 of the Constitution s

defraying of funds from the Consolidated Fund of the State for "public purpose";

(II) The distributions made by the respondent-State is violative of Article 14 since there is no reasonable classification;

(III) Promises of free distribution of non-essential commodities in an election manifesto amounts to electoral bribe under Section 123 of the RP Act;

(IV) The Comptroller and Auditor General of India has a duty to examine expenditures even before they are deployed; and

(V) Safeguards must be built into schemes to ensure that the distribution is made for a public purpose and is not misused.

(I) Article 282 of the Constitution of India only permits defraying of funds from the Consolidated Fund of the State for "public purpose".

7. Regarding the first contention relating to Article 282 of the Constitution of India which only permits use of monies out of the Consolidated Fund of the State for public purpose, it is useful to refer the said Article which reads as under:

> "**282. Expenditure defrayable by the Union or a State out of its revenue –** The Union or a State may make any grants for any public purpose, notwithstanding that the purpose is not one with respect to which Parliament or the Legislature of the State, as the case may be, may make laws."

8. It is pointed out by Mr. Datar that under Article 266(3) of the Constitution, the monies out of the Consolidated Fund of India or the Consolidated Fund of the State can only be appropriated in accordance with law and for the purposes and in the manner provided by the Constitution. Under Article 162,

the extent of the executive power of the State is limited to the matters with respect to which the Legislature of the State has the power to make laws. Likewise, under Article 282, the Union or the States may make grants for "any public purpose", even if such public purpose is not one with respect to which the State or the Union may make laws. By referring these Articles, Mr. Datar submitted that monies out of the Consolidated Fund of the State can only be appropriated for the execution of laws made by the State, or for any other "public purpose".

9. It is further pointed out that the State raises funds through taxation which can be used by the State only to discharge its constitutional functions. Taxpayers' contribution cannot be used to fund State largesse. While the taxpayer has no right to demand a *quid pro quo* benefit for the taxes paid, he has a right to expect that the taxes paid will not be gifted to other persons without general public benefit. The main intention of an act done for a public purpose must be the public, and that the act would remotely, or in a collateral manner, benefit the local public is not relevant at all.

10. According to Mr. Datar, the most important constitutional mandate is that a "public purpose" cannot be the one that results in the creation of private assets. The exceptions that can be made to this overarching principle are the distributions that fulfill an essential need such as food, clothing, shelter, health or education. Even if certain distributions, such as the distribution of televisions might have some public benefit, it would not amount to public purpose since the dominant purpose of such a distribution is only the creation of private assets. Where the purposes of the expenditure are partly public and partly private, the Courts in the US have held that the entire act must fail. (vide *Coates vs. Campbell and Others,* 37 Minn. 498).

11. While statutory authorities can confer social or economic benefits on particular sections of the community, their power is limited by the principle that such

excessive or unreasonable. As Lord Atkinson stated in *Roberts vs. Hopwood & Ors.* 1925 AC 578, the State cannot act in furtherance of "eccentric principles of socialistic philanthropy". In view of the above, a reference was also made to *Bromley London Borough Council, London vs. Greater Council & Anr.* 1982 (2) WLR 62 and *R vs. Secretary of State for Foreign Affairs* (1995) 1 All ER 611.

12. In this context, it is pointed out that Article 41 of the Constitution of India states that the State, "within its economic capacity and development" can make effective provision for securing "public assistance" in certain special cases. Article 39(b) states that the State shall endeavour to ensure that the "material resources" of the community are so distributed as best to subserve the "common good". Both these articles imply that the goal of the Constitution, as evidenced by these Directive Principles, is to ensure that the State distributes its resources to secure "public assistance" and "common good", and must not create private assets.

13. It is also pointed out that the Constitutions of 17 States of the US explicitly prohibit the making of private gifts by the Government, and it is recognized even elsewhere in the US that the public funds cannot be used to make gifts to private persons.

14. It is further stated that the spending on free distribution must be weighed against the public benefits that ensue from it and only if the public benefits outweigh the same, can the spending be classified as being for a public purpose. Mr. Datar asserted that when the literacy rate in the State of Tamil Nadu is around 73% and there are 234 habitations across the State with no school access whatsoever, distribution of free consumer goods to the people having ration cards cannot be justified as "public purpose".

15. In addition to CTVs by the previous Government, the following free distributions have been promised by the Government of Tamil Nadu in the Budget Speech for the year

2011-2012:

"1. **60,000 green houses, at a cost of Rs.1.8 lakhs per house, totally amounting to Rs.1080 crores.** The green houses are being supplied to persons below the poverty line residing in rural areas. However, they are being supplied to persons who already own 300 sq. ft. of land.

Comment by the appellant:

The State is creating private assets through this distribution, when it can, instead build houses owned by the State which can be occupied by eligible persons.

2. **4 gms of gold for poor girls for thali, plus Rs.50000 cash for wedding purposes, totally amounting to Rs.514 crores.**

Comment by the appellant:

The State can achieve the same end of subsidizing marriages by providing institutions such as mandaps and temples that can be used for marriage. There are no safeguards in any scheme proposed by the State to ensure that Rs.50,000 given in cash to the eligible beneficiaries will be used for the marriage, and not diverted for other purposes.

3. **Free mixies, grinders and fans for 25 lakh families, totally amounting to Rs.1250 crores.**

Comment by the appellant:

The reasons given by the State, of alleviating women of "domestic drudgery" are frivolous and do not amount to a "public purpose". Mixies, grinders and fans are luxuries and cannot be freely distributed by the Government. The distribution is being made to a large section of persons without even ascertaining whether th n

these goods and whether they require state assistance to acquire these goods.

4. **9.12 lakh laptops to all class XII students in Tamil Nadu amounting to Rs. 912 crores.**

Comment by the appellant:

No "public purpose" is served by such distribution. The State is duty bound to create computer labs in schools and colleges and not distribute such expensive articles as gifts. Classification of students eligible for the laptops suffers from overclassification, violative of Article 14 of the Constitution. The classification is also violative of Article 14 as it omitted certain categories of students.

5. **Free cattle to poor families in certain rural areas, Rs.56 crores.** Distribution of milch cows is being done, according to the State's Government Order, to "boost the productivity of milk in the State."

Comment by the appellant:

It is stated that the State does run a diary, and the constitutionally valid method to boost milk production is to spend on these institutions and not to create private assets under these Government Orders.

6. **Free rice to 1.83 crore families under the PDS system, amounting to Rs.4500 crores.**

Comment by the appellant:

Rice is already being distributed in the State at Rs.2 per kilo. Under this scheme, rice is being distributed free of cost, as a pure populist measure. As per the State's own submissions, rice is priced at Rs.2 under the Anthyodaya Anna Yojana, which is being followed throughout the country.

16. Mr. Datar, learned senior counsel for the appellant pointed out that the Constitution of India does not permit free distribution of goods such as colour televisions, mixies, grinders, laptops since these are consumer goods and only benefit the persons to whom they are distributed and not the public at large. Public spending on these goods to the tune of Rs.9000 crores far outweighs any public benefit that might arise from such distributions. When the same ends can be efficiently achieved without the creation of private assets, such as the creation of Community Computer Centers instead of distributing laptops, or setting up of Community Televisions at the Panchayat level resorting to make large scale free distribution, it clearly violate Articles 162, 266(3) and 282 of the Constitution. It is further pointed out that the fact that CTVs and other schemes of previous Government were cancelled by the present Government shows that these were not for "public purpose" but only to serve the political objectives of a particular party.

II. The distributions made by the respondent fall foul of Article 14 since there is no reasonable classification

17. The right to equality under Article 14 of the Constitution requires that the State must make a reasonable classification based on intelligible differentia, and such classification must have a nexus with the object of the law. In making free distributions, the State, therefore, must show that it has identified the class of persons to whom such distributions are sought to be made using intelligible differentia, and that such differentia has a rational nexus with the object of the distribution. As held in *Union of India & Anr. vs. International Trading Co. & Anr.* 2003 (5) SCC 437, Article 14 applies to matters of government policy and such policy or action would be unconstitutional if it fails to satisfy the test of reasonableness.

18. This Court, in *K.T. Moopil Nair vs State of Kerala* AIR 1961 SC 552, held that a statute can it

groups together persons who are dissimilar. In that case, a flat tax of Rs. 2 per acre was levied on land without ascertaining the income earning potential of such land, which was struck down as unconstitutional.

19. In the case on hand, the colour televisions, mixies and grinders were being distributed to all persons having ration card. While the distribution of these goods is supposedly being made to help people who cannot afford these items, the State has not made any attempt to find out if such persons already own a colour television, a mixie or a grinder. Further, the differentia of a ration card has no rational nexus with the object of free distribution of the items since a ration card does not indicate the income of the family or whether they already own these goods.

20. Similarly, in another Scheme, the State has promised to distribute free laptops to all the students studying in the State Board. Again, this classification is arbitrary since there are numerous similarly placed students in Central Board schools who were being excluded by this Scheme. The Scheme also excludes commerce, law and medical college students and violates Article 14 by not providing intelligible differentia having a nexus with such distribution.

III. Promises of free distribution of non-essential commodities in election manifesto amounts to an electoral bribe under Section 123 of the RP Act.

21. Under Section 123(1)(A) of the RP Act, any "gift, offer or promise" by a candidate or his agent or by any other person, with the object of inducing a person to vote at an election amounts to "bribery", which is a "corrupt practice" under the said section. The key element in this section is that the voter must be influenced to vote in a particular manner. It has been held in *Richardson-Garnder vs. Ekykn,* (1869) 19 LT 613 that the making of charitable gifts on an extensive scale would lead to an inference that this was made to influence voters.

22. Mr. Datar pointed out that the plea that promises in the manifesto do not amount to bribery is completely baseless and finds no support in the plain words of the statute or in decided case laws. The statute very clearly includes a "promise" within its ambit, and an unconstitutional promise clearly falls foul of the language of Section 123 of the RP Act. Such 'freebies' are in form part of an election manifesto but in substance is a bribe or inducement under section 123. If such practices are permitted, then the manifesto does indirectly what a candidate cannot do directly.

23. It is further pointed out that the promise of distribution was made at the time of elections and not after, and instead of focusing on basic necessities, it was on free distributions which indicates that the promise of free colour televisions, grinders, mixies, laptops, gold etc., was only made as an electoral bribe to induce voters.

24. Mr. Datar further pointed out that the intent of Section 123 of the RP Act is to ensure that no candidate violates the level playing field between the candidates. Therefore, whether such promises are made by the political party or by the candidate himself is irrelevant. The manifesto, where such illegal promises are made, implore the voters to vote for that particular party.

IV. The Comptroller and Auditor General of India has a duty to examine expenditures even before they are deployed.

25. The Comptroller and Auditor General of India is a constitutional functionary appointed under Article 148 of the Constitution. His main role is to audit the income and expenditure of the Government, Government bodies and state-run corporations. The extent of his duties is listed out in the Comptroller and Auditor General's (Duties, Powers etc.) Act, 1971. Section 13 of this Act states that the CAG shall audit all the expenditure from the Consolidated [illegible]f

each State, and ascertain whether the moneys so spent were "legally available for and applicable to the service of purpose to which they have been applied or charged."

26. Section 15 of the Act states that where grants and loans have been given for any specific purpose to any authority or body other than a foreign state or an international organization, the CAG has the duty to scrutinize the procedure by which the loan or grant has been made.

27. The language of the provision suggests that the role of CAG is limited to review. However, this would rob the CAG of the power to ensure that large-scale unauthorized spending of public funds, such as these free distributions, does not take place. The Section must be given purposive interpretation that would further its intent to ensure that the government's spending is only on purposes that are legally allowable. The Chancery Division has held in *Kingston Cotton Mills Co. Re* [1896] 2 Ch 279 that an auditor is a "watchdog". To perform his role as a watchdog, the CAG must be vigilant, watch for any large-scale illegal expenditures, and act upon them immediately.

V. Safeguards must be built into schemes to ensure that the distribution is made for a public purpose, and is not misused.

28. The Members of Parliament Local Area Development Scheme (MPLADS) was challenged before this Court in *Bhim Singh vs. Union of India and Ors.,* (2010) 5 SCC 538 wherein the Constitution Bench of this Court upheld the scheme on the grounds that there were three levels of safeguards built into the scheme to ensure that the funds given to the Members of Parliament would not be misused. This Court held as under:

> "8) The court can strike down a law or scheme only on the basis of its vires or unconstitutionality but not on the basis of its viability. When a regime of accountability is available within the Scheme, it is not proper for the Court to strike it down, unless it violates any constitutional principle.
>
> 9) In the present Scheme, an accountability regime has been provided. Efforts must be made to make the regime more robust, but in its current form, cannot be struck down as unconstitutional."

29. The MPLAD Scheme clearly had prohibitions against spending on the creation of private assets and to make loans. It is pointed out that there is no scheme of accountability in the above mentioned promises for free distributions, hence, learned senior counsel prayed for necessary guidelines for proper utilization of public funds.

Contentions by the Respondents:

Contentions of the State of Tamil Nadu:

30. On the other hand, Mr. Shekhar Naphade, learned senior counsel for the State of Tamil Nadu while disputing the above claim submitted that the freebies, as promised in the election manifesto, would not come under the head "corrupt practices" and "electoral offences" in terms of the RP Act. He further submitted that in view of the mandates in the Directives Principles of State Policy in Part IV of the Constitution, it is incumbent on the State Government to promote the welfare of the people, who are below the poverty line or unable to come up without their support. In any event, according to learned senior counsel, for every promise formulated in the form of election manifesto, after coming to power, the same were being implemented by framing various schemes/guidelines/eligibility criteria etc. as well as with the approval of legislature. Thus, it cannot be construed as a waste of public money or prohibited by any Statute or Scheme.

31. While elaborating his submissions, Mr. Shekhar Naphade replied for the contentions made by the appellant under the following heads:

(I) Political Parties are not State, therefore, not amenable to writ jurisdiction of the High Court under Article 226 or writ jurisdiction of the Supreme Court under Article 32 of the Constitution of India or any other provisions of the Constitution. For corrupt practices, the remedy is Election Petition.

(II) Non-application of Vishaka principle and the difficulties in implementing the directions, if any, that may be issued by this Court.

(III) Promises of political parties do not constitute a corrupt practice.

(IV) The Schemes under challenge operate within the parameters of public purpose and Article 14 of the Constitution has no role to play.

(I) Political Parties are not State, therefore, not amenable to the writ jurisdiction of the High Court under Article 226 or the writ jurisdiction of the Hon'ble Supreme Court under Article 32 of the Constitution of India or any other provisions of the Constitution. For corrupt practices, the remedy is an Election Petition.

32. Learned senior counsel submitted that a political party is not a statutory Corporation. Similarly, a political party is also not a Government. It is also not an instrumentality or agency of the State. None of the parameters laid down by several judgments of this court for identifying an agency or instrumentality of the State apply to a political party and, therefore, no political party can be considered as a State or any agency or instrumentality of the State, hence, no writ can lie against a political party. [vide *Federal Bank Ltd. vs. Sagar Thomas and Others,* (2003) 10 SCC 733.

33. Further, learned senior counsel put forth that it is the

claim of the appellant that the promises like giving colour TVs, mixer-grinders, laptops etc. constitute a corrupt practice and, therefore, must vitiate an election. If the promise of the above nature is a corrupt practice, then the only remedy for the appellant is to file an Election Petition under Section 80, 80A read with other provisions of the RP Act. Under Section 81, such an Election Petition must be filed within 45 days from the date of the election. In the petition, the appellant must set out clearly and specifically the corrupt practice that he complains of and also set out as to how the returned candidate or his agent has committed the same or has connived at the same. An election Petition is to be tried on evidence and therefore, the writ petition is not a remedy.

(II) Non-application of Vishaka principle and the difficulties in implementing the directions, if any, that may be issued by this Court.

34. It was submitted that Entry 72 of List-I of the VIIth Schedule to the Constitution of India deals with election to Parliament and State Legislative Assemblies. In exercise of this power, the Parliament has enacted the RP Act. The Act, as originally enacted, did not contain any provision relating to corrupt practice as contained in Section 123. Section 123 defines and enumerates "corrupt practices" exhaustively. Section 123 came as a result of recommendations of the Select Committee of the Parliament on the basis of which the said Act was amended by substituting Chapter 1 in Part VII of the Act by Act No. 27 of 1956. The Legislature has dealt with the subject of corrupt practice and it is not a case of legislative vacuum. The field of corrupt practice is covered by the provisions of the said Act. Once the Legislature has dealt with a particular topic, then the *Vishakha* principle (*Vishaka and Others vs State of Rajasthan and Others* (1997) 6 SCC 241) has no applicability. This Court, in *Vishaka* (supra) and *Aruna Ramachandra Shanbaug vs. Union of India and Others,* (2011) 4 SCC 454 and other cases has

a given topic there is no law enacted by a competent legislature, then this Court has power to issue directions under its inherent powers under Article 142 and 141 of the Constitution and the said directions would operate and bind all concerned till the competent Legislature enacts a law on the concerned subject. Whether the present provisions of the said Act are adequate or not is a matter for the Parliament and the Parliament alone to decide. This Court, in exercise of powers under Article 141 and 142 or under any other provision of law, cannot issue a direction to include any practice not specified as corrupt practice under the Act as Corrupt Practice.

35. Further, learned senior counsel emphasized on the difficulties to implement the guidelines, if any, framed by this Court by referring to previous cases, viz., *Union of India vs. Association for Democratic Reforms and Another* (2002) 5 SCC 294 and *People's Union for Civil Liberties (PUCL) and Anr. vs. Union of India and Anr.* (2003) 4 SCC 399.

(III) Promises of political parties do not constitute a corrupt practice.

36. Learned senior counsel submitted that inasmuch as the words mentioned in Section 123 of the Act are clear and unambiguous, the same should be interpreted in the same manner as stated therein. Section 123 of the RP Act is a penal statute and ought to be strictly construed. It is settled principle of law that an allegation of "corrupt practice" must be strictly proved as a criminal charge and the principle of preponderance of probabilities would not apply to corrupt practices. In *M.J. Jacob vs. A. Narayanan and Others,* (2009) 14 SCC 318, it has been held by this Court in paras 13 and 15 as under:

> **"13.** It is well settled that in an election petition for proving an allegation of corrupt practice the standard of proof is like that in a criminal case. In other words, the allegation must be proved beyond reasonable doubt, and if two views

> are possible then the benefit of doubt should go to the elected candidate vide *Manmohan Kalia* v. *Yash*, vide SCC p. 502, para 7 in which it is stated:
>
> > "*7.* … It is now well settled by several authorities of this Court that an allegation of corrupt practice must be proved as strictly as a criminal charge and the principle of preponderance of probabilities would not apply to corrupt practices envisaged by the Act because if this test is not applied a very serious prejudice would be caused to the elected candidate who may be disqualified for a period of six years from fighting any election, which will adversely affect the electoral process."
>
> 15. In *Surinder Singh v. Hardial Singh*, vide SCC p. 104, para 23 it was observed:
>
> > "*23.* … It is thus clear beyond any doubt that for over 20 years the position has been uniformly accepted that charges of corrupt practice are to be equated with criminal charges and proof thereof would be not preponderance of probabilities as in civil action but proof beyond reasonable doubt as in criminal trials."
>
> 37. In *Baldev Singh Mann vs. Surjit Singh Dhiman,* (2009) 1 SCC 633, this Court observed as under:
>
> > "19. …. ….. The law is now well settled that the charge of a corrupt practice in an election petition should be proved almost like the criminal charge. The standard of proof is high and the burden of proof is on the election petitioner. Mere preponderance of probabilities is not enough, as may be the case in a civil dispute. Allegations of corrupt practices should be clear and precise and the charge should be proved to the hilt as in a criminal trial by clear, cogent and credible evidence.
>
> **21.** The Court in a number of ca e

charge of corrupt practice is quasi-criminal in character and it has to be proved as a criminal charge and proved in the court. In *Jeet Mohinder Singh case* the Court observed as under:

"(*ii*) Charge of corrupt practice is quasi-criminal in character. If substantiated it leads not only to the setting aside of the election of the successful candidate, but also of his being disqualified to contest an election for a certain period. It may entail extinction of a person's public life and political career. A trial of an election petition though within the realm of civil law is akin to trial on a criminal charge. Two consequences follow. Firstly, the allegations relating to commission of a corrupt practice should be sufficiently clear and stated precisely so as to afford the person charged a full opportunity of meeting the same. Secondly, the charges when put to issue should be proved by clear, cogent and credible evidence. To prove charge of corrupt practice a mere preponderance of probabilities would not be enough. There would be a presumption of innocence available to the person charged. The charge shall have to be proved to the hilt, the standard of proof being the same as in a criminal trial."

38. It is further submitted that the manifesto of the political party in question promises to achieve a social order removing economic inequalities, attain a social plane and attempts to reduce the degradations existing in our society where only a certain class of people are elevated and entitled to economic upliftment. The mandate for social and economic transformation requires that material resources or their ownership and control be so distributed as to subserve the common good.

39. In *Samatha vs. State of A.P. and Others,* (1997) 8 SCC 191, in paras 76 and 79, it has been held as under:

"76. Social and economic democracy is the foundation on

which political democracy would be a way of life in the Indian polity. Law as a social engineering is to create just social order removing inequalities in social and economic life, socio-economic disabilities with which poor people are languishing by providing positive opportunities and facilities to individuals and groups of people. Dr B.R. Ambedkar, in his closing speech in the Constituent Assembly on 25-11-1949, had lucidly elucidated thus:

"… What does social democracy mean? It means a way of life which recognises liberty, equality and fraternity as the principles of life. These principles of liberty, equality and fraternity are not to be treated as separate items in a trinity. They form a union of trinity in the sense that to divorce one from the other is to defeat the very purpose of democracy. Liberty cannot be divorced from equality, equality cannot be divorced from liberty. Nor can liberty and equality be divorced from fraternity. Without equality, liberty would produce the supremacy of the few over the many. Equality without liberty would kill individual initiative. Without fraternity, liberty and equality could not become a natural course of things. It would require a constable to enforce them. We must begin by acknowledging the fact that there is complete absence of two things in Indian society. One of these is equality. On the social plane, we have in India a society based on the principle of graded inequality which means elevation for some and degradation for others. On the economic plane, we have a society in which there are some who have immense wealth as against many who live in abject poverty. On the 26th January, 1950, we are going to enter into a life of contradictions. In politics we will have equality and in social and economic life we will have inequality. In politics we will be recognizing the principle of one man one vote and one vote one value. In our social and economic life, we shall, by reason of our social and economic structure, continue to deny the principle of one

man one value. How long shall we continue to live this life of contradictions? How long shall we continue to deny equality in our social and economic life? If we continue to deny it for long, we will do so only by putting our political democracy in peril. We must remove this contradiction at the earliest possible moment or else those who suffer from inequality will blow up the structure of political democracy which this Assembly has so laboriously built up."

(Vide B. Shiva Rao's *The Framing of India's Constitution*: *Select Documents*, Vol. IV, pp. 944-45.)

79. It is necessary to consider at this juncture the meaning of the word "socialism" envisaged in the Preamble of the Constitution. Establishment of the egalitarian social order through rule of law is the basic structure of the Constitution. The Fundamental Rights and the Directive Principles are the means, as two wheels of the chariot, to achieve the above object of democratic socialism. The word "socialist" used in the Preamble must be read from the goals Articles 14, 15, 16, 17, 21, 23, 38, 39, 46 and all other cognate articles seek to establish, i.e., to reduce inequalities in income and status and to provide equality of opportunity and facilities. Social justice enjoins the Court to uphold the Government's endeavour to remove economic inequalities, to provide decent standard of living to the poor and to protect the interests of the weaker sections of the society so as to assimilate all the sections of the society in a secular integrated socialist Bharat with dignity of person and equality of status to all."

40. In *Bhim Singh* (supra), a Constitution Bench of this Court observed as under:

"58. The above analysis shows that Article 282 can be the source of power for emergent transfer of funds, like the MPLAD Scheme. Even otherwise, the MPLAD Scheme

is voted upon and sanctioned by Parliament every year as a scheme for community development. We have already held that the scheme of the Constitution of India is that the power of the Union or State Legislature is not limited to the legislative powers to incur expenditure only in respect of powers conferred upon it under the Seventh Schedule, but it can incur expenditure on any purpose not included within its legislative powers. However, the said purpose must be "public purpose". Judicial interference is permissible when the action of the Government is unconstitutional and not when such action is not wise or that the extent of expenditure is not for the good of the State. We are of the view that all such questions must be debated and decided in the legislature and not in court.

95. This argument is liable to be rejected as it is not based on any scientific analysis or empirical data. We also find this argument a half-hearted attempt to contest the constitutionality of the Scheme. MPLADS makes funds available to the sitting MPs for developmental work. If the MP utilises the funds properly, it would result in his better performance. If that leads to people voting for the incumbent candidate, it certainly does not violate any principle of free and fair elections.

96. As we have already noted, MPs are permitted to recommend specific kinds of works for the welfare of the people i.e. which relate to development and building of durable community assets (as provided by Clause 1.3 of the Guidelines). These works are to be conducted after approval of relevant authorities. In such circumstances, it cannot be claimed that these works amount to an unfair advantage or corrupt practices within the meaning of the Representation of the People Act, 1951. Of course such spending is subject to the above Act and the regulations of the Election Commission."

(IV) The Schemes under challenge operate within the parameters of public purpose and Article 14 of the Constitution has no role to play.

41. The argument of the appellant that giving of colour TVs, laptops, mixer-grinders etc. on the basis of the manifesto of the party that forms the Government is not an expense for a public purpose. This argument is devoid of any merit according to learned senior counsel for the State of Tamil Nadu. It was submitted that the concept of State Largesse is essentially linked to Directive Principles of State Policy. Whether the State should frame a scheme, which directly gives benefits to improve the living standards or indirectly by increasing the means of livelihood, is for the State to decide. The preamble to the Constitution recognizes Socialism as one of the pillars of Indian Democracy. The preamble has been held to be a part of the Constitution by a catena of judgments including *Keshavanand Bharati vs. State of Kerala* (1973) 4 SCC 1461. The State largesse is directly linked to the principle of Socialism and, therefore, it is too late in the day for anybody to contend that the Government giving colour TVs, laptops, mixer-grinders, etc. that too to the eligible persons as prescribed by way of Government Order is not a public purpose. For the same reasons, it must be held that it is a part of Government function to take measures in connection with Government largesse.

42. It is further submitted that the political parties in their election manifesto promised to raise the standard of living of the people and to formulate a scheme/policy for the upliftment of the poor. The distribution of basic necessities in today's time like TVs, mixers, fans and laptops to eligible persons fixing parameters, can by no stretch of imagination be said to be State largesse. A three-Judge Bench of this Court in *Deepak Theatre, Dhuri vs. State of Punjab and Others*, 1992 Supp (1) SCC 684, held as under:

> **"5.** Witnessing a motion picture has become an amusement to every person; a reliever to the weary and fatigued; a reveller to the pleasure seeker; an imparter of education and enlightenment enlivening to news and current events; disseminator of scientific knowledge; perpetuator of cultural and spiritual heritage, to the teeming illiterate majority of population. Thus, cinemas have become tools to promote welfare of the people to secure and protect as effectively as it may a social order as per directives of the State policy enjoined under Article 38 of the Constitution. Mass media, through motion picture has thus become the vehicle of coverage to disseminate cultural heritage, knowledge, etc. The passage of time made manifest this growing imperative and the consequential need to provide easy access to all sections of the society to seek admission into theatre as per his paying capacity."

43. The grievance of the appellant is that the public resources are being used for the benefit of individuals. According to learned senior counsel for the respondent, this argument is completely misconceived. It was submitted that in catena of cases, this Court has held that while judging the constitutional validity of any law or any State action, the Directive Principles of the State Policy can be taken into account. Article 38 contemplates that the State shall strive to promote the welfare of the people. Article 39 contemplates that the State shall take actions to provide adequate means of livelihood and for distribution of material resources of the community on an egalitarian principle. Article 41 contemplates that the State shall render assistance to citizens in certain circumstances and also in cases of undeserved want. Article 43 directs that the State shall "endeavour to secure to all workers, by suitable legislation or economic organisation or any other way to ensure decent standard of life and full enjoyment of leisure and social and cultural opportunities to the workers". Similarly, Article 45 contemplates that the

to provide early childhood care and education to all children below the age of 6 years and Article 46 says that the State shall promote educational and economic interests of the weaker sections of the people. Article 47 contemplates that the State shall take steps to raise the level of nutrition and the standard of living. The concept of livelihood and standard of living are bound to change in their content from time to time. This Court has dealt with the concept of minimum wage, the fair wage and the living wage while dealing with industrial disputes and has noted that these concepts are bound to change from time to time. What was once considered to be a luxury can become a necessity. The concept of livelihood is no longer confined to a bare physical survival in terms of food, clothing and shelter, but also now must necessarily include some provision for medicine, transport, education, recreation etc. How to implement the directive principles of State Policy is a matter within the domain of the Government, hence, the State distributing largesse in the form of distribution of colour TVs, laptops, mixer-grinders etc. to eligible and deserving persons is directly related to the directive principles of the State Policy.

44. The other facet of the argument is that this largesse is distributed irrespective of the income level and, therefore, violative of Article 14 as unequals are treated equally. Learned senior counsel submitted that this principle of not to treat unequals as equals has no applicability as far as State largesse is concerned. This principle applies only where the law or the State action imposes some burden on the citizen either financial or otherwise.

45. Article 14 essentially contemplates equality in its absolute sense and classification can be taken recourse to if the State is unable or the State policy does not contemplate the same benefit or treatment to people who are not similarly situated. It is the philosophical sense decoded by this Court in the first part of Article 14 which is equal treatment for all without any distinction. This is the concept of formal equality which is

not necessarily an antithesis to Article 14. The concept of equality based on classification is proportional equality. The formal equality applies when the State is in a position to frame a scheme or law which gives the same benefit to all without any distinction and the proportional equality applies when the State frames a law or a Scheme which gives benefit only to people who form a distinct class. It is in the case of proportional equality that the principles of intelligible differentia having reasonable nexus to the object of legislation gets attracted. Article 14 does not prohibit formal equality. The Directive Principles of State Policy save proportional equality from falling in foul with formal equality contemplated by Article 14.

Contentions of the Union of India, CAG and Election Commission:

46. Mr. P.P. Malhotra, learned ASG also reiterated the stand taken by learned senior counsel for the State. It is the stand of the CAG that they have no role at this juncture, particularly, with reference to the prayer sought for. Ms. Meenakshi Arora, learned counsel for the Election Commission of India submitted that with the existing provisions in the RP Act, Election Commission is performing its duties, however, if this Court frames any further guidelines, they are ready to implement the same.

47. We have carefully considered the rival contentions, perused the relevant provisions, various Government orders, guidelines and details furnished in the counter affidavit. The following points arise for consideration:

Points for Consideration:

(i) Whether the promises made by the political parties in the election manifesto would amount to 'corrupt practices' as per Section 123 of the RP Act?

(ii) Whether the schemes under ch[illegible] are within the

ambit of public purpose and if yes, is it violative of Article 14?

(iii) Whether this Court has inherent power to issue guidelines by application of Vishaka principle?

(iv) Whether the Comptroller and Auditor General of India has a duty to examine expenditures even before they are deployed?

(v) Whether the writ jurisdiction will lie against a political party?

Discussion:

Issue No. 1

Whether the promises made by the political parties in their election manifestos would amount to 'corrupt practices' as per Section 123 of the Representation of the People Act, 1951?

48. Before going into the acceptability or merits of the claim of the appellant and the stand of the respondents, it is desirable to reproduce certain provisions of the RP Act. Part VII of the RP Act deals with "corrupt practices" and "electoral offences" which was brought into force with effect from 28.08.1956. Chapter I of Part VII deals with "corrupt practices". Section 123 is the only Section relevant for our purpose which reads thus:-

"123. Corrupt practices.- The following shall be deemed to be corrupt practices for the purposes of this Act:

(1) "Bribery", that is to say-

(A) any gift, offer or promise by a candidate or his agent or by any other person with the consent of a candidate or his election agent of any gratification, to any person whomsoever, with the object, directly or indirectly of inducing-

(a) a person to stand or not to stand as, or [to withdraw or not to withdraw] from being a candidate at an election, or

(b) an elector to vote or refrain from voting at an election, or as a reward to-

(i) a person for having so stood or not stood, or for [having withdrawn or not having withdrawn] his candidature; or

(ii) an elector for having voted or refrained from voting;

(B) the receipt of, or agreement to receive, any gratification, whether as a motive or a reward-

(a) by a person for standing or not standing as, or for [withdrawing or not withdrawing] from being, a candidate; or

(b) by any person whomsoever for himself or any other person for voting or refraining from voting, or inducing or attempting to induce any elector to vote or refrain from voting, or any candidate [to withdraw or not to withdraw] his candidature.

Explanation.- For the purposes of this clause the term" gratification" is not restricted to pecuniary gratifications or gratifications estimable in money and it includes all forms of entertainment and all forms of employment for reward but it does not include the payment of any expenses bona fide incurred at, or for the purpose of, any elec- tion and duly entered in the account of election expenses referred to in Section 78.

(2) Undue influence, that is to say, any direct or indirect interference or attempt to interfere on the part of the candidate or his agent, or of any other person [with the consent of the candidate or his election agent], with the free exercise of any electoral right: Provided that-

(a) without prejudice to the generality of the provisions of this clause any such person as is referred to therein who-

(i) threatens any candidate or any elector, or any person in whom a candidate or an elector is interested, with injury of any kind including social ostracism and ex-communication or expulsion from any caste or community; or

(ii) induces or attempts to induce a candidate or an elector to believe that he, or any person in whom he is interested, will become or will be rendered an object of divine displeasure or spiritual censure,

shall be deemed to interfere with the free exercise of the electoral right of such candidate or elector within the meaning of this clause;

(b) a declaration of public policy, or a promise of public action, or the mere exercise of a legal right without intent to interfere with an electoral right, shall not be deemed to be interference within the meaning of this clause.

(3) The appeal by a candidate or his agent or by any other person with the consent of a candidate or his election agent to vote or refrain from voting for any person on the ground of his religion, race, caste, community or language or the use of, or appeal to religious symbols or the use of, or appeal to, national symbols, such as the national flag or the national emblem, for the furtherance of the prospects of the election of that candidate or for prejudicially affecting the election of any candidate:

Provided that no symbol allotted under this Act to a candidate shall be deemed to be a religious symbol or a national symbol for the purposes of this clause.

(3A) The promotion of, or attempt to promote, feelings of enmity or hatred between different classes of the citizens

of India on grounds of religion, race, caste, community, or language, by a candidate or his agent or any other person with the consent of a candidate or his election agent for the furtherance of the prospects of the election of that candidate or for prejudicially affecting the election of any candidate.

(3B) The propagation of the practice or the commission of sati or its glorification by a candidate or his agent or any other person with the consent of the candidate or his election agent for the furtherance of the prospects of the election of that candidate or for prejudicially affecting the election of any candidate.

Explanation.- For the purposes of this clause," sati" and" glorification" in relation to sati shall have the meanings respectively assigned to them in the Commission of Sati (Prevention) Act, 1987 .

(4) The publication by a candidate or his agent or by any other Person, [with the consent of a candidate or his election agent], of any statement of fact which is false, and which he either believes to be false or does not believe to be true, in relation to the personal character or conduct of any candidate, or in relation to the candidature, or withdrawal [of any candidate, being a statement reasonably calculated to prejudice the prospects of that candidate' s election.

(5) The hiring or procuring, whether on payment or otherwise, of any vehicle or vessel by a candidate or his agent or by any other person with the consent of a candidate or his election agent], [or the use of such vehicles or vessel for the free conveyance] of any elector (other than the candidate himself, the members of his family or his agent) to or from any polling station provided under Section 25 or a place fixed under sub- section (1) of

Section 29 for the poll:

Provided that the hiring of a vehicle or vessel by an elector or by several electors at their joint costs for the purpose of conveying him or them to and from any such polling station or place fixed for the poll shall not be deemed to be a corrupt practice under this clause if the vehicle or vessel so hired is a vehicle or vessel not propelled by mechanical power:

Provided further that the use of any public transport vehicle or vessel or any tramcar or railway carriage by any elector at his own cost for the purpose of going to or coming from any such polling station or place fixed for the poll shall not be deemed to be a corrupt, practice under this clause.

Explanation.- In this clause, the expression" vehicle" means any vehicle used or capable of being used for the purpose of road transport, whether propelled by mechanical power or otherwise and whether used for drawing other vehicles or otherwise.

(6) The incurring or authorizing of expenditure in contravention of Section 77.

(7) The obtaining or procuring or abetting or attempting to obtain or procure by a candidate or his agent or, by any other person [with the consent of a candidate or his election agent], any assistance (other than the giving of vote) for the furtherance of the prospects of that candidate's election, from any person in the service of the Government and belonging to any of the following classes, namely:-

(a) gazetted officers;

(b) stipendiary judges and magistrates;

(c) members of the armed forces of the Union;

(d) members of the police forces;

(e) excise officers;

(f) revenue officers other than village revenue officers known as lambardars, malguzars, patels, deshmukhs or by any other name, whose duty is to collect land revenue and who are remunerated by a share of, or commission on, the amount of land revenue collected by them but who do not discharge any police functions; and]

(g) such other class of persons in the service of the Government as may be prescribed:

Provided that where any person, in the service of the Government and belonging to any of the classes aforesaid, in the discharge or purported discharge of his official duty, makes any arrangements or provides any, facilities or does any other act or thing for to or in relation to any candidate or his agent or any other person acting with the consent of the candidate or his election agent, (whether by reason of the office held by the candidate or for any other reason), such arrangements, facilities or act or thing shall not be deemed to be assistance for the furtherance of the prospects of that candidate' s election.

(h) class of persons in the service of a local authority, university, government company or institution or concern or undertaking appointed or deputed by the Election Commission in connection with the conduct of elections.

(8) Booth Capturing by a candidate or his agent or other person.

Explanation.- (1) In this Section the expression" agent" includes an election agent, a polling agent and any person who is held to have acted as an agent in connection with the election with the consent of the candidate.

(2) For the purposes of clause (7), a person shall be deemed to assist in the furtherance of the prospects of a candidate' s election if he acts as an election agent of that candidate.

(3) For the purposes of clause (7), notwithstanding anything contained in any other law, the publication in the Official Gazette of the appointment, resignation, termination of service, dismissal or removal from service of a person in the service of the Central Government (including a person serving in connection with the administration of a Union territory) or of a State Government shall be conclusive proof-

(i) of such appointment, resignation, termination of service, dismissal or removal from service, as the case may be, and

(ii) where the date of taking effect of such appointment, resignation, termination of service, dismissal or removal from service, as the case may be, is stated in such publication, also of the fact that such person was appointed with effect from the said date, or in the case of resignation, termination of service, dismissal or removal from service, such person ceased to be in such service with effect from the said date.]

(4) For the purposes of clause (8)," booth capturing" shall have the same meaning as in Section 135A."

49. Keeping the parameters fixed in the above Section, we have to analyze the claim of both the parties hereunder. A perusal of sub-sections 1-8 of Section 123 makes it clear that it speaks only about a **candidate** or **his agent** or **any other person**. There is no word about political parties. Taking note of the conditions mandated in those sub-sections, let us test the respective stand of both the parties.

50. For deciding the issue whether the contents of the

political manifesto would constitute a corrupt practice under Section 123 of RP Act, it is imperative to refer to the intention of the legislature behind incorporating the respective section. The purpose of incorporating Section 123 of the RP Act is to ensure that elections are held in a free and fair manner.

51. The object of provisions relating to corrupt practices was elucidated by this Court in *Patangrao Kadam vs. Prithviraj Sayajirao Yadav Deshmukh and Ors.* (2001) 3 SCC 594 as follows:-

> 14. "….Fair and free elections are essential requisites to maintain the purity of election and to sustain the faith of the people in election itself in a democratic set up. Clean, efficient and benevolent administration are the essential features of good governance which in turn depends upon persons of competency and good character. Hence those indulging in corrupt practices at an election cannot be spared and allowed to pollute the election process and this purpose is sought to be achieved by these provisions contained in the RP Act."

52. With this background, let us analyze the contention of the appellant. The gist of appellant's argument is that promises of freebies such as colour TVs, mixer-grinders, laptops, etc., are in form part of an election manifesto of a political party but in substance is a bribe or inducement under Section 123. Thus, it is the stand of the appellant that the promise of this nature indeed induces the voters thereby affecting the level playing field between the candidates, which in turn disrupts free and fair election. Therefore, the appellants suggested for construing the promises made in the election manifesto as a corrupt practice under Section 123 of RP Act. He mainly relied on the principle that one cannot do indirectly what it cannot do directly.

53. As appealing this argument may sound good, the implementation of this suggestion becomes difficult on more than one count. Firstly, if we are to dec of

promises made in the election manifesto is a corrupt practice, this will be flawed. Since all promises made in the election manifesto are not necessarily promising freebies *per se,* for instance, the election manifesto of a political party promising to develop a particular locality if they come into power, or promising cent percent employment for all young graduates, or such other acts. Therefore, it will be misleading to construe that all promises in the election manifesto would amount to corrupt practice. Likewise, it is not within the domain of this Court to legislate what kind of promises can or cannot be made in the election manifesto.

54. Secondly, the manifesto of a political party is a statement of its policy. The question of implementing the manifesto arises only if the political party forms a Government. It is the promise of a future Government. It is not a promise of an individual candidate. Section 123 and other relevant provisions, upon their true construction, contemplate corrupt practice by individual candidate or his agent. Moreover, such corrupt practice is directly linked to his own election irrespective of the question whether his party forms a Government or not. The provisions of the RP Act clearly draw a distinction between an individual candidate put up by a political party and the political party as such. The provisions of the said Act prohibit an individual candidate from resorting to promises, which constitute a corrupt practice within the meaning of Section 123 of the RP Act. The provisions of the said Act place no fetter on the power of the political parties to make promises in the election manifesto.

55. Thirdly, the provisions relating to corrupt practice are penal in nature and, therefore, the rule of strict interpretation must apply and hence, promises by a political party cannot constitute a corrupt practice on the part of the political party as the political party is not within the sweep of the provisions relating to corrupt practices. As the rule of strict interpretation applies, there is no scope for applying provisions relating to

corrupt practice contained in the said Act to the manifesto of a political party.

56. Lastly, it is settled law that the courts cannot issue a direction for the purpose of laying down a new norm for characterizing any practice as corrupt practice. Such directions would amount to amending provisions of the said Act. The power to make law exclusively vests in the Union Parliament and as long as the field is covered by parliamentary enactments, no directions can be issued as sought by the appellant. As an outcome, we are not inclined to hold the promises made by the political parties in their election manifesto as corrupt practice under Section 123 of the RP Act.

Issue No. 2

Whether the schemes under challenge are within the ambit of public purpose and if yes, is it violative of Article 14?

57. The concept of State largesse is essentially linked to Directive Principles of State Policy. Whether the State should frame a scheme, which directly gives benefits to improve the living standards or indirectly by increasing the means of livelihood, is for the State to decide and the role of the court is very limited in this regard.

58. It is not in dispute that television is a widely used telecommunication medium for receiving moving images. Today, television has a lot of positive effects and influences on our society and culture. Television gives helpful information and it is not an equipment aimed for entertainment alone. The State Government has also asserted that the purpose of distributing colour television sets is not restricted for providing recreation but to provide general knowledge to the people, more particularly, to the household women.

59. On behalf of the State of Tamil [illegible]d

that in order to promote the welfare of the people by securing and protecting, as effectively as it may, a social order in which social and economic justice can be achieved, the Government of Tamil Nadu has announced certain welfare schemes for raising the standard of living of the people by providing assistance to the deserving ones as envisaged under the Directive Principles of the Indian Constitution. In order to implement those schemes effectively, the Government of Tamil Nadu had exclusively formed a Special Programme Implementation Department. Guidelines for each Scheme were framed to identify the beneficiaries and mode of distribution.

60. It is pointed out by the State that the Government has issued necessary orders for the following schemes:

(i) Marriage Assistance Scheme;

(ii) Distribution of Milch Animals and Goats;

(iii) Solar Powered Green House Scheme;

(iv) Laptop Computer to students;

(v) Free Rice Scheme; and

(vi) Free distribution of Electric Fans, Mixies and Grinders to women.

The Schemes are as under:

"Marriage Assistance Scheme

(1) The economic status of a family plays a vital role in enabling the poor parents who have daughters to fulfill the social obligation of marriage. Various Marriage Assistance Schemes being implemented by the Government of Tamil Nadu are in vogue to benefit the poor and the downtrodden for whom the marriage ceremony of their daughters impose a

heavy burden. There are at present 5 marriage assistance schemes and they are as follows:

(i) Moovalur Ramamirtham Ammaiyar Ninaivu Marriage Assistance Scheme for poor girls

(ii) Dr. Dharmambal Ammaiyar Ninaivu Widow Re-marriage Assistance Scheme to encourage the remarriage of young widows

(iii) E.V.R. Maniammaiyar Ninaivu Marriage Assistance Scheme for daughters of poor widows

(iv) Annai Theresa Ninaivu Marriage Marriage Assistance Scheme for Orphan Girls.

(v) Dr. Muthulakshmi Reddy Minaivu Inter-caste Marriage Assistance Scheme

(2) With the extraordinary rise in the price of gold, poor families and the abovementioned vulnerable categories find it difficult to buy even a small quantity of gold for the traditional 'Thirumangalyam' (Mangal Sutra). To mitigate the hardship of the poor families and vulnerable sections, the State Government has ordered the provision of 4 gms (1/2 sovereign) 22 ct. gold coin for making the 'Thirumangalyam' in addition to the already existing financial assistance of Rs.25,000/-. Moreover, with the aim of encouraging higher education among women, the present Government has also introduced a new scheme of providing financial assistance of Rs.50,000/- for graduates/diploma holders along with the four grams 22 carat gold coin for making the 'Thirumangalayam'.

(3) The guidelines for sanction of assistance under the various Marriage Assistance Scheme

include that the annual income of the family should not exceed Rs.24,000/- and the minimum age limit for the girls should be 18 years. The detailed guidelines have been issued in G.O.(Ms.) No. 49, SW & NMP Dept. dated 26.07.2011. The details pertaining to each scheme are as follows:

(A) Moovalur Ramamiratham Ammaiyar Ninaiyu Marriage Assistance Scheme

1.	Objectives of the Scheme	To help the poor parents financially in getting their daughter's married and to promote the educational status of poor girls.
2.	Assistance provided and Educational Qualification	Rs.25,000/- along with 4 gms. gold coin (for those who have studies up to 10th std., Vth Std, for Scheduled Tribes)
3.	To whom the benefit is due	Girls belonging to poor families
4.	When the benefit is due	Before marriage
5.	**Eligibility Criteria**	
	a) Age Limit	Bride should have completed 18 years of age
	b) Income Limit	Not exceeding Rs.24,000/ per annum
	c) Other criteria	Only one girl from a family is eligible

(B) Dr. Dharmambal Ammaiyar Ninaivu Widow Re-marriage Assistance Scheme

1.	Objectives of the Scheme	To encourage widow remarriage and rehabilitate widows
2.	Assstance provided and Educational Qualification	Rs.25,000/- along with 4 gms. gold coin (for those who have studies up to 10th std., Vth Std, for Scheduled Tribes) Rs. 50,000/- along with 4 gms. gold coin (for Graduate and diploma holders)
3.	To whom the benefit is due	To the couple
4.	When the benefit is due	Within 6 months from the date of marriage
5.	**Eligibility Criteria**	
	a) Age Limit	Minimum age of 20 years for the bride and below 40 years for the bridegroom.
	b) Income Limit	No income ceiling.

(C) E.V.R. Maniammaiyar Ninaivu Marriage Scheme for daughters of poor widows

1.	Objectives of the Scheme	To help the poor widows by providing financial assistance for the marriage of their daughters

2.	Assistance provided and Educational Qualification	Rs.25,000/- along with 4 gms. gold n coin (for those who have studies up to 10th std., Vth Std, for Scheduled Tribes) Rs. 50,000/- along with 4 gms. gold coin (for Graduate and diploma holders)
3.	To whom the benefit is due	Daughter of poor widow
4.	When the benefit is due	Before marriage
5.	**Eligibility Criteria** a) Age Limit	18 years
	b) Income Limit	Not exceeding Rs.24,000/ per annum
	c) Other Criteria	Only one daughter of a poor widow is eligible

(D) Annai Theresa Ninaivu Marriage Assistance Scheme for Orphan Girls

1.	Objectives of the Scheme	To help the orphan girls financially for their marriage
2.	Assistance provided and Educational Qualification	Rs.25,000/- along with 4 gms. gold coin (for those who have studies up to 10th std., Vth Std, for Scheduled Tribes) Rs. 50,000/- along with 4 gms. gold coin (for Graduate and diploma holders)

3.	To whom the benefit is due	Orphan girls
4.	When the benefit is due	Before marriage
5.	**Eligibility Criteria** a) Age Limit	18 years
	b) Income Limit	Not exceeding Rs.24,000/ per annum

(E) Dr. Muthulakshmi Reddy Ninaivu Inter-Caste Marriage Assistance Scheme

1.	Objectives of the Scheme	To abolish caste and community feelings based on birth and wipe out the evils of untouchabiity by encouraging inter-caste marriage
2.	Assistance provided and Educational Qualification	Rs.25,000/- (Rs.15,000/- DD/Cheque, Rs.10,000/- NSC Certificate) along with 4 gms. gold coin (for those who have studies up to 10th std., Vth Std, for Scheduled Tribes) Rs. 50,000/- (Rs.30,000/- DD/cheque, Rs.20,000/- NSC Certificate) along with 4 gms. gold coin (for Graduate and diploma holders)
3.	To whom the benefit is due	Inter-caste married couple
4.	When the benefit is due	Considering the special constraints in such marriages the facility will be extended up to two yea

5.	**Eligibility Criteria**	
	a) Age Limit	Minimum 18 years
	b) Income Limit	No Income limit

II. Distribution of Milch Animal and Goats

(i) It is highlighted by the State that with the growing population and shrinking land resources, the nutritional requirement of the State cannot be met by increasing the agricultural production alone. Moreover vagaries of monsoon, availability of water have added to the pressure on increasing the agricultural production. To compensate this, it is necessary to improve the animal production.

(ii) As per the Indian Council for Agriculture Research (ICAR) norms, the per capita requirement of milk and meat per individual per day is 260 gms per day and 15gms. per day respectively. At present, the per capita availability of milk and meat in Tamil Nadu is below the recommended requirement. Hence, it is the need of the hour to increase the milk and meat production in the State to the State's human population requirements. Moreover, still a large population in the State live below the poverty line.

(iii) Hence, it has been proposed to improve the standard of living by providing the needy poor with a Milch cow (to 60000 families) and sheep/goats to about poorest of the poor (7 lakh families) spread across the State. The main aim of the above Schemes will be to improve the standard of living of the poorest of the poor.

(iv) Under the Scheme of free distribution of Milch

Cows, it has been envisaged to distribute Milch Cows to the poor people selected by the Grama Sabha based on norms in such villages/districts which do not have adequate availability of milk. Likewise, the poorest of the poor living in the rural areas will be identified democratically by the Grama Sabha and will be given 4 sheep/goats in order to sustain their livelihood by rearing these sheep/goats.

A. The scheme for distribution of 60,000 lactating cows free of cost in rural village panchayats

(i) The Government of Tamil Nadu have planned to launch a Scheme to distribute 60,000 free Milch Cows to the poor beneficiaries in the rural areas in the next 5 years in order to give boost to the milk productivity of the State. This scheme will be called **"Scheme for free distribution of Milch Cows"**.

2. Selection of Villages for the Scheme

(i) The Commissioner of Animal Husbandry and Veterinary Services (CA&VS) will select the Village Panchayats to be taken for implementation during each of the 5 years in such a way that in a year, approximately 12,000 beneficiaries are distributed free Milch Cows in order to complete the distribution of 60,000 Milch Cows in 5 years.

(ii) The free Milch Cows will be distributed to the poor beneficiaries on a priority basis in such Districts that have lesser number of Co-operative Societies than the total number of revenue villages. In such Districts, the distribution will be undertaken in those Village Panchayats where there are no Primary Milk Cooperative Societies at present. Consequent upon the distribution of th e

taken to form Primary Cooperative Societies of the beneficiaries in these villages and render the beneficiaries necessary hand-holding assistance by the Dairy Development Department. The Co-operative network has the following advantages for the beneficiaries:

(a) Availability of immediate opportunity of sale of milk through the Milk Cooperative Society at good prices.

(b) Availability of Breeding services as well as Veterinary care at the door steps through the Society as well as Milk Union.

(c) Opportunity to tap the benefits of various Central/State funded Schemes meant for the co-operative sector.

(iii) Out of the villages to be selected within the Districts concerned, the smaller village Panchayats will be prioritized by the Commissioner of Animal Husbandary & Veterinary Services for the implementation of the Scheme since it will be easier to form the Primary Milk Societies of smaller and cohesive units. Further, the Village Panchayats to be taken up each year will be grouped in appropriate geographical Clusters as to facilitate the economical collection of milk.

3. Breed of Milch Cows to be procured

(i) The breeding policy of the State envisages rearing of the Cross Bred Jersey Cows in the plains and Cross Bred Holstein-Friesian cows in the hilly areas of the State and the Cross Bred Cows yield, on an

average, 2.5 times the milk yield of indigenous cows. It is, hence, proposed to supply Cross bred cows as per the Breeding Policy of the State. Further, in most of the cases, farmers prefer rearing of cows as compared to buffaloes. Hence, it is proposed to distribute only cows in this Scheme. Amongst the Cross Bred cows too, it is proposed to supply lactating cows that are in their first/second lactation so as to ensure a continuous production for next five lactations. The age of the animal should not be more than 5 years.

4. Identification of Beneficiaries

(i) The free Milch Cows will be distributed at the rate of one Cow per eligible household. In order to empower the women, it has been decided that the actual beneficiary will be the Woman of the household. In case there are any transgender residing in the Village Panchayat, who are otherwise eligible as per the criteria given below, they will also be considered to be eligible for the Scheme.

(ii) **Criteria for eligibility** The beneficiaries should satisfy the following criteria:

. Women Headed households are to be given priority, (Widows, Destitutes and the Disabled women to be given priority within this group).

. Are below 60 years of age.

. Do not own land over 1 acre in their own name or family members' name (However, owning some land is preferable, since it will enable production of [illegible] land).

- Do not own any cows/buffaloes at present.
- Are not employees of Central/State Government or any Organisation/cooperative or member of any Local Body (nor should their spouse or father/mother/parents-in-law/ son/daughter/son-in-law/daughter-in-law be so).
- Have not benefited from the free Goats/ Sheep Scheme of the Government.
- Should be permanent resident of the Village Panchayat.
- At least 30% beneficiaries from the Village Panchayat should necessarily belong to SC/ ST (SC 29% and ST 1%) Communities.

(iii) In order to form a viable and successful procurement of milk by the Primary Milk Cooperative Societies, it is preferable that at least 50 members within a village Panchayat should pour the milk to the Milk Cooperative Society. Hence, ordinarily around 50 beneficiaries should be provided with cows in each of the selected Village Panchayats.

(iv) In the District, the District Collector will be overall in-charge of the process of identification of beneficiaries. The Regional Joint director (Animal Husbandry) (RJAD), Project Officer (Mahalir Thittam) and Assistant Director (Panchayats) will assist him in this regard. The District Collector will form a village Level Committee consisting of (i) Village Panchayat President, (ii) Vice-President, (iii) the senior most Ward member (by age) representing SC/ST Community, (iv) the Panchayat

Level Federation (PLF) Coordinator, (v) an active SHG representative (vi) the Veterinary Assistant Surgeon (VAS) of the area and (vii) the Deputy, Block Development Officer (ADW) to identify and shortlist the list of beneficiaries per the norms specified. The District Collector should also ensure that necessary support is rendered to the Committee by the Village Panchayat Assistant concerned. The purpose of adding the Veterinary Assistant Surgeon and Deputy Block Development Officer is to ensure that the short listed beneficiaries are conforming to the prescribed norms.

(v) After constituting the Village Level Committee for the selected Village Panchayats concerned, the District Collector should arrange to convene a meeting of all the members concerned and in that meeting, the details of the Scheme and the eligibility conditions are to be explained in detail. Since, the number of Village Panchayats per District will be ordinarily only about 10 per District per year, the District Collector should himself convene this meeting and convey the details.

(vi) The District Collector should, thereafter, fix a Special Meeting of the Grama Sabha in the Village Panchayat concerned to inform the details of the Scheme to the villagers. The Veterinary Assistant Surgeon and Deputy Block Development Officer (ADW) will explain the salient features of the Scheme and the eligibility details of the beneficiaries in the meeting. Applications for the free Milch Cows will be sought for in this Special Gram Sabha Meeting from the interested beneficiaries.

(vii) A period of one week will also be given for further receipt of Applications. The Applications can be given to any of the village Level Committee members or directly to the Village Panchayat. Thereafter, the Veterinary Assistant Surgeon and Deputy Block Development Officer (ADW) will arrange a meeting of the village level Committee in the office of the Village Panchayat to scrutinize and list out the names of all the eligible beneficiaries for the Scheme.

(viii) The list prepared should also be got verified by the Veterinary Assistant Surgeon and Deputy Block Development Officer (ADW) with the Village Administrative officer concerned, with regard to the land ownership details and the community details. (No certificate is however to be insisted upon and the scrutiny of the Village Level committee and subsequently the Gram Sabha will be considered to be final). Only after ensuring the eligibility of the proposed beneficiaries, the list will be approved by the village Level Committee.

(ix) The finalized list should be placed before the Gram Sabha for approval. The Gram Sabha should again ensure that 30% of the beneficiaries belong to SC/ ST communities.

(x) The District Collector should also arrange to send the Veterinary Assistant Surgeon/Deputy Block Development Officer or another official of the rank of Deputy Block Development Officer (in case the Deputy Block Development Officer is unable to attend) to participate in the Gram Sabha meeting and facilitate the discussion and finalization of the beneficiaries list.

(xi) The list finalized by Gram Sabha will be displayed in the Village Panchayat, Notice Board and other prominent places in the Village Panchayat.

B. Scheme for free distribution of goats/sheep to the poorest of the poor

The Government of Tamil Nadu have proposed to launch a "Scheme for free distribution of Goats/ Sheep" for the poorest of poor in the rural areas in order to enhance their standard of living.

2. Implementation of the Scheme

(i) The Goats/Sheep can be procured within the State and also from outside the State. However, the procurement of Goats/Sheep in larger numbers from the other States is not preferable since this category of animals (also called 'small ruminants' in veterinary terminology) are fragile or prone to diseases when transported enmasse from long distances and different climatic zones. Hence, unlike the Scheme for procurement of free Milch Cows wherein cows only from other States are proposed to be procured, it has been decided to procure Goats/Sheep predominantly from the local market shandies available within the State in the proximity of the beneficiaries. If good quality animals are brought and supplied by the breeders in the village itself, the supply of Goats/Sheep through such breeders will be permitted.

(ii) It is presumed that about 6-7 lakh Goats/Sheep can be procured from the shandies within the State or from the neighbouring State shandies without causing shortage of availability of Goats/Sheep for meat purpose and without causing impact on the price of Goats/Sheep in the

(iii) In view of the availability of about 6-7 lakh Goats/ Sheep in a year, the number of families to be assisted in each year will be 1.5 lakh and in the current year, approximately one lakh families can be assisted since the first quarter of the year is already over. The Gram Sabha will be utilized to identify the poorest of the poor beneficiaries within each village.

3. Eligibility Norms

The beneficiaries will be the poorest of the poor families living in Village Panchayats (rural areas) who are identified by the village Level Committee as per the norms and whose name is approved by the Gram Sabha as the poorest of the poor in the village.

The free Goats/Sheep will be distributed at the rate of 4 Goats/Sheep per household. In order to empower the women, it has been decided that the actual beneficiary will be the Woman of the household. In case there are any transgender residing in the Village Panchayat, who are otherwise eligible as per the criteria given below, they will also be considered to be eligible for the Scheme.

The beneficiaries under this Scheme should satisfy the following eligibility criteria

- Must be the landless Agricultural labourers.
- Should be a permanent resident of the Village Panchayat.
- The beneficiary household should have at least one member between the age of 18 and 60 to effectively

rear the Goats/Sheep.

- Should not own any Cow/Goat/Sheep at present.
- Should not be an employee of Central/State Government or any Organisation/Cooperative or member of any local body (nor should their spouse or father/mother/parents-in-law/son/daughter/son-in-law/daughter-in-law be so).
- Should not have benefited from the free Milch Cows Distribution Scheme of the Government.

(2) **Atleast 30% beneficiaries from the Village Panchayat should necessarily belong to SC/ST (SC 29% and ST 1%) community.**

(i) The target number of beneficiaries for each District will be decided by the Commissioner of Animal Husbandry and Veterinary Services (CAH&VS) based on the strength of the rural population of the District. The Village Panchayat as well as the Block target within the District will also be based on the proportionate rural population.

(ii) Within each District, the Village Panchayats will be selected in such a manner that approximately one-fifth of the beneficiaries will be covered in each Block in a year and the beneficiaries of a particular Village Panchyat will be fully covered within the year itself. The Commissioner of Animal Husbandry and Veterinary Services will work out the detailed Action Plan in this regard and convey to the District Collectors for implementation. In case of difficulties in implementation of the Scheme in some of the Village Panchayats having urbanized characters, the District Collector will, in consultation with the Commissioner of Anim

Veterinary Services, re-allocate the surplus target to other deserving Village Panchayats.

(iii) In the District, the District Collector will be the overall in-charge of the process of identification of beneficiaries. The Regional Joint Director (Animal Husbandry) (RJAD), Project Officer (Mahalir Thittam) and Assistant Director (Panchayats) will assist him in this regard. The District Collector will form a Village Level Committee consisting of (i) Village Panchayat President, (ii) Vice-President, (iii) the senior most Ward member (by age) representing SC/ST Community, (iv) the Panchayat Level Federation (PLF) coordinator (v) an active SHG representative (vi) the Veterinary Assistant Surgeon (VAS) of the area and (vi) the Deputy Block Development Officer (ADW) to identify and shortlist the list of beneficiaries as per the norms specified. The District Collector should also ensure that necessary support is rendered to the Committee by the Village Panchayat Assistant concerned. The purpose of adding the VAS and Deputy BDO(ADW) is to ensure that the shortlisted beneficiaries are conforming to the prescribed norms.

(iv) After constituting the Village Level Committee for the selected Village Panchayats concerned, the District Collector should arrange to convene a meeting of all the members concerned and in that meeting, the details of the Scheme and the eligibility conditions are to be explained in detail. The District Collector should himself convene this meeting in one or more sessions in order to convey the details and the seriousness of the selection process.

(v) The District Collector should, thereafter, fix a Special Meeting of the Gram Sabha in the Village Panchayat concerned to inform the details of the Scheme to the villagers. The Veterinary Assistant Surgeon and Deputy Block Development Officer (ADW) will explain the salient features of the Scheme and the eligibility details of the beneficiaries in the meeting. Applications for the free Goats/Sheep will be sought for in this Special Gram Sabha Meeting from the interested beneficiaries.

(vi) A period of one week will also be given for further receipt of applications. The applications can be given to any of the Village Level Committee members or directly to the Village Panchyat. Thereafter, the Veterinary Assistant Surgeon and Deputy Block Development Officer (ADW) will arrange a meeting of the Village Level Committee in the office of the Village Panchayat to scrutinize and list out the names of all the eligible beneficiaries for the Scheme.

(vii) The list prepared should also be got verified by the Veterinary Assistant Surgeon and Deputy Block Development Officer (ADW) with the village Administrative Officer concerned, to confirm the 'landless' status of the proposed beneficiaries and the community details. (No certificate is however to be insisted upon and the scrutiny of the Village Level Committee and subsequently the Gram Sabha will be considered to be final). Only after ensuring the eligibility of the proposed beneficiaries, the list will be approved by the Village Level Committee.

(viii) The finalized list should be placed before the Gram

Sabha for approval. The Gram Sabha should again ensure that 30% of the beneficiaries belong to SC/ ST (SC 29% and ST 1%) communities.

(ix) The District Collector should also arrange to send the Veterinary Assistant Surgeon/Deputy Block Development Officer (ADW) or another official of the rank of Deputy Block Development Officer (in case the Deputy Block Development Officer (ADW) is unable to attend) to participate in the Gram Sabha meeting and facilitate the discussion and finalization of the beneficiaries list.

III. Solar Powered Green House Scheme

1. The Government proposed to construct "Solar Powered Green House Scheme" for the benefit of the poor in the rural areas and measuring about 300 square feet with unit cost of Rs.1.80 lakhs by meeting the entire cost by Government. The scheme aims at providing Solar Powered Green House for the poor living below poverty line in rural areas. Accordingly, it is proposed to construct 60,000 Solar Powered Green House of 300 sq. ft. each year for the next five years from 2011-2012 totalling 3 lakh house.

2. **Eligibility Criteria** :

1. The beneficiary under Solar Powered Green House Scheme should reside within the Village Panchayat and find a place in the below poverty line list.

2. He/she should own a site of 300 sq. ft. with clear title and patta.

3. Should not own any pacca concrete house and not

benefited by any other housing scheme.

4. Rs.1.50 lakhs will be earmarked for construction of house and Rs.30,000/- for installing solar Powered Home Lighting System.

5. The scheme will be implemented by the District Collector so as to ensure that the construction of houses are completed in time.

IV. Laptop Computers to students

The State of Tamil Nadu have emerged as a favoured destination both for the domestic and multinational IT companies. This has opened new vistas of job opportunities for youth in Tamil Nadu. Further the students from lower rungs of the socio-economic pyramid also need to be equipped to participate in the emerging market. To provide level playing field by bridging the digital divide, develop skills and improve human resources in consonance with the millennium development goals, the Government of Tamil Nadu have decided to provide Laptop computers at free of cost to all students studying in Government and Government aided Higher Secondary Schools, Arts & Science colleges, Engineering Colleges and polytechnic colleges.

Accordingly the Government have issued order in G.O.(Ms) No.1, Special Programme Implementation Department dated 03.06.2011 for distribution of Laptop Computer at free of cost.

Under this scheme, the students studying in Government and Government aided schools, Arts and Science Colleges, Engineering Colleges and Polytechnics will be eligible. These students will be co

Year	Schools	Arts/Science Science	Engineering Colleges	Polytechnics
2011-12	Plus Two (12th std.)	1st & 3rd years students	2nd & 4th year students	1st & 3rd year students
2012-13	Plus Two (12th std.)	3rd year students	2nd & 4th Year students	1st & 3rd year students
2013-14	Plus Two (12th std.)	-	--	1st year student

During the year 2011-12, laptop computers will be distributed to 9.12 lakh students studying in 12th standard, 1st and 3rd year of Arts and Science Colleges, 2nd and 4th year of Engineering Colleges and 1st and 3rd year of Polytechnic colleges. The concerned Heads of Institutions will ensure that the dropouts/discontinued/transferred students are not included in the list of eligible students.

V. Free Rice Scheme

Note on the Scheme of Distribution of free rice under Universal Public Distribution System in Tamil Nadu

In Tamil Nadu Universal Public Distribution System is being followed and there is no differentiation as APL/BPL categories based on income criteria for supply of essential commodities to family cardholders under Public Distribution System. Hence, there is no differentiation like BPL/APL family cards in this State. Instead family cards have been issued on the basis of option exercised by the card holders under self-selection process to receive either rice with all commodities or to receive additional sugar in lieu of rice with other commodities after verifying the genuiness of the residence in this State.

Features of Universal Public Distribution System in Tamil Nadu

(1) Universal Public Distribution System is the heart and soul of State Food Policy. It is built on the principles of non-exclusion, easy access to Public Distribution System shops and adequate availability of food gain at an affordable price.

(2) Though Government of India advocates Targeted Public Distribution system(TPDS), Government of Tamil Nadu is not in favour of rigid targeting, as it may lead to exclusion of large number of genuine Below Poverty Line (BPL) families and vulnerable Above Poverty Line (APL) families due to enumeration errors and improper bench marking.

(3) Poverty is a dynamic and relative concept and hence, it is difficult to design acceptable criteria and methodology to measure poverty. Thus any method used for identifying BPL families is bound to result in some amount of exclusion of deserving families. Further, due to unforeseen natural calamities like droughts, floods and disaster etc., a large number of vulnerable APL families may be forced into poverty trap again.

(4) Rigid government system will not be able to respond quickly to such situation. Thus targeted public distribution system approach will always have some families outside the Public Distribution system at any point of time in defeating the objective of total food security and elimination of hunger.

(5) On the other hand Universal Public Distribution System is based on principle of self selection. Only those who need subsidized o

the Public Distribution System shops and not the entire population.

(6) Based on these principles and out of years of experiences, Government of Tamil Nadu is convinced that Universal Public Distribution System assures better food security to the people and therefore has decided to continue with it.

Process for issue of family cards

On application for issue of family cards in the form prescribed (available in the website of the Department of Civil Supplies and Consumer Protection and can be downloaded and used – No cost for application), the Civil Supplies authorities verify the genuiness of the application and recommend for issue for family card or for rejection of cards as the case may be.

No income details are collected from the individual and this information is not entered in the family card also. As income, except in the case of persons employed in the organized sector, is a dynamic variable susceptible to undergo charges in sync with any unexpected events in the employment market, these details are not being collected for the purpose of the existing Universal Public Distribution System.

On the other hand, option is given to the applicant to choose whether he would like to draw rice or not. If he selects not to draw rice, he is given the benefit of drawing 3kgs. extra sugar in lieu of rice in addition to the normal entitlement of ½ kg. per person per month subject to the maximum of 2kg per month per card.

VI. Free Distribution of Electric Fans, Mixies & Grinders to Women

This scheme is introduced as a welfare measure for

women and intends universal coverage of women beneficiaries belonging to families holding family cards which are eligible for drawing rice. To make women more effective participants in the economy, it is imperative to relieve them from the domestic drudgery. Therefore, the Government have decided to distribute a package of electric Fan, Mixie and Grinder to all the women from the families holding family cards which are eligible to draw rice. This scheme is expected to improve the standard of living of the poor women apart from providing equal opportunities.

In pursuance to above, the Government have issued Orders in G.O. Ms. 2 Special Programme Implementation Department, Dated 03.06.2011 for free distribution of 25 lakh packages of electric fans, mixies and grinder during 2011-12. In total about 1.83 crore women beneficiaries will be covered in a phased manner.

2. **Eligibility Criteria**

All households having a family card which is eligible for drawing rice are eligible for electric fans, mixies and grinders, at free of cost, under this Scheme. The benefits will be distributed only to a woman member of these households.

In case, a household having family card which is eligible for drawing rice, does not have any woman member it will be given to the head of the family.

The family cards as on 30.06.2011 will be considered for distribution of the items during the current year (2011-12).

The benefits will be distributed to an eligible family only once.

While distributing the benefits, priority should be given to rural areas within the Assembly Co y

Town Panchayats, then Municipalities and Municipal Corporations, if any."

61. The concepts of livelihood and standard of living are bound to change in their content from time to time. It is factual that what was once considered to be a luxury has become a necessity in the present day. It is well settled that the concept of livelihood is no longer confined to bare physical survival in terms of food, clothing and shelter but also now necessarily includes basic medicines, preliminary education, transport, etc. Hence, the State distrusting largesse in the form of distribution of colour TVs, laptops, etc. to eligible and deserving persons is directly related to the directive principles of the State policy.

62. As a result, we are not inclined to agree with the argument of the appellant that giving of colour TVs, laptops, mixer-grinders etc. by the Government after adhering to due process is not an expense for public purpose. Judicial interference is permissible when the action of the government is unconstitutional and not when such action is not wise or that the extent of expenditure is not for the good of the State. We are of the view that all such questions must be debated and decided in the legislature and not in court.

63. More so, the functioning of the Government is controlled by the Constitution, the laws of the land, the legislature and the Comptroller and Auditor General of India. As per Article 73 of the Constitution, the executive power of the Union of India is co-extensive with its legislative power. Similarly, the executive power of the State is co-extensive with its legislative power (Article 162). In *Bhim Singh* (supra), this Court has held that the Government can frame a scheme in exercise of its executive powers but if such a scheme entails any expenditure, then it is required to be backed by law. Article 266 of the Constitution lays down that all monies received by the Central Government or by the State Government by way of taxes or otherwise must be credited to the Consolidated Fund of India. Article 267 also

constitutes Contingency Fund of India. If any money (except which is charged on the Consolidated Fund) is to be withdrawn for any governmental purpose, then there has to be an Appropriation Act under Article 266(3) read with Article 114 of the Constitution. Every department of the Government presents its demand to the legislature concerned and the legislature votes on the same, and thereafter, the Appropriation Act is passed which authorizes the Government to withdraw the money from the Consolidated Fund. There are similar provisions relating to the State. The Contingency Fund can be established only by enacting a law in that behalf and not by an executive fiat. The law creating the Contingency Fund authorizes the purposes for which the amount in it can be spent. This is how the money is being spent by the Government on its schemes under the control of the Legislature.

64. In *Bhim Singh* (supra), Article 282 of the Constitution in the context of Government expenditure on various projects was considered. In that case, the Government in question had framed the scheme empowering the Members of Parliament to recommend works and projects in their respective constituencies. The said Scheme was challenged on the ground that the same has been formulated without enacting any law in that behalf. This challenge was negatived by this Court principally on the ground that any expenditure which the Government incurs on the said Scheme is authorized by the Appropriation Act and the Appropriation Act is a law as contemplated by Article 282. This Court also negatived the challenge on the ground that the same is not for public purpose.

65. In addition to the legislative control by way of Appropriation Acts, the rules framed by the Parliament under Article 118 and by the State Legislatures under Article 208 of the Constitution of India, also create a mechanism to keep a check on the expenditure incurred by the Government.

66. As far as State of Tamil Nadu is concerned, the

Legislature has framed rules under Article 208 of the Constitution and these rules are known as The Tamil Nadu Legislative Assembly Rules. Under Chapter XX of the said Rules, a Public Accounts Committee is set up and usually such Public Accounts Committee is headed by a Member of the Opposite Party. The Public Accounts Committee scrutinizes the Government accounts and submits its report to the Legislature for its consideration. So, apart from the Appropriation Act, there is also effective control over the Government accounts and expenses through the Public Accounts Committee.

67. In addition to the Legislative control, the founding fathers of the Constitution have also thought it fit to keep a check on Government accounts and expenses through an agency outside the Legislature also. Article 148 has created a constitutional functionary in the form of the Comptroller and Auditor General of India (CAG). CAG examines the propriety, legality and validity of all expenses incurred by the Government. The office of CAG exercises effective control over the Government accounts.

68. If we analyze the abovementioned articles and the rules of procedure, it is established that there are various checks and balances within the mandate of the Constitution before a scheme can be implemented. As long as the schemes come within the realm of public purpose and monies for the schemes is withdrawn with appropriate Appropriation bill, the court has limited power to interfere in such schemes.

69. Further, the appellant contended by referring to various foreign cases to highlight the principle that public money cannot be used to create private assets. In our opinion, there is no merit in this contention also. The purpose of the schemes is to enforce the directive principles of state policy. In what way the state chooses to implement the directive principles of state policy is a policy decision of the State and this Court cannot interfere with such decisions. Ordinarily, this Court cannot interfere with policy decisions of the government unless they are

clearly in violation of some statutory or Constitutional provision or is shockingly arbitrary in nature. In *Ekta Shakti Foundation vs. Government of NCT of Delhi* (2006) 10 SCC 337, it was held:-

> 10 "While exercising the power of judicial review of administrative action, the Court is not the appellate authority and the Constitution does not permit the Court to direct or advise the executive in matter of policy or to sermonize any matter which under the Constitution lies within the sphere of the Legislature or the executive, provided these authorities do not transgress their constitutional limits or statutory power. The scope of judicial enquiry is confined to the question whether the decision taken by the Government is against any statutory provisions or is violative of the fundamental rights of the citizens or is opposed to the provisions of the Constitution. Thus, the position is that even if the decision taken by the Government does not appear to be agreeable to the Court it cannot interfere. The correctness of the reasons which prompted the Government in decision making, taking one course of action instead of another is not a matter of concern in judicial review and the Court is not the appropriate forum for such investigation.

In the light of settled principle and observing that in the given case no such circumstances prevail as envisaged for judicial enquiry; we are not persuaded to interfere with the policy decision.

70. With regard to the contention that distribution of State largesse in the form of colour TVs, laptops, mixer-grinders, etc., violates Article 14 of Constitution as the unequals are treated equally. Before we venture to answer this question, we must recall that these measures relate to implementation of Directive Principles of State Policy. Therefore, the principle of not to treat unequals as equal has no applicability as far as State largesse

is concerned. This principle applies only where the law or the State action imposes some burden on the citizen either financial or otherwise. Besides, while implementing the directive principles, it is for the Government concerned to take into account its financial resources and the need of the people. There cannot be a straight jacket formula. If certain benefits are restricted to a particular class that can obviously be on account of the limited resources of the State. All welfare measures cannot at one go be made available to all the citizens. The State can gradually extend the benefit and this principle has been recognized by this Court in several judgments.

Issue No. 3

Whether this Court has inherent power to issue guidelines by application of Vishaka principle?

71. It is the stand of the appellant that there is legislative vacuum in the given case. Hence, the judiciary is warranted to legislate in this regard to fill the gap by application of *Vishaka* principle. However, learned counsel for the respondent made a distinction between the *Vishaka* (supra) and the given case. While highlighting that in *Vishaka* (supra), there was no legislation to punish the act of sexual harassment at work place, therefore, the judiciary noting the legislative vacuum framed temporary guidelines until the legislatures passed a bill in that regard. However, in the case at hand, there is a special legislation, namely, the Representation of People Act wherein Section 123 enumerates exhaustively a series of acts as "corrupt practice". Therefore, this is not a case of legislative vacuum where the judiciary can apply its inherent power to frame guidelines.

Issue No. 4:

Whether Comptroller and Auditor General of India has a duty to examine expenditures even before they are

deployed?

72. As reiterated earlier, the Comptroller and Auditor General of India is a constitutional functionary appointed under Article 148 of the Constitution. His main role is to audit the income and expenditure of the Governments, Government bodies and state-run corporations. The extent of his duties is listed out in the Comptroller and Auditor General's (Duties, Powers etc.) Act, 1971. The functioning of the Government is controlled by the Constitution, the laws of the land, the legislature and the Comptroller and Auditor General of India. CAG examines the propriety, legality and validity of all expenses incurred by the Government. The office of CAG exercises effective control over the government accounts and expenditure incurred on these schemes only after implementation of the same. As a result, the duty of the CAG will arise only after the expenditure has incurred.

Issue No. 5

Whether the writ jurisdiction will lie against a political party?

73. Learned senior counsel for the respondent (State of Tamil Nadu) raised the issue of jurisdiction stating that political parties are not State within the meaning of Article 12 of the Constitution of India and therefore, no writ of any nature can be issued against them either under Article 226 or Article 32 of the Constitution of India or any other provision of the Constitution or any other law. The correct forum is the Election Tribunal and not writ jurisdiction.

74. Admittedly, the respondents never raised any objection relating to the jurisdiction in the High Court or even in the pleadings before this Court. It is only in the oral submissions that this issue has been raised.

75. In the matters relating to pec[illegible] and territorial jurisdiction, the objection as t[illegible]e

taken at the earliest possible opportunity. But, this case relates to the jurisdiction over the subject matter. This is totally distinct and stands on a different footing. As such, the question of subject matter jurisdiction can be raised even in the appeal stage. However, as this petition is fit for dismissal *de hors* the jurisdiction issue, the jurisdiction issue is left open.

76. **Summary:**

(i) After examining and considering the parameters laid in Section 123 of RP Act, we arrived at a conclusion that the promises in the election manifesto cannot be read into Section 123 for declaring it to be a corrupt practice. Thus, promises in the election manifesto do not constitute as a corrupt practice under the prevailing law. A reference to a decision of this Court will be timely. In ***Prof. Ramchandra G. Kapse*** vs. ***Haribansh Ramakbal Singh*** (1996) 1 SCC 206 this Court held that "..Ex facie contents of a manifesto, by itself, cannot be a corrupt practice committed by a candidate of that party."

(ii) Further, it has been decided that the schemes challenged in this writ petition falls within the realm of fulfilling the Directive Principles of State Policy thereby falling within the scope of public purpose.

(iii) The mandate of the Constitution provides various checks and balances before a Scheme can be implemented. Therefore, as long as the schemes come within the realm of public purpose and monies withdrawn for the implementation of schemes by passing suitable Appropriation Bill, the court has limited jurisdiction to interfere in such schemes.

(iv) We have also emphasized on the fact that judicial interference is permissible only when the action of the government is unconstitutional or contrary to a statutory provision and not when such action is not wise or that the extent of expenditure is not for the good of the State.

(v) It is also asserted that the schemes challenged under this petition are in consonance with Article 14 of the Constitution.

(vi) As there is no legislative vacuum in the case on hand, the scope for application of Vishaka principle does not arise.

(vii) The duty of the CAG will arise only after the expenditure has incurred.

(viii) Since this petition is fit for dismissal *dehors* the jurisdiction issue, the issue of jurisdiction is left open.

Directions:

77. Although, the law is obvious that the promises in the election manifesto cannot be construed as 'corrupt practice' under Section 123 of RP Act, the reality cannot be ruled out that distribution of freebies of any kind, undoubtedly, influences all people. It shakes the root of free and fair elections to a large degree. The Election Commission through its counsel also conveyed the same feeling both in the affidavit and in the argument that the promise of such freebies at government cost disturbs the level playing field and vitiates the electoral process and thereby expressed willingness to implement any directions or decision of this Court in this regard.

78. As observed in the earlier part of the judgment, this Court has limited power to issue directions to the legislature to legislate on a particular issue. However, the Election Commission, in order to ensure level playing field between the contesting parties and candidates in elections and also in order to see that the purity of the election process does not get vitiated, as in past been issuing instructions under the Model Code of Conduct. The fountainhead of the powers under which the commission issues these orders is Article 324 of the Constitution, which mandates the commission to hold free and fair elections. It is equally imperative to acknowledge that the Election Commission cannot issue such

matter of the order of commission is covered by a legislative measure.

79. Therefore, considering that there is no enactment that directly governs the contents of the election manifesto, we hereby direct the Election Commission to frame guidelines for the same in consultation with all the recognized political parties as when it had acted while framing guidelines for general conduct of the candidates, meetings, processions, polling day, party in power etc. In the similar way, a separate head for guidelines for election manifesto released by a political party can also be included in the Model Code of Conduct for the Guidance of Political Parties & Candidates. We are mindful of the fact that generally political parties release their election manifesto before the announcement of election date, in that scenario, strictly speaking, the Election Commission will not have the authority to regulate any act which is done before the announcement of the date. Nevertheless, an exception can be made in this regard as the purpose of election manifesto is directly associated with the election process.

80. We hereby direct the Election Commission to take up this task as early as possible owing to its utmost importance. We also record the need for a separate legislation to be passed by the legislature in this regard for governing the political parties in our democratic society.

81. In the light of the above discussion, taking note of statutory provisions of the RP Act, which controls only candidate or his agent, mandates provided under the directive principles, various guidelines such as income limit, preference to women, agricultural labourer etc as detailed in the counter affidavit by the State, we find no merit in the appeal as well as in the transferred case. With the above observation as mentioned in paragraph Nos. 77-80, the appeal and the transferred case are dismissed. No order as to costs.

Bibhuti Bhushan Bose Appeal & Transferred Cases dismissed.

JAI BHAGWAN

v.

COMMR. OF POLICE & ORS.

(Civil Appeal Nos.5162-5163 of 2013)

JULY 5, 2013

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

Service Law:

Disciplinary inquiry – On the charges of misconduct – Punishment of dismissal from service – Appellate authority, Administrative Tribunal as well as High Court confirming order of disciplinary authority – Held: There is nothing perverse about the finding as regards the charge of misconduct – But the punishment of dismissal from service for the kind of misconduct alleged, is disproportionate – However, the false accusation on the part of the delinquent against his superior officer of having used casteist abuses to humiliate him, the case does not call for leniency – Hence, in view of totality of the circumstances, order of dismissal substituted to order of reduction of rank, with direction that he would have benefit of continuity of service, but would not be entitled to arrears of pay or other financial benefits for the period between the date of dismissal and date of reinstatement on the lower post.

Disciplinary inquiry was initiated against the appellant on the charge of misconduct. It was alleged that when the appellant was posted as an Assistant Wireless Operator, was provided with a cabin. When an Inspector checked the cabin, he found the cabin locked and when he asked the appellant to open the door of the cabin, appellant shouted at him. The Inspector also found the appellant not in proper uniform and that appellant also snatched the log-book from the Inspector. Disciplinary authority passed order of dismissal from service. The

appellate authority, Administrative Tribunal as well as High Court confirmed the order of the Disciplinary Authority. Hence the present appeal.

Partly allowing the appeal, the Court

HELD: 1. The charges framed against the appellant have been held proved by the disciplinary authority, the appellate authority and even by the Tribunal concurrently. The High Court reviewed those findings and found nothing perverse about the same. There is in that view no room for interference of this Court on that account. [Para 6] [758-F-G]

2.1. What is the appropriate quantum of punishment to be awarded to a delinquent is a matter that primarily rest in the discretion of the disciplinary authority. An authority sitting in appeal over any such order of punishment is by all means entitled to examine the issue regarding the quantum of punishment as much as it is entitled to examine whether the charges have been satisfactorily proved. But when any such order is challenged before a Service Tribunal or the High Court, the exercise of discretion by the competent Authority in determining and awarding punishment is generally respected except where the same is found to be so outrageously disproportionate to the gravity of the misconduct that the Court considers it to be arbitrary in that it is wholly unreasonable. The superior Courts and the Tribunal invoke the doctrine of proportionality which has been gradually accepted as one of the facets of judicial review. A punishment that is so excessive or disproportionate to the offence as to shock the conscience of the Court is seen as unacceptable even when Courts are slow and generally reluctant to interfere with the quantum of punishment. [Para 9] [760-A-E]

Ranjit Thakur vs. Union of India **(1987) 4 SCC 611: 1988 (1) SCR 512;** *Dev Singh vs. Punjab Tourism Development Corporation limited* **(2003) 8 SCC 9;** *Union of India vs. Ganayutham* **(1997) 7 SCC 463: 1997 (3) Suppl. SCR 549;** *Ex-Naik Sardar Singh vs. Union of India* **(1991) 3 SCC 213: 1991 (2) SCR 676;** *Om Kumar vs. Union of India* **(2001) 2 SCC 386: 2000 (4) Suppl. SCR 693– relied on.**

2.2. In the instant case, the punishment of dismissal from service for the kind of misconduct proved against the appellant is grossly disproportionate. There is no allegation that the appellant had manhandled the police Inspector who had gone to check the cabin. Delay of 10 minutes in opening the cabin door, which according to the appellant was open but had got stuck because of humidity leading to expansion of the wooden frame, was not a matter that ought to have led to the appellant's dismissal after he had served the police force for over 10 years. Even assuming that the version given by the appellant was not acceptable, the same did not constitute a misconduct of a kind that would justify the appellant's dismissal from service leading to forfeiture of his past service. That the appellant was not in uniform may also be breach of discipline calling for administrative action against him but not so severe as to throw him out of the police force. [Para 13] [761-G-H; 762-A-C]

Ram kishan vs. Union of India **(1995) 6 SCC 157: 1995 (3) Suppl. SCR 251 – relied on.**

2.3. But in view of the fact that the appellant had falsely accused the Inspector of having used casteist abuses to humiliate him which allegation on an inquiry was found to be totally false, does not call for leniency. It is obvious that the appellant had tried to use the caste card only to escape punishment for the misconduct and indiscipline committed by him. An allegation like the one made by the appellant could n

prosecution and dismissal of the superior officer from service. [Para 14] [762-D-F]

2.4. Thus, in the totality of the circumstances, while dismissal from service of the appellant is a harsh punishment, the order for dismissal could be substituted by an order of reduction to the rank of a constable with the direction that while the appellant shall have the benefit of continuity of service, he shall not be entitled to any arrears of pay or other financial benefits for the period between the date of dismissal and the date of his reinstatement against the lower post of constable. [Para 15] [762-F-H]

Case Law Reference:

1995 (3) Suppl. SCR 251	**relied on**	**Para 7**
1988 (1) SCR 512	**relied on**	**Para 10**
(2003) 8 SCC 9	**relied on**	**Para 11**
1997 (3) Suppl. SCR 549	**relied on**	**Para 12**
1991 (2) SCR 676	**relied on**	**Para 12**
2000 (4) Suppl. SCR 693	**relied on**	**Para 12**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5162-5163 of 2013.

From the Judgment & Order dated 21.10.2010 of the High Court of Delhi at New Delhi in W.P.(C) No. 5450 of 2005 and Order dated 18.02.2011 in Review Petition No. 72 of 2011 in W.P. (C) No. 5450 of 2005.

Arun Bhardwaj, S.S. Shamshery, Bhakti Vardhan (for Dr. Kailash Chand) for the Appellant.

Chahar, Gargi Khanna, D.S. Mahar, Anil Katiyar for the Respondents.

The Judgment of the Court was delivered by

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

2. These appeals by special leave arise out of an order dated 21st October 2010 passed by the High Court of Delhi whereby Writ Petition (Civil) No.5450 of 2005 filed by the appellant challenging his dismissal from the post of Assistant Wireless Operator has been dismissed. An order dated 18th February 2011 whereby the High Court dismissed Review Petition No.72/2011 filed by the appellant has also been assailed by the appellant.

3. The appellant was posted as an Assistant Wireless Operator at Patel Nagar Police Station, Delhi. A cabin was provided to him for that purpose. On the night intervening 28/29th July 2001 when Inspector Harjeet Singh went for checking the cabin used by the appellant he found the same locked from inside. The Inspector knocked at the door but got no response from within the cabin. He then knocked the door harder whereupon, the appellant shouted at him from inside saying, "KYA DARWAJE KO TOREGA BE" (Are you determined to break the door). When the door was eventually opened by the appellant, the Inspector found him wearing plain civilian clothes. He asked the appellant the reason for not being in proper uniform to which the appellant replied that he liked to dress like that only. The appellant also refused to give the log book to the Inspector when asked and snatched the same from him when the Inspector picked it up from the table. The appellant was, in the above circumstances, charged with misconduct. The charge read as under:

"I, Inspr. Anil Dureja, DE Cell. Delhi charge you HC Jai Bhagwan, No. 1212/Commn. That while discharging operator Duty at Radio a Radio Station P.S. Patel Nagar on the intervening night 28/297.2001 from 2000 hrs. to 0800 hrs. Inspr. Harjeet Singh who was night checking officer, approached for checking a

cabin at 0035 hrs, The cabin was found locked from inside. The Inspector knocked the door with little force, you HC Jai Bhagwan shouted from inside in a very undisciplined manner "kya darwaje ko torego be" you were also found in plain clothes and when asked the reasons for the same you replied that you would like this only. You also refused to give the log book when asked to do so snatched the log book from him which the later had picked up from the table. You made irrelevant transmission on District No at 0130 hrs which aggravated your misconduct.

The above act of misbeaviour and misconduct on the part of you HC (AWO) Jai Bhagwan No. 1212/Comn. Renders you liable for punishment under Section 21 D.P. Act read with Delhi Police (Punishment and Appeal) Rules, 1980."

4. An inquiry followed in which the charges were held proved. The appellant found guilty and was dismissed from service by an order passed by the Disciplinary Authority on 29th March 2002. Aggrieved by the said order, the appellant preferred an appeal before the prescribed appellate authority which too failed and was dismissed on 9th January 2003. The appellant then approached the Central Administrative Tribunal for redress but remained unsuccessful even there. He next approached the High Court of Delhi in Writ Petition No.5450 of 2005 before whom he urged five distinct grounds against the order of dismissal. It was firstly urged by the appellant that a copy of the preliminary inquiry conducted by the DCP Communication and relied upon by the Inquiry Officer was never supplied to him thereby causing prejudice to the appellant. It was secondly urged that Inspector Harjeet Singh had improved upon his version inasmuch as the narrative given by him in the first report and that given in the second report were materially different. Thirdly, it was contended that DCP Communication could not act as the Disciplinary Authority

inasmuch as it was he who had conducted the fact finding inquiry that gave rise to a likelihood of bias. The fourth submission urged on behalf of the appellant before the High Court related to the appellant's version that he was medically advised against wearing the police uniform on account of some kind of skin allergy. It was lastly contended that the allegations that he was sleeping inside the wireless cabin was unsupported by any evidence and that the punishment of dismissal from service awarded to him was in any case much too harsh, unreasonable and disproportionate to the gravity of the misconduct, to be countenanced by the Court.

5. The High Court examined each of these contentions and rejected the same by an order that is impugned in the present appeals. The High Court took pains to look into the evidence on record to find out whether there was any perversity in the view taken by the disciplinary authority, the appellate authority, or the Tribunal and found none. Even on the question of quantum of punishment, the High Court held that the petitioner had no case inasmuch as the incident in question was one of gross indiscipline and the penalty of dismissal from service was justified.

6. We have heard learned counsel for the parties at some length and perused the orders under challenge. The charges framed against the appellant have been held proved by the disciplinary authority, the appellate authority and even by the Tribunal concurrently. The High Court reviewed those findings and found nothing perverse about the same. There is in that view no room for our interference on that account. In fairness to learned counsel for the appellant we must mention that even he did not make any serious attempt to assail the concurrent findings of fact recorded against the appellant. We have, therefore, no hesitation in affirming the said findings.

7. What was argued by learned counsel for the appellant with considerable tenacity was the dis proportionality of the quantum of punishment imposed upon s

contended that the charges against the appellant were limited to using rude language against a superior officer who had come to check the wireless cabin provided to the appellant. The fact that the appellant was not in proper uniform or took a little more time than necessary in opening the door also did not materially add to the gravity to the misconduct, if any. Dismissal from service for such a minor act of misdemeanor was according to learned counsel totally unreasonable and disproportionate even assuming that the charges had been satisfactorily proved. Relying upon the decision of this Court in *Ram kishan v. Union of India* (1995) 6 SCC 157 it was contended that the delinquent was in that case also charged with an act like the one alleged against the appellant. This Court had, however, stepped in to set aside the order of dismissal passed by the disciplinary authority and reduced the punishment to stoppage of two increments only. It was urged that a similar order in the instant case would meet the ends of justice.

8. On behalf of the respondent, it was submitted that the conduct of the appellant was highly objectionable and unbecoming of any one serving in the police force where the need for maintaining discipline is paramount. Any leniency towards those responsible for such misconduct was, according to the learned counsel, bound to encourage others to commit similar or more serious acts of indiscipline and misconduct which will not be in public interest as it is bound to undermine discipline as a value, erode the efficacy of the police force and shake the confidence of the people in its efficiency. It was also submitted that the appellant had not only sent out an unwarranted message on the wireless regarding the incident but had gone to the extent of making a false accusation against the Inspector, which aggravated the appellant's misconduct wholly unbecoming of a police officer. A false charge implicating his superior for using casteist remarks was a serious matter. Dismissal from service, in that view was the only punishment which the appellant deserved and with which this Court ought not to interfere.

9. What is the appropriate quantum of punishment to be awarded to a delinquent is a matter that primarily rest in the discretion of the disciplinary authority. An authority sitting in appeal over any such order of punishment is by all means entitled to examine the issue regarding the quantum of punishment as much as it is entitled to examine whether the charges have been satisfactorily proved. But when any such order is challenged before a Service Tribunal or the High Court the exercise of discretion by the competent Authority in determining and awarding punishment is generally respected except where the same is found to be so outrageously disproportionate to the gravity of the misconduct that the Court considers it be arbitrary in that it is wholly unreasonable. The superior Courts and the Tribunal invoke the doctrine of proportionality which has been gradually accepted as one of the facets of judicial review. A punishment that is so excessive or disproportionate to the offence as to shock the conscience of the Court is seen as unacceptable even when Courts are slow and generally reluctant to interfere with the quantum of punishment. The law on the subject is well settled by a series of decisions rendered by this Court. We remain content with reference to only some of them.

10. In *Ranjit Thakur v. Union of India* (1987) 4 SCC 611, this Court held that the doctrine of proportionality, as part of the concept of judicial review, would ensure that even on an aspect which is, otherwise, within the exclusive province of the Court-Martial, if the decision even as to the sentence is in defiance of logic, then the quantum of sentence would not be immune from correction. Irrationality and perversity, observed this Court, are recognized grounds of judicial review. The following passage is apposite in this regard:

> *"the doctrine of proportionality, as part of the concept of judicial review, would ensure that even on an aspect which is, otherwise, within the exclusive province of the Court-Martial, if the decision even*

in defiance of logic, then the quantum of sentence would not be immune from correction. Irrationality and perversity are recognized grounds of judicial review".

11. Similarly, in *Dev Singh v. Punjab Tourism Development Corporation limited* (2003) 8 SCC 9, this Court, following *Ranjit Thakur's* case (supra) held:

"…a court sitting in an appeal against a punishment imposed in the disciplinary proceedings will not normally substitute its own conclusion on penalty. However, if the punishment imposed by the disciplinary authority or the appellate authority shocks the conscience of the court then the court would appropriately mould the relief either by directing the disciplinary/ appropriate authority to reconsider the penalty imposed or to shorten the litigation it may make an exception in rare cases and impose appropriate punishment with cogent reasons in support thereof. It is also clear from the above noted judgments of this court, if the punishment imposed by the disciplinary authority is totally disproportionate to the misconduct proved against the delinquent officer, then the court would interfere in such a case."

12. Reference may also be made to the decisions of this Court in *Union of India v. Ganayutham* (1997) 7 SCC 463, *Ex-Naik Sardar Singh v. Union of India* (1991) 3 SCC 213 and *Om Kumar v. Union of India* (2001) 2 SCC 386, which reiterate the same proposition.

13. Coming to the case at hand we are of the view that the punishment of dismissal from service for the kind of misconduct proved against the appellant appears to us to be grossly disproportionate. There is no allegation that the appellant had manhandled the police Inspector who had gone to check the cabin. Delay of 10 minutes in opening the cabin door, which according to the appellant was open but had got stuck because of humidity leading to expansion of the wooden

frame, was not a matter that ought to have led to the appellant's dismissal after he had served the police force for over 10 years. Even assuming that the version given by the appellant was not acceptable the same did not constitute a misconduct of a kind that would justify the appellant's dismissal from service leading to forfeiture of his past service. That the appellant was not in uniform may also be breach of discipline calling for administrative action against him but not so severe as to throw him out of the police force. The analogy drawn by the appellant in this case and that of *Ram Kishan's* case (supra) is not, therefore, wholly misplaced. The delinquent in that case too was charged with misbehaviour with his superior leading to his dismissal from service which was found by this Court to be disproportionate to the nature of misconduct calling for moderation.

14. Having said that we cannot ignore the fact that the appellant had falsely accused the Inspector of having used casteist abuses to humiliate him which allegation on an inquiry was found to be totally false. It is obvious that the appellant had tried to use the caste card only to escape punishment for the misconduct and indiscipline committed by him. There is no manner of doubt that an allegation like the one made by the appellant could have resulted in his prosecution and dismissal of the superior officer from service. The appellant's case in that view is not on all four corners of ***Ram Krishna*** to call for such leniency as was shown to Ram Krishna.

15. In the totality of these circumstances, we are of the view that while dismissal from service of the appellant is a harsh punishment the order for dismissal could be substituted by an order of reduction to the rank of a constable with the direction that while the appellant shall have the benefit of continuity of service he shall not be entitled to any arrears of pay or other financial benefits for the period between the date of dismissal and the date of his reinstatement against the lower post of constable. We are conscious of the fac[illegible]d in the ordinary course remit the matter [illegible]y

authority for passing a fresh order of punishment considered proper but we are deliberately avoiding that course. We are doing so because the order of dismissal of the appellant was passed in the year 2001. A remand at this distant point of time is likely to lead to further delay and litigation on the subject which is not in the interest of either party. We have, therefore, upon an anxious thought as to the quantum of punishment that is appropriate taken the un-usual but by no means impermissible course of reducing the punishment to the extent indicated above.

16. These appeals are accordingly allowed in the above terms; with a further direction that the respondents shall do the needful expeditiously but not later than three months from the date of this order. No costs.

Kalpana K. Tripathy Appeals partly allowed.

JITENDRA SINGH @ BABBOO SINGH & ANR.
v.
STATE OF U.P.
(Criminal Appeal No. 763 of 2003)

JULY 10, 2013

[T.S. THAKUR AND MADAN B. LOKUR, JJ.]

Juvenile Justice (Care and Protection of Children) Act, 2000:

*ss. 2(k), 7A and 20 – Prosecution of accused u/ss. 147, 302, 304B and 498A IPC – During trial, accused raised plea of juvenility underJuvenile Justice Act, 1986 – Plea rejected, finding him to be above 16 years of age – After trial, convicted u/s. 304B and 498A and sentenced to 7 years and 2 years imprisonment respectively with fine of Rs.100/- – Conviction and sentence confirmed in High Court – In appeal to this Court, accused took plea of juvenility under Juvenile Justice Act, 2000 – On direction of Supreme Court trial court's report as to age of the accused stating him to be of 13 years 8 months on the date of incident as per his school certificate and as per medical examination and other records his age was 17 years – **Held: Per Madan Lokur, J:** The accused was 17 years of age on the date of occurrence, and hence a juvenile under 2000 Act – His conviction is confirmed – The punishment which can be awarded to the accused is to require him to pay afine under clause (e) of s.21(1) of Juvenile Justice Act, 1986 – The fine of Rs. 100/- imposed by trial court is inadequate, in view of the gravity of the offences – Therefore, matter remanded to Juvenile Justice Board for determining appropriate quantum of fine – **Per Thakur, J. (Supplementing)** – Since the accused was above 16 years of age, on the date of occurrence, being not a juvenile under 1986 Act, there was no error of jurisdiction in trying the*

accused – Being a juvenile under 2000 Act, in view of ss.7A and 20, the court is not obliged to set aside the conviction, but only his sentence awarded by the regular court can be set aside and making reference to the Juvenile Justice Board – Juvenile Justice Act, 1986 – s. 21(1)(e) – Penal Code, 1860 – ss. 304B and 498A.

Trial of a person – By a regular criminal court – Who, at subsequent stage found to be a juvenile – Measures for prevention of such situation – Suggested.

Maxim – 'expressio unius est exclusio alterious' – Applicability of.

Per Madan B. Lokur, J.

1. The Report given by the Additional Sessions Judge whereby he has stated that the appellant was a juvenile on the date of the incident, has been examined and there is no reason to reject it. There is documentary evidence to show from the school admission register (which has not been tampered with) that the date of birth of the appellant is 31st August 1974. That apart, the medical examination of the appellant conducted on 8th July 1988 less than two months after the incident, also shows his age to be about 17 years. This was not doubted by the Additional Session Judge while rejecting the bail application of the appellant and was also not doubted by the High Court while granting bail to him. Therefore, it does appear that the appellant was about 17 years of age when the incident had occurred and that he had set up a claim of being a juvenile or child soon after his arrest and before the charge sheet was filed. Thus, the appellant was a juvenile or a child within the meaning of that expression as defined in Section 2(k) of the Juvenile Justice (Care and Protection of Children) Act, 2000. [Para 21] [785-D-G]

2.1. A plain reading of section 304B IPC, which explains a dowry death, makes it clear that its ingredients

are (a) the death of a woman is caused by burns or a bodily injury or that it occurs otherwise than under normal circumstances; (b) the death takes place within seven years of her marriage; (c) the woman was subjected, soon before her death, to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry. In the present case, in the facts of the case, the ingredients of Section 304-B of the IPC were made out. [Paras 24 and 25] [786-G-H; 787-D]

2.2. On the basis of the facts found by the Trial Court as well as the High Court from the evidence on record that a case of causing a dowry death had convincingly been made out against the appellant. There is no apparent reason to disturb the concurrent findings of fact arrived at by the Trial Court and the High Court and so the conviction of the appellant must be upheld. [Para 27] [787-G-H]

2.3. The case of the juvenile has to be examined on merits. If it is found that the juvenile is guilty of the offence alleged to have been committed, he simply cannot go unpunished. However, as the law stands, the punishment to be awarded to him or her must be left to the Juvenile Justice Board constituted under the Juvenile Justice (Care and Protection of Children) Act, 2000. This is the plain requirement of the Act. [Para 42] [791-C-D]

2.4. In the present case, the offence was committed by the appellant when the Juvenile Justice Act, 1986 was in force. Therefore, only the 'punishments' not greater than those postulated by the Juvenile Justice Act, 1986 ought to be awarded to him. This is the requirement of Article 20(1) of the Constitution. The 'punishments' provided under the 1986 Act are given in Section 21 thereof. [Para 43] [791-E-F]

2.5. A perusal of the 'punishr

under the Juvenile Justice Act, 1986 indicate that given the nature of the offence committed by the appellant, advising or admonishing him [clause (a)] is hardly a 'punishment' that can be awarded since it is not at all commensurate with the gravity of the crime. Similarly, considering his age of about 40 years, it is completely illusory to expect the appellant to be released on probation of good conduct, to be placed under the care of any parent, guardian or fit person [clause (b)]. For the same reason, the appellant cannot be released on probation of good conduct under the care of a fit institution [clause (c)] nor can he be sent to a special home under Section 10 of the Juvenile Justice Act, 1986 which is intended to be for the rehabilitation and reformation of delinquent juveniles [clause (d)]. The only realistic punishment that can possibly be awarded to the appellant on the facts of this case is to require him to pay a fine under clause (e) of Section 21(1) of the Juvenile Justice Act, 1986. [Para 44] [793-C-E]

2.6. While dealing with the case of the appellant under the IPC, the fine imposed upon him is only Rs.100/-. This is *ex facie* inadequate punishment considering the fact that the deceased suffered a dowry death. [Para 45] [793-F]

2.7. The appropriate course of action in the present case would be to remand the matter to the jurisdictional Juvenile Justice Board constituted under the Juvenile Justice (Care and Protection of Children) Act, 2000 for determining the appropriate quantum of fine that should be levied on the appellant and the compensation that should be awarded to the family of the deceased. [Para 46] [793-H; 794-A-B]

Ankush Shivaji Gaikwad vs. State of Maharashtra **2013 (6) SCALE 778;** *Ashwani Kumar Saxena vs. State of Madhya Pradesh* **(2012) 9 SCC 750: 2012 (10) SCR 540 – relied on.**

Jayendra vs. State of Uttar Pradesh **(1981) 4 SCC 149;** *Bhoop Ram vs. State of U.P.* **(1989) 3 SCC 1;** *Pradeep Kumar vs. State of U.P.* **1995 Supp (4) SCC 419;** *Bhola Bhagat and other vs. State of Bihar* **(1997) 8 SCC 720: 1997 (4) Suppl. SCR 711;** *Upendra Kumar vs. State of Bihar* **(2005) 3 SCC 592;** *Gurpreet Singh vs. State of Punjab* **(2005) 12 SCC 615: 2005 (5) Suppl. SCR 90;** *Vijay Singh vs. State of Delhi* **(2012) 8 SCC 763: 2012 (7) SCR 434;** *Satish @ Dhanna vs. State of Madhya Pradesh* **(2009) 14 SCC 187: 2009 (6) SCR 486;** *Dharambir vs. State (NCT of Delhi)* **(2010) 5 SCC 344: 2010 (5) SCR 137;** *Hari Ram vs. State of Rajasthan* **(2009) 13 SCC 211: 2009 (7) SCR 623;** *Daya Nand vs. State of Haryana* **(2011) 2 SCC 224: 2011 (1) SCR 173 – referred to.**

3.1. The purpose of the Act is to rehabilitate a juvenile in conflict with law with a view to reintegrate him into society. This is by no means an easy task and it is worth researching how successful the implementation of the Act has been in its avowed purpose in this respect. [Para 54] [796-D]

3.2. The Act and the Model Rules clearly constitute an independent code for issues concerning a child or a juvenile, particularly a juvenile in conflict with law. This code is intended to safeguard the rights of the child and a juvenile in conflict with law and to put him in a category separate and distinct from an adult accused of a crime. [Para 57] [796-H; 797-A]

3.3. Keeping in mind the standards and safeguards required to be met as per international obligations, it becomes obligatory for every Magistrate before whom an accused is produced to ascertain, in the first instance or as soon thereafter as may be possible, whether the accused person is an adult or a juvenile in conflict with law. The reason for this, obviously, is to avoid a two fold

difficulty: first, to avoid a juvenile being subjected to procedures under the normal criminal law and *de hors* the Act and the Rules, and second, a resultant situation, where the "trial" of the juvenile is required to be set aside and quashed as having been conducted by a court not having jurisdiction to do so or a juvenile, on being found guilty, going 'unpunished'. This is necessary not only in the best interests of the juvenile but also for the better administration of criminal justice so that the Magistrate or the Sessions Judge (as the case may be) does not waste his time and energy on a "trial". [Para 58] [797-B-C]

3.4. It must be appreciated by every Magistrate that when an accused is produced before him, it is possible that the prosecution or the investigating officer may be under a mistaken impression that the accused is an adult. If the Magistrate has any iota of doubt about the juvenility of an accused produced before him, Rule 12 provides that a Magistrate may arrive at a *prima facie* conclusion on the juvenility, on the basis of his physical appearance. In such a case, this *prima facie* opinion should be recorded by the Magistrate. Thereafter, if custodial remand is necessary, the accused may be sent to jail or a juvenile may be sent to an Observation Home, as the case may be, and the Magistrate should simultaneously order an inquiry, if necessary, for determining the age of the accused. Apart from anything else, it must be appreciated that such an inquiry at the earliest possible time, would be in the best interests of the juvenile, since he would be kept away from adult under-trial prisoners and would not be subjected to a regimen in jail, which may not be conducive to his well being. It would also be in the interests of better administration of criminal justice. It is, therefore, enjoined upon every Magistrate to take appropriate steps to ascertain the juvenility or otherwise of an accused person brought before him or her at the earliest possible

point of time, preferably on first production. [Para 59] [797-E-H; 798-A-B]

3.5. Due to his juvenility, a juvenile in conflict with law may be presumed not to know or understand the legal procedures making it difficult for him to put forth his claim for juvenility when he is produced before a Magistrate. Added to this are the factors of poor education and poor economic set up that are jointly the main attributes of a juvenile in conflict with law, making it difficult for him to negotiate the legal procedures. [Para 60] [798-C-D]

3.6. It is difficult to expect a juvenile in conflict with law to know his rights upon apprehension by a police officer and if the precautions that have been suggested are taken, the best interests of the child and thereby of society will be duly served. Therefore, it may be presumed, by way of a benefit of doubt that because of his status, a juvenile may not be able to raise a claim for juvenility in the first instance and that is why it becomes the duty and responsibility of the Magistrate to look into this aspect at the earliest point of time in the proceedings before him. This may be a satisfactory way of avoiding the recurrence of a situation such as the one dealt with. [Para 61] [799-B-C]

Abuzar Hossain vs. State of West Bengal **(2012) 10 SCC 489: 2012 (9) SCR 244 – relied on.**

3.7. International obligations as laid down in the Convention on the Rights of the Child and the Beijing Rules require the involvement of the parents or legal guardians in the legal process concerning a juvenile in conflict with law. [Para 62] [799-D-E]

3.8. The procedures laid down in Cr.P.C., in as much as they are for the benefit of a juvenile or a child, apply with full rigour to an apprehension [illegible]n

conflict with law under Section 10 of the Act. If these procedures are followed, the probability of a juvenile, on apprehension, being shown as an adult and sent to judicial custody in a jail, will be considerably minimized. If these procedures are followed, as they should be, along with the requirement of a Magistrate to examine the juvenility or otherwise of an accused person brought before him, subjecting a juvenile in conflict with law to a trial by a regular Court may become a thing of the past. [Para 67] [802-E-G]

D.K. Basu vs. State of West Bengal **(1997) 1 SCC 416: 1996 (10) Suppl. SCR 284 – relied on.**

3.9. Keeping in mind the domestic law of India and the international obligations, it is directed that the provisions of Cr.P.C. relating to arrest and the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000 being the law of the land, should be scrupulously followed by the concerned authorities in respect of juveniles in conflict with law. [Para 69] [803-C-D]

3.10. It is also directed that whenever an accused, who physically appears to be a juvenile, is produced before a Magistrate, he or she should form a *prima facie* opinion on the juvenility of the accused and record it. If any doubt persists, the Magistrate should conduct an age inquiry as required by Section 7A of the Juvenile Justice (Care and Protection of Children) Act, 2000 to determine the juvenility or otherwise of the accused person. In this regard, it is better to err on the side of caution in the first instance rather than have the entire proceedings reopened or vitiated at a subsequent stage or a guilty person go unpunished only because he or she is found to be a juvenile on the date of occurrence of the incident. [Para 70] [803-E-G]

Pawan vs. State of Uttaranchal **(2009) 15 SCC 259: 2009 (3) SCR 468 – referred to.**

Per T.S. Thakur, J. (Supplementing):

1.1. The appellant was above sixteen years as on the date of the commission of the offence, no matter the enquiry report submitted by the Trial Court has held him to be less than 16 years on that date. It is important to mention that the question whether the appellant was less or more than 16 is important not because the benefit of the 2000 Act depends on that question, but because the answer to that question has a bearing on whether the conviction of the appellant was itself illegal, hence liable to be set aside. This is because, the benefit of the 2000 Act, would be in any case available to the appellant, so long as he was less than 18 years of age on the crucial date, and it is nobody's case that he was above that age on that date. [Para 6] [806-F-H; 807-A]

Hari Ram v. State of Rajasthan **(2009) 13 SCC 211: 2009 (7) SCR 623 – referred to.**

1.2. As on the date of the commission of the offence and right up to the date the trial Court convicted and sentenced the appellant to imprisonment, the provisions of Juvenile Justice Act, 1986 (in short, the "1986 Act") held the field. Apart from the fact that the upper age limit for claiming juvenility was 16 years for boys, the question whether a person was or was not a juvenile could be decided by the Court on the basis of documentary or medical evidence or on a fair assessment of both of them. That is because, the provisions of 1986 Act, did not, prioritise the basis on which such determination could be made. It was left for the accused to produce evidence or the Court to direct a medical examination for determining his age. The weightage which the Rules framed under the 2000 Act provide and the order of p[illegible]r

purposes of placing reliance upon evidence coming from different sources were not in vogue while the 1986 Act held the field. The result was that the Court was free to determine the question on the basis of one such piece of evidence or on a cumulative effect and on such evidence that may have been produced before it. It is necessary to bear in mind this dichotomy in the legal framework while determining whether the trial Court had committed an error of jurisdiction in holding the appellant to be not a juvenile and hence triable by it. [Para 7] [807-D-H; 808-A]

1.3. The question whether the appellant was a juvenile was first raised before the trial Court at a very early stage of the case. The appellant had prayed for bail on that basis, which appears to have led the Court to direct assessment of his age on the basis of a medical examination. The medical examination, however, determined the age of the appellant to be 17 years, which took him beyond the upper age of juvenility under the 1986 Act. No attempt was made by the appellant to adduce any evidence to support his claim of being a juvenile nor was any documentary evidence in the form of school certificate or otherwise adduced. As a matter of fact, the chapter was totally forgotten, and the trial allowed to proceed to its logical conclusion without the appellant raising his little finger against the competence of the Court or agitating the issue regarding his age in any higher forum. The conviction and sentence recorded by the trial Court was also assailed on merits before the High Court but not on the ground that the trial was vitiated on account of the appellant being a juvenile, not triable by an ordinary criminal Court. [Para 8] [808-B-E]

1.4. It was only in this Court that long after the appeal was filed that a fresh claim for benefit under the 2000 Act was made by the appellant in which this Court directed a

fresh enquiry that was conducted in terms of Rule 12 of the Rules framed under the 2000 Act. The enquiry report submitted supports the appellant's claim of his being a juvenile under Section 2(k) of the 2000 Act, hence, entitled to the benefits admissible thereunder. Although an attempt was made by the respondent-State to assail the finding that the appellant was less than 18 years of age on the date of the occurrence. There is no cogent reason to hold that the appellant was more than 18 years on the date of the occurrence. The determination of age of the appellant, by the trial Court, on the basis of the first medical examination is fully supported and corroborated by the medical examination of the appellant conducted in the course of the enquiry directed by this Court . The medical examination conducted by the Board of Doctors has determined the appellant's age to be 40 years as on 24th December, 2010 which implies that he was around 17 ½ years old on the date of the occurrence. Superadded to the medical evidence is the documentary evidence that has come to light in the course of the enquiry in the form of the Family Register (Ex. Ka-3) maintained by the Panchayat and proved by A.P.W.2-Gram Panchayat Officer. According to this witness who spoke from the register, the appellant was born in the year 1969. The Electoral roll for the year 2009 for the constituency in which the appellant's village falls, also mentions this age to be 37 years, implying thereby that he was around 17 years old on the date of the occurrence. Deposition of the Gram Sabha Head examined as PW-12 in the course of the enquiry is supportive of the age of the appellant as given in the Electoral roll. The two medical examinations and the documents come from proper custody and lend complete corroboration to the appellant's age being above 16 years on the date of the occurrence. Besides, what cannot be lightly brushed away is the fact that the appellant was a married man on the date of the occurrence and that the charge levelled against h y

harassment and dowry death of his wife who was 19 years old at the time of her demise. If the appellant was only 13 years and 8 months old as suggested by the school certificate the question of his harassing the deceased almost six years his senior would not arise for he would be only an adolescent while his wife-the deceased was a grown up girl who could hardly get harassed by a mere child so young in age that he had barely cut his teeth. The trial Court did not in that view commit any error of jurisdiction in trying the appellant for the offences alleged against him. [Para 8] [808-E-H; 809-A-G]

1.5. While the appellant was above 16 years of age on the date of the commission of the offence, he was certainly below 18 years and hence entitled to the benefit of the 2000 Act, no matter the later enactment was not on the statute book on the date of the occurrence. [Para 9] [809-H; 810-A]

2.1. The conviction cannot however be set aside for more than one reason. Firstly because there was and is no challenge to the order of conviction recorded by the Courts below in this case either before the High Court or before this Court. As a matter of fact the plea of juvenility before this Court by way of an additional ground stopped short of challenging the conviction of the appellant on the ground that the Court concerned had no jurisdiction to try the appellant. Secondly because the fact situation in the case at hand is that on the date of the occurrence the appellant was above 16 years of age. He was, therefore, not a juvenile under the 1986 Act that covered the field at that point of time, nor did the 1986 Act deprive the trial Court of its jurisdiction to try the appellant for the offence he was charged with. Repeal of the 1986 Act by the 2000 Act raised the age of juvenility to 18 years. Parliament provided for cases which were either pending trial or were, after conclusion of the trial, pending before an

appellate or a revisional Court by enacting Section 20 of the Juvenile Justice (Care and Protection) Act, 2000. [Para 9, 10] [810-B-E]

2.2. The provision u/s. 20 of 2000 Act starts with a non-obstante clause, which implies that the provisions have an overriding effect on all other provisions contained in the enactment. The provision deals with proceedings pending against a juvenile in any court. The provision sanctions the continuance of such pending proceedings in the very same court, as if the 2000 Act had not been enacted.The provision requires the Court seized of the matter to record a finding as to whether the juvenile has committed an offence. If the finding is against the juvenile in that he is found to have committed an offence, the court is required to forebear from passing an order of sentence and instead forward the juvenile to the Board, which shall then pass an order in accordance with the provisions of the Act, as if it had been satisfied on inquiry under the Act that the juvenile had committed an offence.In all pending cases including trial, revision, appeal or any other criminal proceedings the determination of juvenility shall be in terms of clause (l) of Section 2 even if the juvenile ceases to be so on or before the date of commencement of the 2000 Act. [Para 11] [811-E-H; 812-A-C]

2.3. A case that was pending before 'any Court' (which expression would include both the trial Court and the High Court) would continue in that Court, who would not only proceed with the trial and/or hearing of the case as if the 2000 Act was not on the Statute book, but also record a finding as to the guilt or innocence of the juvenile. Far from stipulating a specific prohibition, the provisions of Section 20, make it obligatory for the Court concerned to proceed with the matter and record its conclusion as to the guilt or otherwis

prohibition is against the Court passing an order of sentence against the juvenile, for which purpose the juvenile has to be forwarded to the Board for appropriate orders. [Para 12] [812-D-F]

2.4. In all such cases where the accused was above 16 years but below 18 years of age on the date of occurrence, the proceedings pending in the Court concerned will continue and be taken to their logical end except that the Court upon finding the juvenile guilty would not pass an order of sentence against him. Instead he shall be referred to the Board for appropriate orders under the 2000 Act. Applying that proposition to the present case, the trial Court and the High Court could and indeed were legally required to record a finding as to the guilt or otherwise of the appellant. All that the Courts could not have done was to pass an order of sentence, for which purpose, they ought to have referred the case to the Juvenile Justice Board. [Para 18] [817-B-D]

2.5. Section 7A (2) of the 2000 Act prescribes the procedure to be followed, when a claim of juvenility is made before any Court. Although a claim of juvenility can be raised by a person at any stage and before any Court, upon such Court finding the person to be a juvenile on the date of the commission of the offence, it has to forward the juvenile to the Board for passing appropriate orders and the sentence, if any, passed shall be deemed to have effect. There is no provision suggesting, or making it obligatory for the Court before whom the claim for juvenility is made, to set aside the conviction of the juvenile on the ground that on the date of commission of the offence he was a juvenile, and hence not triable by an ordinary criminal court. Applying the maxim of *expressio unius est exclusio alterious*, it would be reasonable to hold that the law in so far as it requires a reference to be made to the Board, excludes by

necessary implication any intention on the part of the legislature requiring the Courts to set aside the conviction recorded by the lower court. The Parliament, it appears, was content with setting aside the sentence of imprisonment awarded to the juvenile and making of a reference to the Board without specifically or by implication requiring the court concerned to alter or set aside the conviction. [Paras 19 and 20] [817-E, G-H; 818-A-C]

2.6. There is no reason why the conviction of the appellant should be interfered with, simply because he is under the 2000 Act, a juvenile entitled to the benefit of being referred to the Board for an order under Section 15 of the said Act. There is no gainsaying that even if the appellant had been less than sixteen years of age, on the date of the occurrence, he would have been referred for trial to the Juvenile Court in terms of Section 8 of the 1986 Act. The Juvenile Court would then hold a trial and record a conviction or acquittal depending upon the evidence adduced before it. In an ideal situation, a case filed before an ordinary Criminal Court when referred to the Board or Juvenile Court may culminate in a conviction at the hands of the Board also. But law does not countenance a situation where a full-fledged trial and even an appeal ends in a conviction of the accused but the same is set aside without providing for a trial by the Board. [Para 23] [819-D-G]

Pratap Singh v. State of Jharkhand and Anr. **(2005) 3 SCC 551: 2005 (1) SCR 1019;** *Bijender Singh v. State of Haryana and Anr.* **(2005) 3 SCC 685: 2005 (2) SCR 1131** *Dharambir v. State (NCT of Delhi)* **(2010) 5 SCC 344: 2010 (5) SCR 137;** *Daya Nand v. State of Haryana* **(2011) 2 SCC 224: 2011 (1) SCR 173;** *Kalu @ Amit v. State of Haryana* **(2012) 8 SCC 34;** *Pradeep Kumar & Ors. v. State of U.P.* **1995 Supp (4) SCC 419;** *Bhola Bha[illegible]of*

Bihar **(1997) 8 SCC 720: 1997 (4) Suppl. SCR 711;** *Upendra Kumar v. State of Bihar* **(2005) 3 SCC 592;** *Vaneet Kumar Gupta @ Dharmindher v. State of Punjab* **(2009) 17 SCC 587 – relied on.**

Case Law Reference

In the Judgment of Madan B. Lokur:

2009 (3) SCR 468	**referred to**	**Para 11**
(1981) 4 SCC 149	**referred to**	**Para 29**
(1989) 3 SCC 1	**referred to**	**Para 30**
1995 Supp (4) SCC 419	**referred to**	**Para 31**
1997 (4) Suppl. SCR 711	**referred to**	**Para 32**
(2005) 3 SCC 592	**referred to**	**Para 33**
2005 (5) Suppl. SCR 90	**referred to**	**Para 34**
2012 (7) SCR 434	**referred to**	**Para 35**
2009 (6) SCR 486	**referred to**	**Para 36**
2010 (5) SCR 137	**referred to**	**Para 36**
2009 (7) SCR 623	**referred to**	**Para 37**
2011 (1) SCR 173	**referred to**	**Para 38**
2012 (10) SCR 540	**relied on**	**Para 39**
2013 (6) SCALE 778	**relied on**	**Para 46**
2012 (9) SCR 244	**relied on**	**Para 60**
1996 (10) Suppl. SCR 284	**relied on**	**Para 63**

In the Judgment of T.S. Thakur:

2009 (7) SCR 623	**referred to**	**Para 6**
2005 (1) SCR 1019	**relied on**	**Para 13**
2005 (2) SCR 1131	**relied on**	**Para 14**

2010 (5) SCR 137	**relied on**	**Para 15**
2011 (1) SCR 173	**relied on**	**Para 16**
(2012) 8 SCC 34	**relied on**	**Para 17**
1995 Supp (4) SCC 419	**relied on**	**Para 22**
1997 (4) Suppl. SCR 711	**relied on**	**Para 22**
(2005) 3 SCC 592	**relied on**	**Para 22**
(2009) 17 SCC 587	**relied on**	**Para 22**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 763 of 2003.

From the Judgment & Order dated 23.05.2003 of the High Court of Judicature at Allahabad, Lucknow Bench, Lucknow in Criminal Appeal No. 464 of 1990.

Sushil Kumar Jain, Anurag Gohil, Ruchika Gohil for the Appellants.

Ameet Singh, Mukul Singh, Pragati Neekhra for the Respondent.

The Judgment of the Court was delivered by

MADAN B. LOKUR, J. 1. Three principal issues arise for consideration in this appeal. The first is whether the appellant was a juvenile or a child as defined by Section 2(k) of the Juvenile Justice (Care and Protection of Children) Act, 2000 on the date of occurrence of the offence he was charged with. On a consideration of the Report called for by this Court on this question, the issue must be answered in the affirmative.

2. The second is whether the conviction of the appellant can be sustained on merits and, if so, the sentence to be awarded to the appellant. In our opinion the conviction of the appellant must be upheld and on the quantum of sentence, he ought to be dealt with in accordance [illegible]f

Section 20 of the Juvenile Justice (Care and Protection of Children) Act, 2000 read with Section 15 thereof.

3. The third question is whether any appropriate measures can be taken to prevent the recurrence of a situation, such as the present, where an accused is subjected to a trial by a regular Court having criminal jurisdiction but he or she is later found to be a juvenile. In this regard, we propose to give appropriate directions to all Magistrates which, we hope, will prevent such a situation from arising again.

The facts:

4. On the midnight of 23rd / 24th May 1988 it is alleged that Asha Devi was set on fire by the appellants and two other persons. A demand for dowry, which she was unable to meet, resulted in the unfortunate incident.

5. On 24th May 1988 at about 5 a.m., Asha Devi's uncle came to know of the incident and he lodged a complaint with the local police. In the meanwhile, Asha Devi had been taken to the District Hospital where she succumbed to the burns.

6. After completing the investigation, the local police filed a charge sheet on 10th July 1988 against the appellants and two other persons. The charge sheet alleged offences committed under Section 147, Section 302, Section 304-B and Section 498-A of the Indian Penal Code (for short the 'IPC').

7. Thereafter the case proceeded to trial and the Sessions Judge, Rae Bareli in S.T. No. 186 of 1988 delivered judgment on 30th August 1990 convicting the appellants and acquitting the other two persons. The appellants were convicted under Section 304-B of the IPC (dowry death) and sentenced to undergo 7 years rigorous imprisonment. They were also convicted under Section 498-A of the IPC (husband or relative of husband of a woman subjecting her to cruelty) and sentenced to undergo 2 years rigorous imprisonment and to pay a fine of Rs.100/- each.

8. Feeling aggrieved by their conviction and sentence, the appellants preferred Criminal Appeal No. 464 of 1990 in the Lucknow Bench of the Allahabad High Court. By its judgment and order dated 23rd May 2003 the High Court dismissed the Criminal Appeal. This is reported as 2003 (3) ACR 2431=MANU/UP/2115/2003.

9. Against the judgment and order passed by the Allahabad High Court the appellants came up in appeal to this Court. It may be mentioned that during the pendency of this appeal the second appellant (father of the first appellant) died and therefore only the appeal filed by the first appellant, the husband of Asha Devi, survives.

10. During the pendency of these proceedings the appellant filed Criminal Miscellaneous Petition No. 16974 of 2010 for raising additional grounds. He sought to contend that on the date of commission of the offence, he was a juvenile or child within the meaning of that expression as defined in Section 2(k) of the Juvenile Justice (Care and Protection of Children) Act, 2000 (hereinafter referred to as the 'Act'). According to the appellant his date of birth was 31st August 1974 and therefore, when the offence is alleged to have been committed, he was about 14 years of age.

11. The application for urging additional grounds was considered by this Court and by an order dated 19th November 2010 it was held, while relying upon *Pawan v. State of Uttaranchal,* (2009) 15 SCC 259 that prima facie there was material which necessitated an inquiry into the claim of the appellant that he was a juvenile at the time of commission of the offence. Accordingly, the following direction was given:

> "In the result we allow the appellant to urge the additional ground regarding juvenility of the appellant on the date of the commission of the offence and direct the Trial Court to hold an enquiry into the said question and submit a report as expeditiously as

than four months from today. We make it clear that the Trial Court shall be free to summon the concerned School, Panchayat or the Electoral office record or any other record from any other source which it considers necessary for a proper determination of the age of the appellant. We also make it clear that in addition to the above, the Trial Court shall be free to constitute a Medical Board comprising at least three experts on the subject for determination of the age of the appellant, based on medical tests and examination."

Report of the Additional Sessions Judge:

12. The Additional Sessions Judge, Rae Bareli acted on the order dated 19th November 2010 and registered the proceedings as Miscellaneous Case No. 1 of 2010. He then submitted his Report dated 18th February 2011 in which he accepted the claim of the appellant that his date of birth was 31st August 1974. As such, the appellant was a juvenile on the date of commission of the offence.

13. For the purposes of preparing his Report, the Additional Sessions Judge examined several witnesses including A.P.W. 1 Samar Bahadur Singh, Principal, Pre-Middle School, Sohai Bagh who produced the school admission register pertaining to the admission of the appellant in the school. The register showed the date of birth of the appellant as 31st August 1974 and the Additional Sessions Judge found that the register had not been tampered with.

14. The Additional Sessions Judge also examined A.P.W. 11 Dr. Birbal who was a member of the Medical Board constituted by him. The Medical Board examined the appellant on 24th December 2010 and gave his age as about 40 years. Reference in this context was also made to an ossification test conducted on the appellant while he was in judicial custody in the District Jail in Rae Bareli during investigation of the case.

The ossification test was conducted on 8th July 1988 and that determined the appellant's age as about 17 years.

15. At this stage, it may be mentioned that on the basis of the ossification test the appellant had applied for bail before the Additional Sessions Judge in Rae Bareli being Bail Application No. 435 of 1988. The Additional Sessions Judge noted that while the age of the appellant was determined at about 17 years by the Chief Medical Officer, there could be a difference of about 2 years either way and therefore by an order dated 13th July 1988 the application for bail was rejected.

16. The appellant then moved the Lucknow Bench of the Allahabad High Court by filing a bail application which was registered as Criminal Miscellaneous Case No. 1859(B) of 1988. By an order dated 25th November 1988 the Allahabad High Court granted bail to the appellant while holding, *inter alia,* that it was difficult to discard the opinion of the Chief Medical Officer regarding the appellant's age.

17. Coming back to the Report, the Additional Sessions Judge also examined A.P.W. 5 Pankulata the younger sister of deceased Asha Devi. She stated that Asha Devi was about 4 or 5 years older than the appellant and that it was not unknown, apparently in their community, for the wife to be older than the husband. The record of the case shows that Asha Devi died at the age of about 19 after having been married for about 4½ years. This would mean that the appellant was married to Asha Devi when he was about 9 years old and that on the date of the incident he was about 14 years old.

18. The Additional Sessions Judge also examined A.P.W. 8 Sanoj Singh, husband of Pankulata, who gave a statement in tune with that of his wife. The Additional Sessions Judge also examined A.P.W. 9 Narendra Bahadur Singh husband of A.P.W. 10 Kanti Singh. All these witnesses stated to the effect that apparently in their community the wife is normally older than the husband at the time of marriage. A

produced proof of their age to show that the wife (A.P.W. 5 Pankulata and A.P.W. 10 Kanti Singh) was older than her husband at the time of their marriage.

19. On the basis of the material before him, the Additional Sessions Judge accepted the claim of the appellant that he was younger than his wife at the time of marriage and that his date of birth was 31st August 1974.

20. Objections have been filed to this Report by the State of Uttar Pradesh, but the only objection taken is that the documents pertaining to the education of the appellant were produced after a great delay and not immediately. It was also submitted that it is improbable that a girl of about 15 years of age would get married to a boy of about 9 years of age.

21. The Report given by the Additional Sessions Judge has been examined with the assistance of learned counsel and there is no reason to reject it. While the circumstances are rather unusual, the fact remains that there is documentary evidence to show from the school admission register (which has not been tampered with) that the date of birth of the appellant is 31st August 1974. That apart, the medical examination of the appellant conducted on 8th July 1988 less than two months after the incident, also shows his age to be about 17 years. This was not doubted by the Additional Session Judge while rejecting the bail application of the appellant and was also not doubted by the Allahabad High Court while granting bail to him. Therefore, it does appear that the appellant was about 17 years of age when the incident had occurred and that he had set up a claim of being a juvenile or child soon after his arrest and before the charge sheet was filed. In other words, the appellant was a juvenile or a child within the meaning of that expression as defined in Section 2(k) of the Act.

Should the conviction be upheld:

22. The next question that arises is whether the conviction

of the appellant is justified or not. Before examining the evidence on record, it is necessary to mention that both the Trial Court as well as the High Court have concurrently found that the appellants had demanded dowry from Asha Devi and that she had been set on fire for not having complied with the demands for dowry.

23. Section 304-B of the IPC which is the more serious offence for which the appellant has been found guilty, reads as follows:

> "**304-B. Dowry death.**—(1) Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called "dowry death", and such husband or relative shall be deemed to have caused her death.
>
> *Explanation*.—For the purpose of this sub-section, "dowry" shall have the same meaning as in Section 2 of the Dowry Prohibition Act, 1961 (28 of 1961).
>
> (2) Whoever commits dowry death shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life."

24. A plain reading of this section, which explains a dowry death, makes it clear that its ingredients are (a) the death of a woman is caused by burns or a bodily injury or that it occurs otherwise than under normal circumstances; (b) the death takes place within seven years of her marriage; (c) the woman was subjected, soon before her death, to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry.

25. In the present case, both the T h

Court have found that Asha Devi had died of burn injuries as per the medical evidence; she had been set on fire on the midnight of 23/24 May 1988 and taken to the hospital at about 4 a.m. on 24th May 1988 where she succumbed to the burn injuries at about 5.30 a.m.; she had been married to the appellant for about 4½ years before her death; and that the evidence of PW-1 Ram Bahadur (uncle of Asha Devi) and PW-3 Tej Bahadur Singh (father of Asha Devi) disclosed that demands were being made by the appellants for dowry soon before her death. Apart from cash, a demand was made by the in-laws of Asha Devi for a gold chain and a horse. Since the demands were not complied with, Asha Devi was frequently beaten and harassed. She had brought this to the notice of her uncle as well as her father. In fact, before her demise, she had written a letter to her father about the beating and harassment given to her due to the inability to meet the dowry demands. The letter was proved by the prosecution and was relied on by the Trial Court as well as the High Court in accepting the version of the prosecution. Clearly, therefore, the ingredients of Section 304-B of the IPC were made out.

26. However, the case put up by the appellant was that Asha Devi had accidentally caught fire while she was cooking and therefore it was a case of accidental death. This was not accepted by both the Trial Court as well as the High Court since there was no explanation given for the delay of about 4 hours in taking Asha Devi to the hospital if the case was really one of accidental death. Moreover, there was nothing to suggest that the appellant or anyone in the family had made any attempt to extinguish the fire.

27. There is no doubt, on the basis of the facts found by the Trial Court as well as the High Court from the evidence on record that a case of causing a dowry death had convincingly been made out against the appellant. There is no apparent reason to disturb the concurrent findings of fact arrived at by the Trial Court and the High Court and so the conviction of the appellant must be upheld.

Sentence to be awarded:

28. On the sentence to be awarded to a convict who was a juvenile when he committed the offence, there is a dichotomy of views.

29. In the first category of cases, the conviction of the juvenile was upheld but the sentence quashed. In *Jayendra v. State of Uttar Pradesh,* (1981) 4 SCC 149 the conviction of the appellant was confirmed though he was held to be a child as defined in Section 2(4) of the Uttar Pradesh Children Act, 1951. However, he was not sent to an 'approved school' since he was 23 years old by that time. His sentence was quashed and he was directed to be released forthwith.

30. Similarly, in *Bhoop Ram v. State of U.P.* (1989) 3 SCC 1 this Court followed *Jayendra* and while upholding the conviction of the appellant who was 28 years old by that time, the sentence awarded to him was quashed.

31. In *Pradeep Kumar v. State of U.P.,* 1995 Supp (4) SCC 419 yet another case under the Uttar Pradesh Children Act, 1951 the conviction of the appellant was upheld but since he was 30 years old by that time, his sentence was set aside.

32. In *Bhola Bhagat and other v. State of Bihar,* (1997) 8 SCC 720 the conviction of the appellant was upheld by this Court but the sentence was quashed keeping in mind the provisions of the Bihar Children Act, 1970 read with the Bihar Children Act, 1982 and the Juvenile Justice Act, 1986.

33. In *Upendra Kumar v. State of Bihar,* (2005) 3 SCC 592 this Court followed *Bhola Bhagat* and upheld the conviction of the appellant but quashed the sentence awarded to him.

34. In *Gurpreet Singh v. State of Punjab,* (2005) 12 SCC 615 one of the appellants was a juvenile within the meaning of that expression occurring in Section 2(h) of the Juvenile Justice Act, 1986. This Court held that if the a[illegible]e

on the date of occurrence and continues to be so, then in that event he would have to be sentenced to a juvenile home. However, if on the date of sentence, the accused is no longer a juvenile, the sentence imposed on him would be liable to be set aside. In this context, reference was made to *Bhoop Ram*.

35. Finally in *Vijay Singh v. State of Delhi,* (2012) 8 SCC 763 the conviction of the appellant was upheld but the sentence was quashed since he was about 30 years old by that time.

36. The second category of cases includes *Satish @ Dhanna v. State of Madhya Pradesh,* (2009) 14 SCC 187 wherein the conviction of the appellant was upheld but the sentence awarded was modified to the period of detention already undergone. Similarly, in *Dharambir v. State (NCT of Delhi),* (2010) 5 SCC 344 the conviction of the appellant was sustained but since the convict had undergone two years and four months of incarceration, the sentence awarded to him was quashed.

37. The third category of cases includes *Hari Ram v. State of Rajasthan,* (2009) 13 SCC 211 wherein the appellant was held to be a juvenile on the date of commission of the offence. His appeal against his conviction was allowed and the entire case remitted to the Juvenile Justice Board for disposal in accordance with law.

38. In *Daya Nand v. State of Haryana,* (2011) 2 SCC 224 this Court followed *Hari Ram* and directed the appellant to be produced before the Juvenile Justice Board for passing appropriate orders in accordance with the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000.

39. The fourth category of cases includes *Ashwani Kumar Saxena v. State of Madhya Pradesh,* (2012) 9 SCC 750 in which the conviction of the appellant was upheld and the records were directed to be placed before the Juvenile Justice Board for awarding suitable punishment to the appellant.

40. The sum and substance of the above discussion is that in one set of cases this Court has found the juvenile guilty of the crime alleged to have been committed by him but he has gone virtually unpunished since this Court quashed the sentence awarded to him. In another set of cases, this Court has taken the view, on the facts of the case that the juvenile is adequately punished for the offence committed by him by serving out some period in detention. In the third set of cases, this Court has remitted the entire case for consideration by the jurisdictional Juvenile Justice Board, both on the innocence or guilt of the juvenile as well as the sentence to be awarded if the juvenile is found guilty. In the fourth set of cases, this Court has examined the case on merits and after having found the juvenile guilty of the offence, remitted the matter to the jurisdictional Juvenile Justice Board on the award of sentence.

41. In our opinion, the course to adopt is laid down in Section 20 of the Juvenile Justice (Care and Protection of Children) Act, 2000. This reads as follows:

> **"20. Special provision in respect of pending cases**.— Notwithstanding anything contained in this Act, all proceedings in respect of a juvenile pending in any court in any area on the date on which this Act comes into force in that area, shall be continued in that court as if this Act had not been passed and if the court finds that the juvenile has committed an offence, it shall record such finding and instead of passing any sentence in respect of the juvenile, forward the juvenile to the Board which shall pass orders in respect of that juvenile in accordance with the provisions of this Act as if it had been satisfied on inquiry under this Act that a juvenile has committed the offence:
>
> Provided that the Board may, for any adequate and special reason to be mentioned in the order, review the case and pass appropriate order in the interest of such juvenile.
>
> *Explanation*.-In all pending cases i n,

appeal or any other criminal proceedings in respect of a juvenile in conflict with law, in any court, the determination of juvenility of such a juvenile shall be in terms of clause (*l*) of Section 2, even if the juvenile ceases to be so on or before the date of commencement of this Act and the provisions of this Act shall apply as if the said provisions had been in force, for all purposes and at all material times when the alleged offence was committed."

42. It is clear that the case of the juvenile has to be examined on merits. If it found that the juvenile is guilty of the offence alleged to have been committed, he simply cannot go unpunished. However, as the law stands, the punishment to be awarded to him or her must be left to the Juvenile Justice Board constituted under the Juvenile Justice (Care and Protection of Children) Act, 2000. This is the plain requirement of Section 20 of the Juvenile Justice (Care and Protection of Children) Act, 2000. In other words, *Ashwani Kumar Saxena* should be followed.

43. In the present case, the offence was committed by the appellant when the Juvenile Justice Act, 1986 was in force. Therefore, only the 'punishments' not greater than those postulated by the Juvenile Justice Act, 1986 ought to be awarded to him. This is the requirement of Article 20(1) of the Constitution. The 'punishments' provided under the Juvenile Justice Act, 1986 are given in Section 21 thereof and they read as follows:

"**21. Orders that may be passed regarding delinquent juveniles**.—(1) Where a Juvenile Court is satisfied on inquiry that a juvenile has committed an offence, then, notwithstanding anything to the contrary contained in any other law for the time being in force, the Juvenile Court may, if it so thinks fit,—

(*a*) allow the juvenile to go home after advice or admonition;

(*b*) direct the juvenile to be released on probation of good conduct and placed under the care of any parent, guardian or other fit person, on such parent, guardian or other fit person executing a bond, with or without surety as that Court may require, for the good behaviour and well-being of the juvenile for any period not exceeding three years; Juvenile Justice Act, 1986

(*c*) direct the juvenile to be released on probation of good conduct and placed under the care of any fit institution for the good behaviour and well-being of the juvenile for any period not exceeding three years;

(*d*) make an order directing the juvenile to be sent to a special home,—

(*i*) in the case of a boy over fourteen years of age or of a girl over sixteen years of age, for a period of not less than three years;

(*ii*) in the case of any other juvenile, for the period until he ceases to be a juvenile:

Provided that xxx xxx xxx.

Provided further that xxx xxx xxx;

(*e*) order the juvenile to pay a fine if he is over fourteen years of age and earns money.

(2) Where an order under clause (*b*), clause (*c*) or clause (*e)* of sub-section (1) is made, the Juvenile Court may, if it is of opinion that in the interests of the juvenile and of the public it is expedient so to do, in addition make an order that the delinquent juvenile shall remain under the supervision of a probation officer named in the order during such period, not exceeding three years, as may be specified therein, and may in such supervision order

impose such conditions as it deems necessary for the due supervision of the delinquent juvenile:

Provided that xxx xxx xxx.

(3) xxx xxx xxx.

(4) xxx xxx xxx."

44. A perusal of the 'punishments' provided for under the Juvenile Justice Act, 1986 indicate that given the nature of the offence committed by the appellant, advising or admonishing him [clause (a)] is hardly a 'punishment' that can be awarded since it is not at all commensurate with the gravity of the crime. Similarly, considering his age of about 40 years, it is completely illusory to expect the appellant to be released on probation of good conduct, to be placed under the care of any parent, guardian or fit person [clause (b)]. For the same reason, the appellant cannot be released on probation of good conduct under the care of a fit institution [clause (c)] nor can he be sent to a special home under Section 10 of the Juvenile Justice Act, 1986 which is intended to be for the rehabilitation and reformation of delinquent juveniles [clause (d)]. The only realistic punishment that can possibly be awarded to the appellant on the facts of this case is to require him to pay a fine under clause (e) of Section 21(1) of the Juvenile Justice Act, 1986.

45. While dealing with the case of the appellant under the IPC, the fine imposed upon him is only Rs.100/-. This is *ex facie* inadequate punishment considering the fact that Asha Devi suffered a dowry death.

46. Recently, one of us (T.S. Thakur, J.) had occasion to deal with the issue of compensation to the victim of a crime. An illuminating and detailed discussion in this regard is to be found in *Ankush Shivaji Gaikwad v. State of Maharashtra,* 2013 (6) SCALE 778. Following the view taken therein read with the provisions of Section 20 of the Juvenile Justice (Care and Protection of Children) Act, 2000 the appropriate course

of action in the present case would be to remand the matter to the jurisdictional Juvenile Justice Board constituted under the Juvenile Justice (Care and Protection of Children) Act, 2000 for determining the appropriate quantum of fine that should be levied on the appellant and the compensation that should be awarded to the family of Asha Devi.

Avoiding a recurrence:

47. How can a situation such as the one that has arisen in this case (and in several others in the past) be avoided? We need to only appreciate and understand a few provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000 (the Act) and the Model Rules framed by the Government of India called the Juvenile Justice (Care and Protection of Children) Rules, 2007 (the Rules).

48. The preamble to the Act draws attention to the Convention on the Rights of the Child which was ratified by the Government of India on 11th December 1992. The Convention has prescribed, *inter alia*, a set of standards to be adhered to in securing the best interests of the child. For the present purposes, it is not necessary to detail those standards. However, keeping this in mind, several special procedures, over and above or despite the Criminal Procedure Code (for short the Code) have been laid down for the benefit of a juvenile or a child in conflict with law. These special procedures are to be found both in the Act as well as in the Rules. Some (and only some) of them are indicated below.

49. A Juvenile Justice Board is constituted under Section 6 of the Act to deal exclusively with all proceedings in respect of a juvenile in conflict with law. When a juvenile charged with an offence is produced before a Juvenile Justice Board, it is required to hold an inquiry (not a trial) and pass such orders as it deems fit in connection with the juvenile (Section 14 of the Act).

50. A juvenile or a child in conflict with law cannot be kept in jail but may be temporarily received in an Observation Home during the pendency of any inquiry against him (Section 8 of the Act). If the result of the inquiry is against him, the said juvenile may be received for reception and rehabilitation in a Special Home (Section 9 of the Act). The maximum period for reception and rehabilitation in a Special Home is three years (Section 15 of the Act). Even this, in terms of Article 37 of the Convention on the Rights of the Child, shall be a measure of last resort.

51. The provision dealing with bail (Section 12 of the Act) places the burden for denying bail on the prosecution. Ordinarily, a juvenile in conflict with law shall be released on bail, but he may not be so released if there appear reasonable grounds for believing that the release is likely to bring him into association with any known criminal or expose him to moral, physical or psychological danger or that his release would defeat the ends of justice.

52. Orders that may be passed by a Juvenile Justice Board against a juvenile, if it is satisfied that he has committed an offence, are mentioned in Section 15 of the Act. One of the orders that may be passed, as mentioned above, is for his reception and rehabilitation in a Special Home for a period of three years, as a measure of last resort.

53. The Rules, particularly Rule 3, provide, *inter alia*, that in all decisions taken within the context of administration of justice, the principle of best interests of a juvenile shall be the primary consideration. What this means is that "the traditional objectives of criminal justice, that is retribution and repression, must give way to rehabilitative and restorative objectives of juvenile justice". The right to privacy and confidentiality of a juvenile is required to be protected by all means and through all the stages of the proceedings, and this is one of the reasons why the identity of a juvenile in conflict with law is not disclosed. Following the requirements of the Convention on the Rights of the Child, Rule 3 provides that institutionalization of a child or

a juvenile in conflict with law shall be the last resort after a reasonable inquiry and that too for the minimum possible duration.

Rule 32 provides that:

> "The primary aim of rehabilitation and social reintegration is to help children in restoring their dignity and self-worth and mainstream them through rehabilitation within the family where possible, or otherwise through alternate care programmes and long-term institutional care shall be of last resort."

54. It is quite clear from the above that the purpose of the Act is to rehabilitate a juvenile in conflict with law with a view to reintegrate him into society. This is by no means an easy task and it is worth researching how successful the implementation of the Act has been in its avowed purpose in this respect.

55. As regards procedurally dealing with a juvenile in conflict with law, the Rules require the concerned State Government to set up in every District a Special Juvenile Police Unit to handle the cases of juveniles or children in terms of the provisions of the Act (Rule 84). This Unit shall consist of a juvenile or child welfare officer of the rank of Police Inspector having an aptitude and appropriate training and orientation to handle such cases. He will be assisted by two paid social workers having experience of working in the field of child welfare of which one of them shall be a woman.

56. Rule 75 of the Rules requires that while dealing with a juvenile or a child, except at the time of arrest, a police officer shall wear plain clothes and not his uniform.

57. The Act and the Model Rules clearly constitute an independent code for issues concerning a child or a juvenile, particularly a juvenile in conflict with law. This code is intended to safeguard the rights of the child and a[illegible]h

law and to put him in a category separate and distinct from an adult accused of a crime.

58. Keeping in mind all these standards and safeguards required to be met as per our international obligations, it becomes obligatory for every Magistrate before whom an accused is produced to ascertain, in the first instance or as soon thereafter as may be possible, whether the accused person is an adult or a juvenile in conflict with law. The reason for this, obviously, is to avoid a two-fold difficulty: first, to avoid a juvenile being subjected to procedures under the normal criminal law and *de hors* the Act and the Rules, and second, a resultant situation, where the "trial" of the juvenile is required to be set aside and quashed as having been conducted by a court not having jurisdiction to do so or a juvenile, on being found guilty, going 'unpunished'. This is necessary not only in the best interests of the juvenile but also for the better administration of criminal justice so that the Magistrate or the Sessions Judge (as the case may be) does not waste his time and energy on a "trial".

59. It must be appreciated by every Magistrate that when an accused is produced before him, it is possible that the prosecution or the investigating officer may be under a mistaken impression that the accused is an adult. If the Magistrate has any iota of doubt about the juvenility of an accused produced before him, Rule 12 provides that a Magistrate may arrive at a *prima facie* conclusion on the juvenility, on the basis of his physical appearance. In our opinion, in such a case, this *prima facie* opinion should be recorded by the Magistrate. Thereafter, if custodial remand is necessary, the accused may be sent to jail or a juvenile may be sent to an Observation Home, as the case may be, and the Magistrate should simultaneously order an inquiry, if necessary, for determining the age of the accused. Apart from anything else, it must be appreciated that such an inquiry at the earliest possible time, would be in the best interests of the juvenile,

since he would be kept away from adult under-trial prisoners and would not be subjected to a regimen in jail, which may not be conducive to his well being. As mentioned above, it would also be in the interests of better administration of criminal justice. It is, therefore, enjoined upon every Magistrate to take appropriate steps to ascertain the juvenility or otherwise of an accused person brought before him or her at the earliest possible point of time, preferably on first production.

60. It must also be appreciated that due to his juvenility, a juvenile in conflict with law may be presumed not to know or understand the legal procedures making it difficult for him to put forth his claim for juvenility when he is produced before a Magistrate. Added to this are the factors of poor education and poor economic set up that are jointly the main attributes of a juvenile in conflict with law, making it difficult for him to negotiate the legal procedures. We say this on the strength of studies conducted, and which have been referred to by one of us (T.S. Thakur, J) in *Abuzar Hossain v. State of West Bengal,* (2012) 10 SCC 489. It is worth repeating what has been said:

> "Studies conducted by National Crime Records Bureau (NCRB), Ministry of Home Affairs, reveal that poor education and poor economic set up are generally the main attributes of juvenile delinquents. Result of the 2011 study further show that out of 33,887 juveniles arrested in 2011, 55.8% were either illiterate (6,122) or educated only till the primary level (12,803). Further, 56.7% of the total juveniles arrested fell into the lowest income category. A similar study is conducted and published by B.N. Mishra in his Book 'Juvenile Delinquency and Justice System', in which the author states as follows:
>
> "*One of the prominent features of a delinquent is poor educational attainment. More than 63 per cent of delinquents are illiterate. Poverty is the main cause of their illiteracy. Due to poor economic condition they were compelled to enter into the labour* [illegible]*nt*

their family income. It is also felt that poor educational attainment is not due to the lack of intelligence but may be due to lack of opportunity."

61. Such being the position, it is difficult to expect a juvenile in conflict with law to know his rights upon apprehension by a police officer and if the precautions that have been suggested are taken, the best interests of the child and thereby of society will be duly served. Therefore, it may be presumed, by way of a benefit of doubt that because of his status, a juvenile may not be able to raise a claim for juvenility in the first instance and that is why it becomes the duty and responsibility of the Magistrate to look into this aspect at the earliest point of time in the proceedings before him. We are of the view that this may be a satisfactory way of avoiding the recurrence of a situation such as the one dealt with.

62. We may add that our international obligations as laid down in the Convention on the Rights of the Child and the Beijing Rules require the involvement of the parents or legal guardians in the legal process concerning a juvenile in conflict with law. For example, a reference may be made to Article 40 of the Convention and Principles 7, 10 and 15 of the Beijing Rules. That this is not unusual is clear from the fact that in civil disputes, our domestic law requires a minor to be represented by a guardian.

The remedy:

63. In *D.K. Basu v. State of West Bengal,* (1997) 1 SCC 416 this Court laid down some important requirements for being adhered to by the police "in all cases of arrest or detention till legal provisions are made in that behalf as *preventive measures*". The Criminal Procedure Code has since been amended and some of the important requirements laid down by this Court have been given statutory recognition. These are equally applicable, *mutatis mutandis*, to a child or a juvenile in conflict with law.

64. Attention may be drawn to Section 41-B of the Code which requires a police officer making an arrest to prepare a memorandum of arrest which shall be attested by at least one witness who is a member of the family of the person arrested or a respectable member of the locality where the arrest is made. The police officer is also mandated to inform the arrested person, if the memorandum of arrest is not attested by a member of his family, that he has a right to have a relative or a friend named by him to be informed of his arrest. Section 41-B of the Code reads as follows:

> "**41-B. Procedure of arrest and duties of officer making arrest**.— Every police officer while making an arrest shall—
>
> (*a*) bear an accurate, visible and clear identification of his name which will facilitate easy identification;
>
> (*b*) prepare a memorandum of arrest which shall be—
>
> (*i*) attested by at least one witness, who is a member of the family of the person arrested or a respectable member of the locality where the arrest is made;
>
> (*ii*) countersigned by the person arrested; and
>
> (*c*) inform the person arrested, unless the memorandum is attested by a member of his family, that he has a right to have a relative or a friend named by him to be informed of his arrest."

65. Every police officer making an arrest is also obliged to inform the arrested person of his rights including the full particulars of the offence for which he has been arrested or other grounds for such arrest (Section 50 of the Code), the right to a counsel of his choice and the right that the police inform his friend, relative or such other person

50-A of the Code is relevant in this regard and it reads as follows:

"**50-A. Obligation of person making arrest to inform about the arrest, etc., to a nominated person**.—(1) Every police officer or other person making any arrest under this Code shall forthwith give the information regarding such arrest and place where the arrested person is being held to any of his friends, relatives or such other persons as may be disclosed or nominated by the arrested person for the purpose of giving such information.

(2) The police officer shall inform the arrested person of his rights under sub-section (1) as soon as he is brought to the police station.

(3) An entry of the fact as to who has been informed of the arrest of such person shall be made in a book to be kept in the police station in such form as may be prescribed in this behalf by the State Government.

(4) It shall be the duty of the Magistrate before whom such arrested person is produced, to satisfy himself that the requirements of sub-section (2) and sub-section (3) have been complied with in respect of such arrested person."

66. When any person is arrested, it is obligatory for the arresting authority to ensure that he is got examined by a medical officer in the service of the Central or the State Government or by a registered medical practitioner. The medical officer or registered medical practitioner is mandated to prepare a record of such examination including any injury or mark of violence on the person arrested. Section 54 of the Code reads as follows:

"**54. Examination of arrested person by medical officer**.—(1) When any person is arrested, he shall be examined by a medical officer in the service of Central or

State Government, and in case the medical officer is not available, by a registered medical practitioner soon after the arrest is made:

Provided that where the arrested person is a female, the examination of the body shall be made only by or under the supervision of a female medical officer, and in case the female medical officer is not available, by a female registered medical practitioner.

(2) The medical officer or a registered medical practitioner so examining the arrested person shall prepare the record of such examination, mentioning therein any injuries or marks of violence upon the person arrested, and the approximate time when such injuries or marks may have been inflicted.

(3) Where an examination is made under sub-section (1), a copy of the report of such examination shall be furnished by the medical officer or registered medical practitioner, as the case may be, to the arrested person or the person nominated by such arrested person."

67. In our opinion, the procedures laid down in the Code, in as much as they are for the benefit of a juvenile or a child, apply with full rigour to an apprehension made of a juvenile in conflict with law under Section 10 of the Act. If these procedures are followed, the probability of a juvenile, on apprehension, being shown as an adult and sent to judicial custody in a jail, will be considerably minimized. If these procedures are followed, as they should be, along with the requirement of a Magistrate to examine the juvenility or otherwise of an accused person brought before him, subjecting a juvenile in conflict with law to a trial by a regular Court may become a thing of the past.

Conclusion:

68. The appellant was a juvenile on the date of the

occurrence of the incident. His case has been examined on merits and his conviction is upheld. The only possible and realistic sentence that can be awarded to him is the imposition of a fine. The existing fine of Rs.100/- is grossly inadequate. To this extent, the punishment awarded to the appellant is set aside. The issue of the quantum of fine to be imposed on the appellant is remitted to the jurisdictional Juvenile Justice Board. The jurisdictional Juvenile Justice Board is also enjoined to examine the compensation to be awarded, if any, to the family of Asha Devi in terms of the decision of this Court in *Ankush Shivaji Gaikwad*.

69. Keeping in mind our domestic law and our international obligations, it is directed that the provisions of the Criminal Procedure Code relating to arrest and the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000 being the law of the land, should be scrupulously followed by the concerned authorities in respect of juveniles in conflict with law.

70. It is also directed that whenever an accused, who physically appears to be a juvenile, is produced before a Magistrate, he or she should form a *prima facie* opinion on the juvenility of the accused and record it. If any doubt persists, the Magistrate should conduct an age inquiry as required by Section 7A of the Juvenile Justice (Care and Protection of Children) Act, 2000 to determine the juvenility or otherwise of the accused person. In this regard, it is better to err on the side of caution in the first instance rather than have the entire proceedings reopened or vitiated at a subsequent stage or a guilty person go unpunished only because he or she is found to be a juvenile on the date of occurrence of the incident.

71. Accordingly, the matter is remanded to the jurisdictional Juvenile Justice Board constituted under the Juvenile Justice (Care and Protection of Children) Act, 2000 for determining the appropriate quantum of fine that should be levied on the appellant and the compensation that should be

awarded to the family of Asha Devi. Of course, in arriving at its conclusions, the said Board will take into consideration the facts of the case as also the fact that the appellant has undergone some period of incarceration.

72. The appeal is partly allowed with the directions given above.

T.S. THAKUR, J. 1. I have had the advantage of going through the Judgment and Order proposed by my Esteemed Brother Madan B. Lokur, J. The draft judgment formulates three issues for determination and answers them with remarkable lucidity. While I agree with the view taken by Brother Lokur, J. that the appellant was a juvenile on the date of the commission of the offence within the meaning of Section 2(k) of the Juvenile Justice (Care & Protection of Children) Act, 2000 (in short , the "2000 Act") and that his conviction ought to be upheld, I wish to add a few words of my own in support of that view. As regards issue of general directions for guidance of the Courts below, I do not have any serious conceptual or other disagreement with what has been proposed by my erudite Brother, for the proposed directions will promote the objects underlying the 2000 Act, and prevent anomalous situations in which juveniles in conflict with law may stand to get prejudiced because of their economic and other handicaps/ because of proverbial law's delay.

2. The facts have been succinctly summarised in the draft judgment of Brother Lokur, J. which do not bear repetition except to the extent the same is absolutely necessary to elucidate the narrative in which the issues arise for our consideration. The appellant was, together with three others, tried for offences punishable under Sections 302, 304-B and 498-A of the IPC by the Sessions Judge, Rae Bareli, who by her judgment dated 30th August, 1990 convicted him and his father Lal Bahadur Singh (since deceased) under Section 304-B and sentenced both of them to undergo rigorous imprisonment for a period of seven y o

convicted under Section 498-A of the IPC and sentenced to undergo rigorous imprisonment for a period of two years and a fine of Rs.200/- each. The prosecution case against the appellant and his co-accused was that they set on fire Asha Devi, who was none other than the wife of the appellant, on the night intervening 23rd and 24th May, 1988. The motive for the commission of the offence was the alleged failure of the deceased Asha Devi and her parents to satisfy the appellant's demand for dowry.

3. Aggrieved by their conviction and sentence the appellant and his co-accused filed Criminal Appeal No.464 of 1990, which failed and was dismissed by the High Court in terms of the order impugned in this appeal. Demise of the second appellant during the pendency of the present appeal abated the proceedings qua him, leaving the appellant to pursue the challenge mounted against the judgments and orders passed by the Courts below, by himself.

4. Seven years after the filing of the present appeal, the appellant for the first time filed Crl. Misc. Petition No.16974 of 2010 for permission to urge an additional ground to the effect that the appellant was on the date of the commission of the offence a juvenile within the meaning of Section 2 (k) of the 2000, Act. It was urged on the basis of a school certificate that the petitioner was on the date of commission of the offence hardly 14 years of age, and hence a juvenile entitled to the protection of the Act aforementioned. By an order dated 19th November, 2010, this Court allowed the Criminal Miscellaneous Petition, permitted the appellant to raise the additional plea and directed an inquiry into the claim of juvenility of the appellant by the Trial Court.

5. The Trial Court accordingly conducted an inquiry, examined the relevant school record and, based on the entirety of the evidence including the medical evidence adduced in the

course of the inquiry, held that according to the school certificate the age of the appellant on the date of the incident in question was around 13 years 8 months on the date of the incident. In doing so the trial Court gave credence to the school certificate in preference to the medical examination and other equally compelling records touching upon the age of the appellant like the Family Register maintained by the Panchayat and the Electoral rolls according to which the appellant's age was above 16 years and below 17 ½ years on the date of the occurrence. Although the respondent has objected to the finding of the Trial Court and the assessment of the age as on the date of the commission of the offence, I am inclined to go along with Lokur, J's finding as to age of the appellant when His Lordship says:

> *".....Therefore, it does appear that the appellant was about 17 years of age when the incident had occurred and that he had set up a claim of being a juvenile or child soon after his arrest and before the charge sheet was filed. In other words, the appellant was a juvenile or a child within the meaning of that expression as defined in Section 2(k) of the Act."*

6. I may, independent of the conclusion drawn by my esteemed brother, briefly state my reasons for holding that the appellant was above sixteen years as on the date of the commission of the offence, no matter the enquiry report submitted by the Trial Court has held him to be less than 16 years on that date. But before I do so, it is important to mention that the question whether the appellant was less or more than 16 is important not because the benefit of the 2000 Act depends on that question, but because the answer to that question has a bearing on whether the conviction of the appellant was itself illegal, hence liable to be set aside. I say so because, the benefit of the 2000 Act, would be in any case available to the appellant, so long as he was less than 18 years of age on the crucial date, and it is nob[illegible]s

above that age on that date. The decision of this Court in *Hari Ram v. State of Rajasthan* (2009) 13 SCC 211 authoritatively settles the legal position in that regard when it says:

> *"A juvenile who had not completed eighteen years on the date of commission of the offence was also entitled to the benefits of the Juvenile Justice Act, 2000, as if the provisions of Section 2(k) had always been in existence even during the operation of the 1986 Act."*

7. Equally important is the fact that the jurisdiction of the Court to try the appellant, as indeed any other person accused of commission of an offence would have to be determined by reference to the legal position that prevailed as on the date the Court tried, convicted and sentenced the appellant. It is common ground that as on the date of the commission of the offence and right up to the date the trial Court convicted and sentenced the appellant to imprisonment, the provisions of Juvenile Justice Act, 1986 (in short, the "1986 Act") held the field. Apart from the fact that the upper age limit for claiming juvenility was 16 years for boys, the question whether a person was or was not a juvenile could be decided by the Court on the basis of documentary or medical evidence or on a fair assessment of both of them. That is because, the provisions of 1986 Act, did not, prioritise the basis on which such determination could be made. It was left for the accused to produce evidence or the Court to direct a medical examination for determining his age. The weightage which the Rules framed under the 2000 Act provide and the order of preference settled for purposes of placing reliance upon evidence coming from different sources were not in vogue while the 1986 Act held the field. The result was that the Court was free to determine the question on the basis of one such piece of evidence or on a cumulative effect and on such evidence that may have been produced before it. It is necessary to bear in mind this dichotomy in the legal framework while determining whether the trial Court had committed an error of jurisdiction in holding the

appellant to be not a juvenile and hence triable by it.

8. The question whether the appellant was a juvenile was first raised before the trial Court at a very early stage of the case. The appellant had prayed for bail on that basis, which appears to have led the Court to direct assessment of his age on the basis of a medical examination. The medical examination, however, determined the age of the appellant to be 17 years, which took him beyond the upper age of juvenility under the 1986 Act. What is noteworthy is that no attempt was made by the appellant to adduce any evidence to support his claim of being a juvenile nor was any documentary evidence in the form of school certificate or otherwise adduced. As a matter of fact the chapter was totally forgotten, and the trial allowed to proceed to its logical conclusion without the appellant raising his little finger against the competence of the Court or agitating the issue regarding his age in any higher forum. The conviction and sentence recorded by the trial Court was also assailed on merits before the High Court but not on the ground that the trial was vitiated on account of the appellant being a juvenile, not triable by an ordinary criminal Court. It was only in this Court that long after the appeal was filed that a fresh claim for benefit under the 2000 Act was made by the appellant in which this Court directed a fresh enquiry that was conducted in terms of Rule 12 of the Rules framed under the 2000 Act. The enquiry report submitted supports the appellant's claim of his being a juvenile under Section 2(k) of the 2000 Act, hence, entitled to the benefits admissible thereunder. Although an attempt was made by the respondent-State to assail the finding that the appellant was less than 18 years of age on the date of the occurrence, we do not see any cogent reason to hold that the appellant was more than 18 years on the date of the occurrence. In my view, the determination of age of the appellant, by the trial Court, on the basis of the first medical examination is fully supported and corroborated by the medical examination of the appellant conducted in the course of the enquiry directed by this Court by o h

November, 2010. The medical examination conducted by the Board of Doctors has determined the appellant's age to be 40 years as on 24th December, 2010 which implies that he was around 17 ½ years old on the date of the occurrence. Superadded to the medical evidence is the documentary evidence that has come to light in the course of the enquiry in the form of the Family Register (Ex. Ka-3) maintained by the Panchayat and proved by A.P.W.2-Gokaran Nath Tiwari, Gram Panchayat Officer. According to this witness who spoke from the register, the appellant was born in the year 1969. The Electoral roll for the year 2009 for the constituency in which the appellant's village falls, also mentions this age to be 37 years, implying thereby that he was around 17 years old on the date of the occurrence. Deposition of the Gram Sabha Head examined as PW-12 in the course of the enquiry is supportive of the age of the appellant as given in the Electoral roll. The two medical examinations and the documents referred to above come from proper custody and lend complete corroboration to the appellant's age being above 16 years on the date of the occurrence. Besides, what cannot be lightly brushed away is the fact that the appellant was a married man on the date of the occurrence and that the charge levelled against him was one of dowry harassment and dowry death of his wife who was 19 years old at the time of her demise. If the appellant was only 13 years and 8 months old as suggested by the school certificate the question of his harassing the deceased almost six years his senior would not arise for he would be only an adolescent while his wife-the deceased was a grown up girl who could hardly get harassed by a mere child so young in age that he had barely cut his teeth. The trial Court did not in that view commit any error of jurisdiction in trying the appellant for the offences alleged against him.

9. The upshot of the above discussion is that while the appellant was above 16 years of age on the date of the commission of the offence, he was certainly below 18 years and hence entitled to the benefit of the 2000 Act, no matter the later

enactment was not on the statute book on the date of the occurrence. The difficulty arises when we examine whether the trial and the resultant order of conviction of the appellant, would also deserve to be set aside as illegal and without jurisdiction. The conviction cannot however be set aside for more than one reason. Firstly because there was and is no challenge to the order of conviction recorded by the Courts below in this case either before the High Court or before us. As a matter of fact the plea of juvenility before this Court by way of an additional ground stopped short of challenging the conviction of the appellant on the ground that the Court concerned had no jurisdiction to try the appellant.

10. Secondly because the fact situation in the case at hand is that on the date of the occurrence i.e. on 24th May, 1988 the appellant was above 16 years of age. He was, therefore, not a juvenile under the 1986 Act that covered the field at that point of time, nor did the 1986 Act deprive the trial Court of its jurisdiction to try the appellant for the offence he was charged with. Repeal of the 1986 Act by the 2000 Act raised the age of juvenility to 18 years. Parliament provided for cases which were either pending trial or were, after conclusion of the trial, pending before an appellate or a revisional Court by enacting Section 20 of the Juvenile Justice (Care and Protection) Act, 2000 which is to the following effect:

> ***"20. Special provision in respect of pending cases.-*** *Notwithstanding anything contained in this Act, all proceedings in respect of a juvenile pending in any court in any area on the date on which this Act comes into force in that area, shall be continued in that court as if this Act had not been passed and if the court finds that the juvenile has committed an offence, it shall record such finding and instead of passing any sentence in respect of the juvenile, forward the juvenile to the Board which shall pass orders in respect of that juvenile in accordance with the provisions of th*

satisfied on inquiry under this Act that a juvenile has committed the offence.

Provided that the Board may, for any adequate and special reason to be mentioned in the order, review the case and pass appropriate order in the interest of such juvenile.

Explanation.- In all pending cases including trial, revision, appeal or any other criminal proceedings in respect of a juvenile in conflict with law, in any court, the determination of juvenility of such a juvenile shall be in terms of Clause (1) of Section 2, even if the juvenile ceases to be so on or before the date of commencement of this Act and the provisions of this Act shall apply as if the said provisions had been in force, for all purposes and at all material times when the alleged offence was committed."

11. A plain reading of the above brings into bold relief the following features that have a significant bearing on the controversy at hand:

(i) The provision starts with a non-obstante clause, which implies that the provisions have an overriding effect on all other provisions contained in the enactment.

(ii) The provision deals with proceedings pending against a juvenile in any court.

(iii) The provision sanctions the continuance of such pending proceedings in the very same court, as if the 2000 Act had not been enacted.

(iv) The provision requires the Court seized of the matter to record a finding as to whether the juvenile has committed an offence.

(v) If the finding is against the juvenile in that he is found to have committed an offence, the court is required to forebear from passing an order of sentence and instead forward the juvenile to the Board, which shall then pass an order in accordance with the provisions of the Act, as if it had been satisfied on inquiry under the Act that the juvenile had committed an offence.

(vi) In all pending cases including trial, revision, appeal or any other criminal proceedings the determination of juvenility shall be in terms of clause (l) of Section 2 even if the juvenile ceases to be so on or before the date of commencement of the 2000 Act.

12. It is manifest, that a case that was pending before 'any Court' (which expression would include both the trial Court and the High Court) would continue in that Court, who would not only proceed with the trial and/or hearing of the case as if the 2000 Act was not on the Statute book but also record a finding as to the guilt or innocence of the juvenile. Far from stipulating a specific prohibition, the provisions of Section 20, make it obligatory for the Court concerned to proceed with the matter and record its conclusion as to the guilt or otherwise of the juvenile. The prohibition is against the Court passing an order of sentence against the juvenile, for which purpose the juvenile has to be forwarded to the Board for appropriate orders. That is precisely the view which this Court has taken in a line of decisions to which I may briefly refer at this stage.

13. In *Pratap Singh v. State of Jharkhand and Anr.* (2005) 3 SCC 551, this Court while interpreting the provisions of Section 20 (supra) held that the same is attracted to cases where the person, if male, has ceased to be a juvenile under the 1986 Act being more than 16 years of age but had not yet crossed the age of 18 years. Such cases alone were within the comprehension of Section 20 of the Act, observed the Court, in which the Court seized of the matter was bound to record

its conclusion, as to the guilt or innocence of the accused. The Court said:

> "*30. Section 20 of the Act as quoted above deals with the special provision in respect of pending cases and begins with non-obstante clause. The sentence "Notwithstanding anything contained in this Act all proceedings in respect of a juvenile pending in any Court in any area on date of which this Act came into force" has great significance. The proceedings in respect of a juvenile pending in any court referred to in Section 20 of the Act is relatable to proceedings initiated before the 2000 Act came into force and which are pending when the 2000 Act came into force. The term "any court" would include even ordinary criminal courts. If the person was a "juvenile" under the 1986 Act the proceedings would not be pending in criminal courts. They would be pending in criminal courts only if the boy had crossed 16 years or girl had crossed 18 years. This shows that Section 20 refers to cases where a person had ceased to be a juvenile under the 1986 Act but had not yet crossed the age of 18 years then the pending case shall continue in that Court as if the 2000 Act has not been passed and if the Court finds that the juvenile has committed an offence, it shall record such finding and instead of passing any sentence in respect of the juvenile, shall forward the juvenile to the Board which shall pass orders in respect of that juvenile.*"
>
> (emphasis supplied)

14. To the same effect is the decision of this Court in *Bijender Singh v. State of Haryana and Anr.* (2005) 3 SCC 685, where this Court reiterated the legal position as to the true purpose of Section 20 in the following words:

> *"8. One of the basic distinctions between the 1986 Act and the 2000 Act relates to age of males and females. Under the 1986 Act, a juvenile means a male juvenile who has not attained the age of 16 years, and a female juvenile who has not attained the age of 18 years. In the 2000 Act, the distinction between male and female juveniles on the basis of age has not been maintained. The age-limit is 18 years for both males and females.*
>
> *9. A person above 16 years in terms of the 1986 Act was not a juvenile. In that view of the matter the question whether a person above 16 years becomes "juvenile" within the purview of the 2000 Act must be answered having regard to the object and purport thereof.*
>
> *10. In terms of the 1986 Act, a person who was not juvenile could be tried in any court. Section 20 of the 2000 Act takes care of such a situation stating that despite the same the trial shall continue in that court as if that Act has not been passed and in the event, he is found to be guilty of commission of an offence, a finding to that effect shall be recorded in the judgment of conviction, if any, but instead of passing any sentence in relation to the juvenile, he would be forwarded to the Juvenile Justice Board (in short the 'Board') which shall pass orders in accordance with the provisions of the Act as if it has been satisfied on inquiry that a juvenile has committed the offence. A legal fiction has, thus, been created in the said provision...*
>
> *xx xx xx*
>
> *12. Thus, by reason of legal fiction, a person, although not a juvenile, has to be treated to be one by the Board for the purpose of sentencing which takes care of a situation that the person although not a juvenile in terms of the 1986 Act but still would be treated as such under the 2000 Act for the said limited purpose."*
>
> (emphasis supplied)

15. Reference may also be made to the decision of this Court in *Dharambir v. State (NCT of Delhi)* (2010) 5 SCC 344 where too this Court interpreted Section [illegible]e

explanation appended to the same, to declare that the provision enables the Court to determine the juvenility of the accused even after conviction and while maintaining the conviction to set aside the sentence imposed upon him and to forward the case to the Board for passing an appropriate order in accordance with the provisions of the Act. This Court observed:

> *"11. It is plain from the language of the Explanation to Section 20 that in all pending cases, which would include not only trials but even subsequent proceedings by way of revision or appeal, etc., the determination of juvenility of a juvenile has to be in terms of Clause (l) of Section 2, even if the juvenile ceases to be a juvenile on or before 1st April, 2001, when the Act of 2000 came into force, and the provisions of the Act would apply as if the said provision had been in force for all purposes and for all material times when the alleged offence was committed. Clause (l) of Section 2 of the Act of 2000 provides that "juvenile in conflict with law" means a "juvenile" who is alleged to have committed an offence and has not completed eighteenth year of age as on the date of commission of such offence. Section 20 also enables the Court to consider and determine the juvenility of a person even after conviction by the regular Court and also empowers the Court, while maintaining the conviction, to set aside the sentence imposed and forward the case to the Juvenile Justice Board concerned for passing sentence in accordance with the provisions of the Act of 2000."*

16. Two recent decisions of this Court are a timely reminder of the legal position on the subject to which I may gainfully refer at this stage. In *Daya Nand v. State of Haryana* (2011) 2 SCC 224, this Court, reiterated the law on the subject in the following words.

> *"11. The Juvenile Justice Act, 1986 was replaced by the Juvenile Justice (Care and Protection of Children) Act, 2000 that came into force on April 1, 2001. The 2000 Act defined `juvenile or child' in Section 2(k)to mean a person who has not completed eighteenth years of age. Section 69 of the 2000 Act, repealed the Juvenile Justice Act, 1986. The 2000 Act, in Section 20 also contained a provision in regard to cases that were pending when it came into force and in which the accused at the time of commission of offence was below 18 years of age but above sixteen years of age (and hence, not a juvenile under the 1986 Act) and consequently who was being tried not before a juvenile court but a regular court."*

(emphasis supplied)

17. Similarly in *Kalu @ Amit v. State of Haryana* (2012) 8 SCC 34, this Court summed up the law in the following passage:

> *"16. Section 20 makes a special provision in respect of pending cases. It states that notwithstanding anything contained in the Juvenile Act, all proceedings in respect of a juvenile pending in any court in any area on the date on which Juvenile Act comes into force in that area shall be continued in that court as if the Juvenile Act had not been passed and if the court finds that the juvenile has committed an offence, it shall record such finding and instead of passing any sentence in respect of the juvenile forward the juvenile to the Board which shall pass orders in respect of that juvenile in accordance with the provisions of the Juvenile Act as if it had been satisfied on inquiry under the Juvenile Act that the juvenile has committed the offence. The Explanation to Section 20 makes it clear that in all pending cases, which would include not only trials but even subsequent proceedings by way of revision or appeal, the determination of juvenility of a juvenile would be in terms of Clause (l) of Section 2, even if the juvenile ceased to be a juvenile on or before 1/4/2001, when the J... o*

force, and the provisions of the Juvenile Act would apply as if the said provision had been in force for all purposes and for all material times when the alleged offence was committed..."

18. The settled legal position, therefore, is that in all such cases where the accused was above 16 years but below 18 years of age on the date of occurrence, the proceedings pending in the Court concerned will continue and be taken to their logical end except that the Court upon finding the juvenile guilty would not pass an order of sentence against him. Instead he shall be referred to the Board for appropriate orders under the 2000 Act. Applying that proposition to the case at hand the trial Court and the High Court could and indeed were legally required to record a finding as to the guilt or otherwise of the appellant. All that the Courts could not have done was to pass an order of sentence, for which purpose, they ought to have referred the case to the Juvenile Justice Board.

19. The matter can be examined from another angle. Section 7A (2) of the Act prescribes the procedure to be followed when a claim of juvenility is made before any Court. Section 7A (2) is as under:

"7A. Procedure to be followed when claim of juvenility is made before any court .- (1) xxx xxx

(2) If the court finds a person to be a juvenile on the date of commission of the offence under sub-section (1), it shall forward the juvenile to the Board for passing appropriate orders and the sentence, if any, passed by a court shall be deemed to have no effect."

20. A careful reading of the above would show that although a claim of juvenility can be raised by a person at any stage and before any Court, upon such Court finding the person to be a juvenile on the date of the commission of the offence, it has to forward the juvenile to the Board for passing appropriate orders and the sentence, if any, passed shall be deemed to have

effect. There is no provision suggesting, leave alone making it obligatory for the Court before whom the claim for juvenility is made, to set aside the conviction of the juvenile on the ground that on the date of commission of the offence he was a juvenile, and hence not triable by an ordinary criminal court. Applying the maxim of *expressio unius est exclusio alterious*, it would be reasonable to hold that the law in so far as it requires a reference to be made to the Board excludes by necessary implication any intention on the part of the legislature requiring the Courts to set aside the conviction recorded by the lower court. The Parliament, it appears, was content with setting aside the sentence of imprisonment awarded to the juvenile and making of a reference to the Board without specifically or by implication requiring the court concerned to alter or set aside the conviction. That perhaps is the reason why this Court has in several decisions simply set aside the sentence awarded to the juvenile without interfering with the conviction recorded by the court concerned and thereby complied with the mandate of Section 7A(2) of the Act.

21. In *Kalu @ Amit's* case (supra), the plea of juvenility was raised before this Court for the first time as is the position in the present case also. This Court while dealing with the options available noticed the absence of plea on the ground of juvenility and held that even if such a plea had been raised before the High Court, the High Court would have had to record its finding that Kalu @ Amit was guilty, confirm his conviction, set aside the sentence and forward the case to the Board for passing an order under Section 15 of the Juvenile Act. The Court observed:

`**"24.** The instant offence took place on 7-4-1999. As we have already noted Kalu alias Amit was a juvenile on that date. He was convicted by the trial court on 7-9-2000. The Juvenile Act came into force on 1-4-2001. The appeal of Kalu alias Amit was decided by the High Court on 11-7-2006. Had the defence of juvenility been raised before the High Court and the fact that Kalu al

at the time of commission of the offence has come to light the High Court would have had to record its finding that Kalu alias Amit was guilty, confirm his conviction, set aside the sentence and forward the case to the Board and the Board would have passed any appropriate order permissible under Section 15 of the Juvenile Act (see Hari Ram)."

22. That procedure has been followed in several other cases where this Court has, after holding the accused to be a juvenile as on the date of the commission of offence, set aside the sentence awarded to him without interfering with the order of conviction. *(See: Pradeep Kumar & Ors. v. State of U.P.* 1995 Supp (4) SCC 419, *Bhola Bhagat & Ors. v. State of Bihar* (1997) 8 SCC 720, *Upendra Kumar v. State of Bihar* (2005) 3 SCC 592, *Vaneet Kumar Gupta @ Dharmindher v. State of Punjab* (2009) 17 SCC 587).

23. In the totality of the above circumstances, there is no reason why the conviction of the appellant should be interfered with, simply because he is under the 2000 Act a juvenile entitled to the benefit of being referred to the Board for an order under Section 15 of the said Act. There is no gainsaying that even if the appellant had been less than sixteen years of age, on the date of the occurrence, he would have been referred for trial to the Juvenile Court in terms of Section 8 of the 1986 Act. The Juvenile Court would then hold a trial and record a conviction or acquittal depending upon the evidence adduced before it. In an ideal situation a case filed before an ordinary Criminal Court when referred to the Board or Juvenile Court may culminate in a conviction at the hands of the Board also. But law does not countenance a situation where a full-fledged trial and even an appeal ends in a conviction of the accused but the same is set aside without providing for a trial by the Board.

24. With the above observations, I agree with the Order proposed by brother Lokur, J.

Kalpana K. Tripathy Appeal partly allowed.

UNION OF INDIA
v.
ABN AMRO BANK AND OTHERS
(Criminal Appeal No. 975 of 2007)

JULY 12, 2013

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

Foreign Exchange Regulation Act, 1973:

ss.19(1)(a), and (d), 29(1)(b), 47(1) and 49(1)(a) r/w. s.68 – Contravention of – Prosecution for – Alleging the company and its foreign share-holder (holding 51% shares of the Company) for carrying out business/trading activities of imported gold coins, in contravention of above provisions – Accused found guilty for contravention of the provisions by Adjudicating Authority – Appellate Tribunal set aside the order of Adjudicating Authority – High Court upheld the order of appellate authority refusing to interfere with it on the ground that no questions of law arose for its consideration – On appeal, held: The trading activity of the company was without due approval under 19(1)(a) and (d) and 29(1)(b) – The company was not covered under the Notification relaxing the provisions of ss. 19 and 29(1)(b).

Doctrine – Doctrine of 'Lifting of corporate veil' – Applicability of, in cases of violation of provisions of Foreign Exchange Regulation Act.

Interpretation of Statutes – 'Heading' of a provision – As an aid to interpretation of the provision – Held: Heading of a section can be regarded as a key to the interpretation of the operative portion of the section – If the language in the Section is plain, clear and unambiguous, the heading strengthens that meaning.

The respondent Nos. 2 to 4 were charged for carrying out business/trading activities of 'imported Maple Leaf Gold Coins' in contravention of ss. 19(1)(a) and (d), 29(1)(b), 47(1), 49(1)(a) r/w. s.68 of Foreign Exchange Regulation Act, 1973. Proceedings were also initiated against respondent No.1-Bank for violation of s.6 (4) and (5) of the Act alleging that the Bank sold gold coins to the company without being reasonably satisfied about the nature of the business of the Company and without ascertaining whether the Company had got necessary permission from RBI in dealing with gold coins, and thus the Bank misused the permission granted to it by RBI for importing gold coins. The Adjudicating authority found the respondents guilty of the offences they were charged with. The appeals against the order of adjudicating authority was allowed by Appellate Tribunal for Foreign Exchange. High Court dismissed the appeal filed u/s. 54 of the Act, on the ground that neither any question of law nor any legal infirmity was found in the order passed by the Tribunal.

In appeal to this Court, the respondents 2 to 4 contended that respondent-Company was an Indian Company under Indian Companies Act, 1956 consisting of Indian shareholders as well as Directors, and such Company having foreign shareholdings did not need permission from RBI to carry on business or to establish a place of business in India; that the respondent-Swiss Company cannot be said to have violated s. 29(1)(a) and indirectly tried to establish a place of business in India merely because the Swiss Company held 51% shares of the Company and initiated its incorporation; that by virtue of Foreign Exchange Regulation Amendment Act 29 of 1993, an Indian company in which non-resident interest is more than 40% can carry on business in India without any permission from RBI, that the company fell squarely within the category of "newly setup trading company

primarily engaged in export" which fell within the purview of the general permission granted by RBI under the automatic approval route and hence there was no contravention u/ss. 19(a) and (d), 29(1)(b) or 49(1)(a) of the Act, and that while interpreting a statute, courts would lift the corporate veil more restrictively and FERA was not expected to lift the veil under Section 29(1)(a) after the amendment Act of 1993.

The appellant contended that section 29(1)(a) puts an injunction on the foreign companies and foreign nationals from establishing or carrying on any business in India or opening any branch in India without obtaining the permission of the RBI; that the Company was a foreign Company set up by foreign nationals in violation of s. 29(1)(a); that the Adjudicating Authority rightly lifted the corporate veil and examined as to who were all in fact controlling the Company; that in view of Para 39(B) of Industrial Policy, 1991 dealing with Foreign Investment, and Press Notes dated 20.8.1991, 13.12.1991 and 31.12.1999, there is no concept of automatic approval for the companies engaged primarily in trading and such companies fulfilling certain conditions have to apply to RBI for permission; and that the benefit of automatic approval route allowed by RBI under Notification No.180/98-RB dated 13.1.1998 is given to the Companies primarily "engaged in exports" and the companies who claim the benefit under the Notification are required to submit a declaration in Form FC (RBI), while the activities of the company are the activities indicated in NIC Code 893.

Allowing the appeal, the Court

HELD: 1.1. Section 19(1)(a) was intended to regulate export and transfer of securities. Section 19 states that no person shall except with the general or special permission of the Reserve Bank take ... y

to any place outside India or to issue whether in India or elsewhere any security which is registered or to be registered in India to a person resident outside India. Section 19 while intending to regulate export and transfer of securities, Section 29 placed restrictions on establishment of place of business in India. It is in pursuance of clause (a) and clause (d) of sub-section (1) of Section 19 read with clause (b) of sub-section (1) of Section 29 of FERA, Notification No. 180/98 dated 13.01.1998 was issued by the RBI. [Para 48] [865-D-F]

1.2. The language used in Section 29(1)(a) of Foreign Exchange Regulation Act, 1973 (FERA) is unambiguous and plain and calls for no interpretation or explanation. Section 29(1)(a) puts a specific bar on the foreign companies and foreign nationals mentioned in Section 29(1) from establishing or carrying on any business in India or opening any branch in India without obtaining permission of the Reserve Bank of India (RBI). Heading of Section can be regarded as a key to the interpretation of the operative portion of the Section and if there is no ambiguity in the language or if it is plain and clear, then the heading used in the section strengthens that meaning. Heading of Section 29 indicates restrictions and the expression "shall not" "except with" general or special permission of the Reserve Bank make the requirements mandatory and the negative words used by the legislature shows its intention that if any act is done in breach thereof, will be illegal. Reading the Press Note and the Cabinet Note for the amendment under Section 29, apart from the fact that the language used in Section 29(1)(a) is unambiguous clearly indicates that restrictions have only been liberalized, instead of 40% of the limit, it was increased to 51% and 74% subject to fulfilment of certain conditions as set out in the industrial policy and the various Press Notes. [Para 37] [859-G-H; 860-A-D]

1.3. Restrictions imposed under Section 29(1)(a) is not applicable to an Indian company to establish a place of business in India but, on the other hand, restriction has been statutorily fixed in respect of foreign company which wants to establish a place of business in India. Section 29(1)(a) deals with following categories of foreign entities: (i) A person resident outside India; whether a citizen of India or not, (ii) A person who is not a citizen of India but is a resident of India or (iii) A company, (other than a banking company) which is not incorporated under any law enforced in India or (iv) Any branch of such company. [Para 37] [860-D-G]

1.4. The Automatic Permission Route was found open by the Notifications dated 13.1.1998 and 20.1.1998 and those notifications have laid down certain conditions and parameters for automatic approval which were to be complied with by the issuer company along with the filling of declaration in Form FC(RBI). The Notification had given relaxation to the provisions of Section 19 and Section 29(1)(b) to invest not exceeding 51% to two categories namely all industries mentioned in Annexure III to the Statement of Industrial Policy 1991 or to a trading company primarily engaged in export and is registered as an Export/Trading/Star Trading House with the Ministry of Commerce, Government of India. To claim the benefit of the above-mentioned Notifications, it was essential that a true declaration in Form FC(RBI) was required to be filed and benefit of the general permission through automatic route could be obtained only for the activity specified in Form FC(RBI) and there was no automatic approval for any activity not specified in the above-mentioned form. [Para 55] [868-C-F]

1.5. Reading of Section 19(1)(a), (d) and 29(1)(b) with the Notifications and the Press Notes, show that the intention of the Legislature was

incorporated in India which is engaged or proposing to engage in an activity specified in Annexure III or an Indian Company which is a trading company, primarily engaged in export and is registered as an export/trading/star trading house with the Ministry of Commerce, Government of India to issue equity shares, subject to the conditions mentioned in paragraph 3 of the Notification dated 13.1.1998. The first proviso to Notification states that a company existing on the date of the Notification, which was not engaged in Annexure III activity would be eligible to issue shares if it had embarked upon expansion programme, predominantly in Annexure III activities, subject to the condition that foreign equity raised by issue of equity shares to the foreign investors was utilized for such expansion. The first proviso goes along with clause (a) of the Notification. The second proviso states that in the case of a newly set-up "trading company", primarily engaged in export, issue of shares shall be subject to the conditions that registration as an export/trading/star trading house was obtained before the dividend is declared to the foreign investors. These provisos go along with clause (b) of the Notification. The Notification was intended to give relaxation to the provisions of Section 19(1)(a), (b) and 29(b) of the Act to the investments not exceeding 51% of the aforesaid two categories, namely, (1) Industries in Annexure III to the statement of Industrial Policy, 1991 or (2) a trading company primarily engaged in export and was registered as an export/trading/star trading house with the Ministry of Commerce, Government of India. Companies which do not fulfill the conditions of the Notification dated 13.01.1998 and 20.01.1998 and all other companies which do not fulfill the conditions mentioned in those Notifications are required to obtain prior permission from FIBP for foreign equity investment. [Para 55] [860-F-H; 869-A-E]

1.6. The Notifications dated 13.01.1998 and 20.01.1998 cannot be read in isolation, but have to be read along with Section 19(1)(a),(d), Section 29(1)(b), the Industrial Policy of July 1991 especially para 39B(iv), Press Notes dated 20.08.1991, 13.12.1991, 31.12.1991 with specific reference to the trading companies primarily engaged in export activities whether new or existing. Para 39B(iv) of the Policy read with paras 5 and 6 of the Press Note dated 31.12.1991 indicate that a newly setup trading company primarily engaged in the export will have to file application in prescribed form for approval of foreign equity upto 51% equity. [Para 56] [869-F-H; 870-A]

1.7. Newly set-up trading company primarily engaged in export has therefore also to satisfy the conditions laid down in clause (b) of paragraph 1 of the Notification dated 13.01.1998 and the plea that a trading company is primarily engaged in export be determined only when it remits dividend, cannot be accepted. The expression "further" used in the second proviso makes it more explicit. "Further" as means "additional" meaning thereby a newly set up trading company is not a third category as such but it goes along with second category i.e. "a trading company primarily engaged in export". To get the benefit of the general permission in the automatic route a trading company should be primarily engaged in export, even if it is a newly set up company. A newly set up company also could demonstrate the same by specifying the same in Form FC(RBI) that it is a trading company, whether new or old, and is at least intended to be engaged primarily in export. [Para 57] [870-B-D]

1.8. FC(RBI) form specifically directs the applicants to "carefully tick" the "appropriate" box. In the box dealing with the application for approval for foreign investment not to exceed 51% for "service sector in Annexure III", the company has pu

would indicate that it sought to avail of the automatic route for service sector only as indicated in Annexure III. Noticeably in the present case, no tick mark was put in the next box referring to "not exceeding 51% of the trading companies engaged in exports. Para VII deals with the "existing activities" which the 2nd respondent indicated as "not applicable" and no supplementary sheet was also attached explaining as to whether it was a newly set up trading company proposing to engage in export activities. Para VIII referring to Item Code ITC (HS) the company has indicated "893", which as per the Code deals with "Business and Management Consultancy Activities". The company stated in the application as "Business Management Consultancy for Trading, Marketing and Selling of Goods and Services". Even there, there is no indication whatsoever that the company was set up for trading, but only indicated "consultancy for trading". Further Para IX (iii) called for the description of the products for export trading wherein the company has stated as "not applicable". Resultantly, it is clear that the purpose for which the company had sought for foreign collaboration was not for trading in gold coins either for export or domestic purpose, but for the activities mentioned in the NIC Code 893. [Para 58] [870-E-H; 871-A-B]

1.9. The company cannot go back from the information already furnished by it in the application form which are declared as 'true and correct'. Based on that application RBI vide its communication dated 29.6.1998 granted registration No.FC98NDR1005. Registration, pertains only to NIC code '893'. No permission was obtained by the second respondent company from the RBI for 51% foreign equity induction, for trading, by way of export. RBI, on the other hand, granted general permission only for dealing with the activities mentioned in NIC Code 893 and not for any trading activities leading

to import or export. [Para 59] [871-C-E]

1.10. In a given situation if the authorities functioning under FERA find that there are attempts to over-reach the provision of Section 29(1)(a), the authority can always lift the veil and examine whether the parties have entered into any fraudulent, sham, circuitous or a devise so as to overcome statutory provisions like Section 29(1)(a). It is trite law that any approval/permission obtained by non-disclosure of all necessary information or making a false representation tantamount to approval/permission obtained by practicing fraud and hence a nullity. [Para 42] [862-G-H; 863-A]

New Horizons Limited and Anr. vs. Union of India (UOI) and Ors. **1995(1) SCC 478: 1994 (5) Suppl. SCR 310;** *Delhi Development Authority vs. Skiper Construction Company (P) Ltd. and Anr.* **1996(4) SCC 622: 1996 (2) Suppl. SCR 295;** *Vodafone International Holdings B.V. vs . Union of India (UOI) and Anr.* **.2012 (6) SCC 613: 2012 (1) SCR 573;** *Life Insurance Corporation of India vs. Escorts Ltd. And Ors.* **(1986) 1 SCC 264: 1985 (3) Suppl. SCR 909;** *Union of India vs. Azadi Bachao Andolan* **(2004) 10 SCC 1: 2003 (4) Suppl. SCR 222;** *Union of India and Ors. vs. Ramesh Gandhi* **(2012) 1 SCC 476: 2011 (16) SCR 126 – relied on.**

Re. H. PC. Produce Ltd. **(1962) 1 All ER 37 – referred to.**

1.11. Trading in gold is not an activity covered under Notification dated 13.01.1998 and 20.01.1998; perhaps for that reason, fourth respondent also took some steps to establish its 100% subsidiary in India and an application to that effect was filed on 24.08.1998 to FIPB by the company but it was not pursued further, but sought to achieve the same as if RBI had granted automatic permission which cannot be sustained in the eve of law. [Para 63] [872-F]

1.12. The High Court has committed an error in holding that no questions of law arose for its consideration under Section 54 of FERA and has completely misread and misinterpreted the Industrial Policy, Press Notes and Section 19(1)(a) and (b), Section 29(1)(a) and (b) etc. and issues raised in appeals, which are clearly questions of law which fell within the ambit of Section 56 of FERA and the High Court committed a serious error in rejecting the same holding no questions of law arose for its consideration. [Para 60] [871-E-F]

Hindustan Lever Employees Union vs. Hindustan Lever Ltd. **1995 Suppl (1) SCC 499: 1994 (4) Suppl. SCR 723 – distinguished.**

Ghatge and Patil Concerns' Employees' Union vs. Ghatge and Patil (Transports) Private Ltd. And Anr. **AIR 1968 SC 503: 1968 SCR 300;** *Landon and Country Commercial Investment Properties Ltd. vs. Attorney-General* **1953 1 AER 436 – referred to.**

2. The Bank had imported the gold on its own behalf and sold the same to the company and if the Bank was acting as an agent of the company, it would not have sold the gold to the company, but would have charged the commission for acting as an agent. No materials have been placed to show that the Bank was acting as an agent of the company. On facts, the Tribunal as well as the High Court took the view that the Bank had not misused the permission granted by the RBI for importing gold coins. There is no reason to interfere with those finding of facts. There is no error in the view taken by the Tribunal as well as the High Court that the proceedings initiated against the Bank that it had violated Sections 6(4) and (5) of FERA was illegal. The appeal filed by the Union of India, so far as the Bank is concerned, stands dismissed. [Para 61 and 62] [872-B-E]

Case Law Reference:

1994 (4) Suppl. SCR 723	**distinguished**	**Para 16**
1968 SCR 300	**referred to**	**Para 16**
1953 1 AER 436	**referred to**	**Para 16**
1994 (5) Suppl. SCR 310	**relied on**	**Para 40**
1996 (2) Suppl. SCR 295	**relied on**	**Para 40**
2012 (1) SCR 573	**relied on**	**Para 40**
1985 (3) Suppl. SCR 909	**relied on**	**Para 41**
2003 (4) Suppl. SCR 222	**relied on**	**Para 41**
(1962) 1 All ER 37	**referred to**	**Para 41**
2011 (16) SCR 126	**relied on**	**Para 41**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 975 of 2007.

From the Judgment & Order dated 21.09.2005 of the High Court of Delhi at New Delhi in Crl. Appeal No. 380 of 2003.

WITH

Crl.A.No. 976 of 2007.

P.P. Malhotra, AAG, Ashok Panda, V. Giri, Jaideep Gupta, Asha G. Nair, Abhishek Kumar Pandey, Lingaraj Sarangi (for B. Krishna Prasad), Subramonium Prasad, Koshy John, Manav Vohra, Amit Sibal, Jafar Alam (for Lawyer's Knit & Co.), Kuldeep S. Parihar, H.S. Parihar for the appearing parties.

The Judgment of the Court was delivered by

K.S. RADHAKRISHNAN, J. 1. Crl. M.P. No.11274 of 2013 is allowed.

2. The Special Director of Enforcement, Enforcement Directorate, Government of India, New D[illegible]s

under Section 51 of the Foreign Exchange Regulation Act, 1973 (for short "FERA"), later repealed, initiated proceedings vide order dated 22.9.2000 against M/s Maple Leaf Trading International Pvt. Ltd. (for short 'the Company') for violation of the provisions of Section 19(1)(a) and (d), 29(1)(b), 47(1) and 49(i)(a) read with Section 68 of FERA. Proceedings were also initiated against the other respondents, including 1st respondent, ABN AMRO Bank NV (now called "Royal Bank of Scotland NV") and 4th respondent - M/s Piccadily Invest AG, Zurich, Switzerland (for short "Piccadily"). Respondents, aggrieved by the above mentioned order, preferred four appeals before the Appellate Tribunal for Foreign Exchange, New Delhi and the Tribunal allowed those appeals vide its order dated 10.3.2003 and set aside the order of confiscation and the penalty imposed.

3. Union of India, aggrieved by the said order, preferred Criminal Appeal No. 380 of 2003 before the Delhi High Court under Section 54 of FERA read with Section 35 of the Foreign Exchange Management Act, 1999 which was, however, dismissed, stating that neither any question of law nor any legal infirmity had been found in the impugned order passed by the Tribunal. Aggrieved by the same, Criminal Appeal No. 975 of 2007 has been filed by the Union of India, which is treated as the main appeal and being heard along with Criminal Appeal No. 976 of 2007, which was also filed by the Union of India and another against the order of the High Court dated 12.9.2003 setting aside the order confiscating the drafts deposited by few investors in the 2nd company.

FACTS:

4. M/s Maple Leaf Trading International Pvt. Ltd., the 2nd respondent, was formed with the assistance of M/s J. C. Bhalla and Company, a Chartered Accountant firm having its office at New Delhi, in the following circumstances. One Lambert Kroger, Stefen Mayer and Cliff Roy, all foreign nationals, had met Anil Bhalla of the above mentioned firm and expressed their desire for establishing a company for trading in Maple Leaf

Gold Coins in India, which they were doing in Netherlands and Germany. Anil Bhalla was informed that necessary approvals would be obtained through M/s. Abascus Legal Group, New Delhi. Anil Bhalla and Rajesh Sethi, Chartered Accountants of that firm, became subscribers of the newly formed company. Cliff Roy, a foreign national and power of attorney holder of 4th respondent – Piccadily informed him that from Abascus, one Vikrant Singh Jafa and Rahul Krishna would be the Directors of the company and ten shares of the company each in the name of Anil Bhalla and in the name of Rajesh Sethi were issued, which were transferred on 19.5.1998 in the name of Vikram Singh Jafa and a sum of Rs.2,000/- was received in cash from Cliff Roy. In the above background, the company was incorporated on 5.4.1998 and, on the same date, Cliff Roy, a foreigner, was appointed as the Director of the Company and on 17.4.1998 he became the Managing Director of the company. Anil Bhalla, Rajesh Sethi (Chartered Accountants) and Rahul Krishnan, then, resigned as Directors of the company on 19.5.1998. Jafa resigned as Director on 11.1.1999. Jafa was holding 49% shares of the company and on 16.4.1999 a Share Transfer Agreement was entered into by him with one A.R. Khan and Lambert Kroger, the Managing Director of the company to transfer 9780 shares of the company to A.R. Khan. The Adjudicating Officer says, ultimately, the Indian company came under the control of Cliff Roy, Paul Singh Clare, Lambert Kroger, all foreign nationals. For deciding the various legal issues at this stage, a detailed analysis of the facts are unnecessary and we do not want to burden our judgment with further factual details, which are all part of the record.

5. We may, for the purpose of deciding these appeals, start from the stage at which Cliff Roy, a foreign national and power of attorney holder of 4th respondent company, had submitted an application in Form FC (RBI) on 21.5.1998 before the Reserve Bank of India (for short "RBI") for approval of not exceeding 51% foreign investment for Service Sector in Annexure III from the 4th respondent. Per[illegible]r, for the foreign collaboration for "Bu[illegible]t

Consultancy for Trading, Marketing and Selling of Goods and Services" with specific reference to NIC Code 893. Details of foreign investment resulting in foreign exchange inflow were also given in para VI of the application. Para VIII (iii) called for the description of products in the case of trading companies primarily engaged in exports, to which the Company replied stating that the same is not applicable. RBI, with reference to that application, allotted Registration No. FC-98 NDR 1005 vide letter dated 29.6.1998 and vide letter dated 29.6.1998 informed the company that it would advise the foreign collaborator that they would obey the laws of the land and there should be no compromise or excuse for the ignorance of the Indian Legal System.

6. The Enforcement Directorate got information that the company had started trading activity in gold coins on 27.5.1998 and signed the first contract for trading in Maple Leaf Gold Coins, which it was noticed, was contrary to the declaration made by the company in its application Form FC (RBI) dated 21.5.1998 under NIC Code 893. RBI also got information from the Economic Offences Wing of the Crime Branch, Delhi that the Company was collecting money from the public on the pretext of distributing Maple Leaf gold coins misleading the public that it had got RBI permission for such an activity. RBI also got information from the Ministry of Industry, Government of India, that the company had also applied for FIPB approval for foreign equity induction beyond 51% claiming that they had been given approval by RBI for equity induction under the Automotive Approval Route for trading in gold coins. In the application dated 24.8.1998 submitted by the Company for FIRB approval, it was specifically stated that the existing activity of the Company was Business Management Consultancy (NIC No. 893)" and, therefore, not indulged in any trading activity.

7. RBI vide its letter dated 8.6.1999 informed the Directorate of Enforcement that the company had filed documents with RBI on 21.5.1998 for entering into a foreign collaboration with M/s Piccadily under the general permission,

in terms of FERA Notification no. 180/98-RB dated 13.1.1998 under NIC Code 893 i.e. Business management, consultancy for trading, marketing and selling of goods and services and not for trading in gold coins. RBI, it was pointed out, issued the registration number FC 98 NDR 1005 dated 29.6.1988 based on that request. It was pointed out that, under the General Permission, when a company gives a declaration in form FC (RBI) stating that it is engaged in an eligible activity and later the company is found doing a different activity, the company is deemed to have violated the provisions of the notification issued under FERA.

8. RBI also vide letter dated 8.6.1999 also informed the Government of India, Ministry of Industry stating that it had granted registration number for a foreign collaboration agreement in terms of notification NO. 180 dated 13.1.1998 and that the foreign collaboration covered activities under NIC Code Group 893, published in Annexure III to the Press Note No. 2, 1997 series dated 17.1.1997. RBI pointed out that the claim of the company that it had been given approval by RBI for 51% foreign equity induction under automatic approval route for trading in gold coins, was incorrect.

9. The Special Director, Enforcement Directorate, on getting various information of the violation of the provisions of FERA, along with other officers, searched the business premises of the company on 2.7.1999, which resulted in the recovery and seizure of various documents and articles and a panchnama dated 2.7.1999 was prepared. The search at the office premises of Group-A Securities at National Highway No. 8, Mahipalpur, New Delhi also resulted in the recovery and seizure of articles as per panchnama dated 3.7.1999.

10. Lambert Kroger, the third respondent herein, in his statements under Section 40 of FERA dated 2/3.7.1999, 5.7.1999, 6.7.1999, 7.7.1999, 8.7.1999 and 24.8.1999, stated that he is a German National and he came to India on 16.12.1997 to give suggestions to Cliff Roy, the power of attorney holder of 4th respondent, as we[illegible]r

of Maple, who applied to RBI on 21.5.1998 for approval of 51% foreign financial collaboration under the automatic route. Further, it was also stated that A.R. Khan was in possession of 49% of the shares of the company and the seller of those 49% shares V.S. Jafa had entered into with an understanding with 4th respondent to transfer the share of 49% under the direction of the Swiss company and he had also signed on that agreement. Anil Bhalla also gave statements under Section 40 of FERA on 12.7.1999, 13.7.1999 and 14.7.1999, stating that he had explained the procedure for applying for setting up 100% trading company through FIPB to Cliff Roy and Lambert Kroger and the 2nd respondent company was formed at their instance. He was informed that necessary approvals would be obtained by M/s Abascus Legal Group. Jafa also gave statements on 16.8.1999, 31.8.1999 and 30.9.1999, explaining the circumstances under which he had entered into the Share Transfer Agreement with A.R. Khan and Lambert Kroger as the confirming party. Statement of the Vice President of the erstwhile ABN Amro Bank was also recorded on 18.10.1999. . Bank stated that it is an authorized agency for import of gold and that gold is sold to customers of the Bank as a practice, after necessary documents are obtained and after getting purchase orders from the customers. The Bank places orders on the supplier and the price is fixed on the basis of the invoice sent by the suppliers. Bank has followed the said procedure in respect of the 2nd respondent company as well.

11. The Special Director, Directorate of Enforcement, after recording the statements and examining various documents, issued a show-cause-notice dated 29.12.1999 to the company, Lambert Kroger, Cliff Roy - Directors of the company, 4th respondent – Piccadily, Paul Abraham – Director of the 2nd respondent company, for contravention of Sections 6(4) and (5), 9(1)(e), 47(1), 19(1)(a) and (e), 29(1)(a) and (b), 30(1), 49, 63 and 68 of FERA and to show cause why the amounts blocked in the accounts of noticee no 1 (bank) to the tune of 12.5 Crores approximately, seized 466 drafts, totalling 2.14 crores and

seized yellow metal coins appearing to be gold, should not be confiscated in terms of Section 63 of FERA and Cliff Roy and Paul Clare were issued notice to show cause why they should not be directed to bring back the foreign exchange remitted outside India into India in terms of Section 63 of the Act. Following are the brief details of the show-cause-notice:

"CHARGE

On the basis of the above investigations, a Show Cause Notice No. T-$/9-D/99 dated 29.12.99 was issued to:

1.	Maple Leaf Trading International (P) Ltd. S-485, GK-II, New Delhi-42 said noticee No. 1, its directors the said noticee No. 2,3 & 6.	For failure to comply with the provisions and declarations subject to which approval under automatic route was granted by the RBI and by engaging themselves in the trading activities of imported Maple Leaf Gold Coins in contravention of the provisions of sec. 19(1)(1) & (d), 29(1)(b) read with sec. 49 & 68(1) & (2) of FERA, 1973 and by entering into contracts/ agreements in violation of provisions of section 47(1) of FERA, 1973 and by collecting a sum of Rs.25 Crore approx. and placing this amount without any general or special exemption of RBI to the credit of persons resident outside India in contravention of section 9(1)(e) of FERA, 1973 read with section 68(1) & (2) of the said Act

2.	M/s. Picadily Invest AG, Post FAch 284, 8034, Zurich, Switzerland, Mr. Cliff Roy, Mr. Lambert Kroger & Mr. Paul Singh Clare the said notices No. 4, 3, 2 & 6.	By their carrying out the business of imported Maple Leaf Gold Coins in India in name & style of notice No. 1 without any general or special permission of RBI in contravention of the provisions of section 29(1)(a) of FERA, 1973 and by the unlawful trading collected a sum of Rs.25 crores approximately in the account of M/s. Mapl Leaf Trading International (P) Ltd.
3.	Mr.Cliff Roy, Lamber Kroger & Mr. Paul Singh Clare the said notices No. 2, 3 & 6.	By opening bank accounts with repatriation facility without prior permission of RBI and engaging in the trading of imported Maple leaf gold coins without any ground of special permission of RBI in contravention of section 30(1) of FERA, 1973.

They were also asked as to why the amounts blocked in the accounts of the Noticee No. 1 to the tune of Rs.12.5 crores approx., seized 466 drafts totalling to Rs.2.14 crores approx. And seized yellow metal coins appearing to be gold should not be confiscated in terms of section 63 of the said Act and Mr. Cliff Roy and Mr.Paul Singh Clare are also required to show cause as to why they should not be directed to bring back foreign exchange remitted outside India into India in terms of section 63 of the said Act."

12. Detailed reply was submitted by all the parties and the

Adjudicating Officer passed the final order on 22.2.2000 recording the finding that Lambert Kroger, Cliff Roy and Piccadily had established business activities in India and, therefore, would fall within the ambit of Section 29(1)(a) of FERA, 1973, for which they required a general or special permission from RBI, which they had not obtained and, therefore, liable to penalty under Section 50 of the Act. Further, it was also pointed out that the facts of the case had clearly indicated that, virtually, it is they who had established the company in India and that instead of following the route of Section 29(1)(a), they followed the route of Section 29(1)(b), by incorporating Maples, but indicated that foreign investment would be up to 51% for service sector in Annexure III. The Adjudicating Officer also recorded a finding that the 2nd respondent company had faulted the provisions of Section 29(1)(b) of FERA read with Notification No. 180/98 RB dated 13.1.1988. Findings have also been recorded as against the 1st respondent bank for not ascertaining the genuineness of the 2nd respondent company and as to whether the Company had the requisite permission from RBI for trading in gold and that the Bank has violated the provisions of Sections 6(4) and 6(t) of FERA and is liable to penalty under Section 50 of the Act. After holding so, the Adjudicating Officer passed the following order:

"In view of my findings that Noticee No. 1 has contravened the provisions of Section 19(1)(d) and 29(1)(b) read with Section 49(1)(a) and Section 47(1) of FERA, 1973 and Noticee NO. 2, 3 and 4 have contravened the provisions of Section 19(1)(a) of FERA, 1973,In am inclined to confiscate these gold coins seized under Panchnama dated 02.07.99 and 03.07.99 because these were acquired/specifically imported against foreign exchange by Noticee No. 1 for an activity which was contrary to the automatic approval route allowed by RBI under Notification No. 180/98-RB dated 13.01.1998 issued under Section 9(1)(d) and Section 29(1)(b) of FER s

generated in violation of Section 29(1)(a) of the said Act and gold coins being also liable to confiscation under Section 63 of FERA, 1973. The route adopted by them was to protect themselves from action as is evident from FAX dated 04.02.98 referred on page 66.

The SCN also proposed the confiscation of blocked amounts in bank accounts of Noticee No. 1 and fixed deposits maintained with following banks:-

(1) ABN AMRO BANK : DLF Centre, Sansad Marg, New Delhi.

(2) HDFC BANK LTD; Greater Kailash, Part II, New Delhi.

(3) BANK OF AMERICA: Barakhamba Road, New Delhi.

The evidence on record reveals that Noticee No. 1 collected amounts from various individuals known as business partners in accordance with the contracts executed with them for purchase of Maple Leaf gold coins in accordance with terms of such contracts. Since the activity under the contracts has been held by me illegitimate under the provisions of Section 29(1)(a) and 29(1)(b) read with Section 49(i)(a) and Section 47(1) of FERA, 1973, so I hold these amounts and fixed deposits liable to confiscation under Section 63 of FERA, 1973 as their collection and usage was for financing activities which were contrary to the said provisions of the FERA, 1973.

The SCN also proposes to confiscate 466 bank drafts seized under Panchnama dated 02.07.99. these drafts are given by the said business partners in terms of the said contracts for aforesaid activity which has been held by me in violation of the provisions of Section 29(1)(a) and 29(1)(b) read with Section 47(1) and 49(i)(a) and, therefore, for the same reasons, I hold these drafts also

liable to confiscation under the provisions of Section 63 of the said Act.

Further, I also hold that all these Noticees, except No. 5, are liable to penalty under Section 50 of the FERA, 1973 for the reasons and observations recorded hereinabove. In view of the aforesaid, I pass order as under:-

"O R D E R

1. I order confiscation of 35 gold coins seized from the business premises of Noticee No. 1 under Panchnama dated 02.07.99 and 630 gold coins seized from M/s. Group 4 Securities, Mahipalpur, New Delhi, under Panchanama dated 03.07.99 under Section 63 of FERA, 1973, on the grounds mentioned hereinabove.

2. I also order confiscation of amounts blocked in following accounts including the fixed deposits along with the interest accrued thereon:-

Sl. No.	Name of the Banks	Account No. (A) Fixed Deposits (B)	Amount (Rs.)
A.	Bank of America, Barakhamba Road New Delhi.	261157(A)	3,88,089.22
		317177(A)	78,043.00
B.	ABN Amro Bank DLF Centre Sansad Marg, New Delhi	6362400(A)	6,19,17,244.88
		6362559(A)	41,89,460.66
		6414389(A)	,44,98,474.00
		6372694 (A)	14,73,340.00
		312330040115(B)	77,10,103.80
		312330045196(B)	1,00,00,000.00
		312330045729(B)	2,65,444.97
		31233045778(B)	1,00,00,000.00
C.	HDFC Bank	027200000	

3. I order confiscation of the sale proceeds of the 466 bank drafts/pay orders seized from the business premises of Noticee No. 1 under Panchanama dated 02.07.99 under Section 63 of FERA. However, for 3 drafts/pay orders bearing no. 326191, 326192 and 326193, the order is subject to the outcome of Writ Petition pending before the Hon'ble High Court of Delhi in repaired to these.

4. I also order confiscation of following amounts lying in the following accounts of Noticee No. 3 and 6 with ABN Amro Bank, New Delhi:-

NAME	ACCOUNT NO.	AMOUNTS IN RS.
Cliff Roy	000006368697	1,99,666.13
Pau Singh Clare	000006467689	60,104.32

Under Section 63 of the FERA, 1973 on the grounds referred hereinabove.

5. I impose penalty of Rs.15,00,000/- (Rs. Fifteen lakhs only) on M/s. Maple Leaf International Pvt. Ltd., Greater Kailash, Part-II, New Delhi, under Section 50 of FERA, 1973 for the reasons mentioned hereinabove.

6. I also impose penalty of RS.5,00,000 (Rs. Five lakhs only) on M/s. Picadily Invest AG, Switzerland under Section 50 of FERA, 1973 for the reasons mentioned hereinabove.

7. I also impose personal penalty on Noticees No. 2, 3 and 6 under Section 50 of FERA, 1973, as per details below:

SL.NO.	NAME	AMOUNT (IN RS.)
1.	Cliff Roy	10,00,000/- (Rs. Ten lakh only)
2.	Lambert Kroger	10,00,000/- (Rs. Ten lakh only)
3.	Paul Singh Clare	5,00,000/- (Rs. Five lakh only)

I also direct Mr. Cliff Roy and Mr. Paul Singh Clare to bring back to India the foreign exchange indicated below which was remitted from their personal bank accounts with notice No. 7 under Section 63 of the FERA, 1973 as these amounts were earned by them on account of the activities undertaken by them in violation of the abovesaid provisions of FERA, 1973:-

NAME	AMOUNT REMITED (IN RS.)
Cliff Roy	8,84,449.00
Paul Singh Clare	18,85,000.00

8. I also impose personal penalty of Rs.1,00,000 (Rs. One Lakh only) on ABN Amro Bank, Sansad Marg, New Delhi under Section 50 of FERA, 1973 on the grounds mentioned hereinabove.

9. In view of my observations hereinabove, I drop the charges alleged against Mr. Paul Abraham, Noticee no. 5.

The Penalty imposed should be deposited in the office of Deputy Director, Enforcement Directorate, Hqrs. Office, 6th Floor, Lok Nayak Bhawan, Khan Market, New Delhi- 110 003, in the form of Demand Draft to be drawn in favour of the Pay & Accountants Officer, Department of Revenue, New Delhi, within 45 days of the re

SEALED SIGNED AT NEW DELHI ON THIS 22ND DAY OF SEPTEMBER TWO THOUSAND."

ARGUMENTS

13. Shri P.P. Malhotra, Additional Solicitor General of India, submitted that the High Court has committed an error in rejecting the appeal filed by the Union of India holding that no questions of law arose for its consideration and that there was no illegality in the order passed by the Tribunal. Shri Malhotra also submitted that the High Court has not properly appreciated or understood the scope of Sections 19(1)(a) and (d), 29(1)(a) and (b) of FERA. Shri Malhotra also submitted that no permission was either granted or sought for by Lambert Kroger or Cliff Roy - 4th respondent under Section 29(1)(a) of FERA for establishing, carrying on or opening any branch in India from RBI. Adjudicating authority, it was pointed out, clearly found on facts that the 4th respondent and the above mentioned persons who are foreign nationals had established a place of business in India in the name of Maple and for reaching that conclusion, the Adjudicating Officer has rightly lifted the corporate veil and examined as to who were all in fact controlling the Maple.

14. Mr. Malhotra submitted that the High Court has also not examined the scope of Section 29(1)(b) of the Act read with notifications dated 13.1.1998 and 20.1.1998 issued by the RBI. Learned counsel submitted that from the reading of the above mentioned notifications, it is clear that any company whose activities fell within the ambit of the notification dated 13.1.1998 and which claims the benefit of the notification, was required to submit a declaration in Form FC(RBI). Learned Additional Solicitor General also referred to the statement on the Industrial Policy, 1991 with reference to paragraph 39(B) dealing with Foreign Investment and also to the Press Note no. 11 dated 20.8.1991 dealing with changes in procedures for foreign investment approvals and also to paras 3(A), 4, 6 etc.. Reference was also made to the Press Notes dated 13.12.1991 and also 31.12.1991 and stated that, according to the Press

Notes, there is no concept of automatic approval for the companies engaged primarily in trading and such companies fulfilling certain conditions have to apply to the RBI for permission. Referring to the judgment of this Court in *Hindustan Lever* (Infra), it was submitted that this Court had no occasion to consider the scope of various clauses of Section 29 and hence the observations made in that judgment are only obiter. Shri Malhotra also submitted that the grant of permission under the automatic route is an "activity specific" and under the policy only those trading companies primarily "engaged in exports", have been given the benefit of automatic route. On the other hand, the respondent company, it was pointed out, has indicated in the application that the company's activities are the activities indicated in NIC Code 893.

15. Shri Malhotra also submitted that 1st respondent bank was not discharging its functions as an authorized dealer in gold and ought to have ensured that 2nd respondent was a trading company primarily engaged in exports and had the requisite permission from RBI for the same. It was pointed out that the Bank had acted contrary to the provisions of the notifications dated 13.1.1998 and 20.1.1998 and was also a party to the fraudulent transaction and hence clearly violated the mandate of the second proviso to Section 6(5) of FERA.

16. Shri Amit Sibal, learned counsel appearing for respondents 2 to 4, submitted that they had not violated the provisions of Section 29(1)(a) of FERA and that the 2nd respondent is an Indian company consisting of Indian shareholders as well as Directors. Learned counsel submitted that an Indian company incorporated under the Indian Companies Act, 1956, with foreign shareholding, does not need the permission from RBI to carry on business or establish a place of business in India. Learned counsel also submitted that merely because Picadily, a Swiss company, held 51% shares in the 2nd respondent company and initiated its incorporation, does not lead to the con[illegible]s

company sought to circumvent Section 29(1)(a) of FERA and indirectly tried to establish a place of business in India. Learned counsel referred to the Foreign Exchange Regulation Amendment Act no. 29 of 1993 and submitted that the words "or in which non-resident interest is more than 40%" were omitted from Section 29(1) with effect from 8.1.1993, which would indicate the Legislative intention was to encourage foreign initiative in investment in India and in Indian companies without obtaining permission from RBI. In support of his contention, reference was made to the judgment of this Court in *Hindustan Lever Employees Union v. Hindustan Lever Ltd.,* 1995 Suppl (1) SCC 499. Learned counsel submitted that respondents 2 to 4 could not be said to have violated the provisions of FERA merely because they sought to arrange the affairs of Maple so as to not to fall foul of Section 29(1)(a) so long as they did not violate any other law. Reliance was also placed on the judgment of this Court in *Ghatge and Patil Concerns' Employees' Union v. Ghatge and Patil (Transports) Private Ltd. And another* AIR 1968 SC 503 and *Landon and Country Commercial Investment Properties Ltd. v. Attorney-General* 1953 1 AER 436.

17. Learned counsel submitted that respondents 2 to 4 have not violated the provisions under Section 19(1)(a) and (d), 29(1)(b) and Section 49(i) of FERA. Referring to the notification no. 180/98, learned counsel submitted that the company had issued 51% of its share to 4th respondent in accordance with the general permission granted vide second proviso to paragraph 1 of the notification No. FERA 180/98. Learned counsel also submitted that the notification itself has given general permission to "newly set up trading company primarily engaged in export" and, therefore, no further permission was required by a company before issuing shares to a foreign investor. Learned counsel submitted that 2nd respondent squarely falls within the category of "primarily engaged in export" and its business plan had all along been to export various products made in India, attain export stock/trading/star trading

house and only then pay dividends to shareholders, including foreign investor. Reference was made to the various documents in support of this contention. Learned counsel also submitted that in any view the second proviso to the notification FERA 180/98 does not require a newly set up trading company to be engaged in exports, at the time of issue of shares and all that can be said is that the issuer cannot remit dividend to the foreign investor until it has achieved the status of export trading/star trading house.

18. Learned counsel referring to the judgment of this Court in *Life Insurance Corporation of India v. Escorts Ltd. And Others* (1986) 1 SCC 264 submitted that the primary policy or purpose of FERA is to permit inflow of foreign exchange and maintain a balance between inflow and outflow of foreign exchange and such a balance would be lost if the stand of the appellant – Union of India – is accepted. Learned counsel, therefore, submitted that, even if the company had not been primarily engaged in exports, at the time its business was shut down by the Enforcement Directorate, it was still not in violation of any provision of the Notification No. FERA 180/98 since it had not remitted any dividends to the 4th respondent. The learned counsel, therefore, submitted that the company is covered by the general permission granted under the automatic route and that the respondents 2, 3 and 4 have not acted in contravention of Section 19(1)(a) and (d), 29(1)(b) or 49(i)(a) of FERA.

19. We vide our order dated 30.4.2013, directed RBI to file an affidavit to explain as to how they understood the scope of Sections 19 and 29(1)(b) of the Act and also the notification dated 13.1.1998 issued by RBI. RBI, in response to our direction, filed an affidavit to that effect on 7.7.2013. Shri Jaideep Gupta, learned senior counsel appearing on behalf of RBI, submitted that the RBI had come to know that the company after obtaining the registration for carrying on activities under NIC Code 893, had started trading in gold coins in the name of Maple, an activity which was not perm[illegible]d

senior counsel submitted that the company was misleading the public that it had got RBI permission to carry on the above mentioned activity. Referring to Form FC (RBI), learned senior counsel submitted that the company had specifically sought for permission for foreign investment with regard to NIC Code 893 and with regard to the items mentioned in para IX(iii). The company stated that it was not applicable, therefore, it was not seeking the automatic route, as a trading company primarily engaged in export.

20. Shri V. Giri, learned senior counsel appearing for 1st respondent, submitted that the Bank had imported the gold on its own behalf and sold the same to the company and that the bank was engaged in that activity as an authorized dealer, for which it had obtained permission from RBI. Learned senior counsel submitted that in order to attract Section 6(5) of FERA, 1973, it is necessary that an authorized dealer must have conducted a transaction in foreign exchange and it had only imported gold and sold the same to the company incorporated in India against Indian currency, consequently, there is no violation of Section 6(5). Learned senior counsel submitted that "reasonable satisfaction" contemplated under Section 6(5) does not impose an obligation on the authorized dealer to require a person on whose behalf the authorized dealer is entering into the said transaction to furnish information and declarations to satisfy itself that the transaction will not contravene the provisions of FERA. Further, in the instant case, it was pointed out that the Bank did not enter into any transaction "on behalf" of the company and therefore the Tribunal and the High Court have rightly found that the Bank had not committed any illegality in selling the gold coins to the company.

INDUSTRIAL POLICY 1991

Foreign Investment Initiative

21. The Government of India had decided to take up

series of initiatives in respect of policies relating to the areas of Industrial Licencing, Foreign Investment, Foreign Technology Agreements, Public Sector Policy, MRTP etc. in the Industrial Policy of July 24, 1991. For achieving social and economic justice to end poverty and unemployment and to build a modern, democratic, socialist, prosperous forward looking India, it was felt necessary that India should also grow as part of the world economy and not in isolation. Paragraph 24 of that policy stated that the Government would welcome foreign investment in high priority industries requiring large investments and advance technology for which approval for direct foreign investment upto 51% foreign equity was permitted. Paragraph 26 of that policy noted that promotion of exports of Indian products called for a systematic explorations of world markets through intensive and highly professional marketing activities, for which it was found necessary that the Government would encourage foreign trading companies to assist us in export activities. Paragraph 39B of that Policy dealt with "Foreign Investment", the portions which are relevant for the purpose are given below:

"39B. **Foreign Investment**

(i) Approval will be given for direct foreign investment upto 51% foreign equity in high priority industries (Annex III). There shall be no bottlenecks of any kind in this process. Such clearance will be available, if foreign equity covers the foreign exchange requirement for imported capital goods. Consequential amendments to the Foreign Exchange Regulation Act (1973) shall be carried out.

(ii) While the import of components, raw materials and intermediate goods, and payment of knowhow fees and royalties will be governed by the general policy applicable to other domestic units, the payment of

dividends would be monitored through the Reserve Bank of India so as to ensure that outflows on account of dividend payments are balanced by export earnings over a period of time.

(iii) Other foreign equity proposals, including proposals involving 51% foreign equity which do not meet the criteria under (i) above, will continue to need prior clearance. Foreign equity proposals need not necessarily be accompanied by foreign technology agreements.

(iv) To provide access to international markets, majority foreign equity holding upto 51% equity will be allowed for trading companies primarily engaged in export activities. While the thrust would be on export activities, such trading houses shall be at par with domestic trading and export houses in accordance with Import-Export Policy.

(v) A Special Empowered Board would be constituted to negotiate with a number of large international firms and approve direct foreign investment in select areas. This would be a special programme to attract substantial investment that would provide access to high technology and world markets. The investment programmes of such firms would be considered in totality, free from pre-determined parameters or procedures."

22. Policy referred above would show that it was focusing on foreign equity on high priority industries as per para 39B(i) and for other foreign equity proposals including proposals involving 51% foreign equity as per para 39B(iii), prior clearance from FIPB was required to be obtained as in the past. In other words, there was no change in the industrial policy for other items except for the items covered under para 39B(i).

23. Press Note No.11 dated 20.08.1991 dealt with some changes in the Procedures for Foreign Investment Approvals. Paragraph 3 of the Press Note dealt with approvals for foreign investments upto 51% foreign equity in high priority industries (Annexure III – List of Industries for Automatic Approval Technology Agreement and for 51% Foreign Equity Approvals). Press Note stated that applications for approval under provisions in para 39B(i) and 39B(ii) of the Statement on Industrial Policy would be filed with the RBI. Para 3(A) of the Press Note is of some relevance, hence noted below:

"Procedures for Approvals

Applications for approval under the provisions in paras 39B(i) and 39B(ii) of the Statement on Industrial Policy will be filed with Reserve Bank of India. The application shall state clearly the description of the article to be manufactured in ITC (HS classification). The proposal shall be a composite one including detailed information on the capital goods to be imported for the project. Under the provisions of the policy the proposed foreign equity must cover the import of capital goods required for the project.

The Reserve Bank of India will issue the necessary permission for the foreign equity investment under the Foreign Exchange Regulation Act, 1973 (FERA). This permission will include exemption from the operation of Sections 26(7), 28, 29 and 31 of FERA. Simultaneously the Reserve Bank of India will confirm that the import of capital goods is covered by the foreign equity. Based on this confirmation the Chief Controller of Imports & Exports shall issue the relevant import licence for capital goods imports.

Under the procedure outlined above the plant and machinery proposed to be imported must be new and not second hand. There will be no indigenous clearance of these capital goods."

24. RBI was, therefore, permitted to issue necessary permission for equity investment under FERA and that permission would include exemption from the operation of Sections 26(7), 28, 29 and 31 of FERA, 1973.

Trading Companies primarily engaged in Export

25. Paragraph 4 of the above mentioned Press Note dealt with 'Foreign Investment in Trading Companies' which provided that foreign investment in trading companies upto 51%, primarily engaged in export activities, were required to file applications with the RBI in the prescribed form. Para 6 of Press Note dealt with Other Foreign Investment Proposals, those paragraphs are relevant for the purpose, hence given below:

"**4. FOREIGN INVESTMENT IN TRADING COMPANIES**

Under the provisions of para 39B(iv) foreign equity holdings upto 51% equity will be allowed in trading companies primarily engaged in export activities. Applications for foreign investment under this clause will be filed with the Reserve Bank of India in the form to be prescribed by the RBI. Such trading houses shall be at par with the domestic trading and export houses and shall operate in accordance with the Import Export Policy.

6. OTHER FOREIGN INVESTMENT PROPOSALS

All other foreign investment proposals will be subject to the existing procedures. Applications will be made to the Secretariat of industrial Approvals in the Department of Industrial Development in the prescribed form. These proposals will be considered according to usual procedures. This will include proposals involving 51% foreign equity which do not meet any or all of the criteria under paras 39 B(i) and (ii) of the Policy. Proposals of foreign investment, foreign technology agreements not

covered by the automatic facility, and import of capital goods may, if desired, continue to be made on a composite basis."

26. Above mentioned paragraphs of Press Note indicate that the trading companies covered under 39B(iv) were required to make an application for foreign investment to the RBI in the prescribed form meaning thereby even after the Press Note, filing of applications with RBI for trading houses primarily engaged in export was essential even for 51% foreign equity.

27. In this connection, it is useful to refer to para 9 of the Press Note No.17 dated 19.11.1991 dealing with procedure for increase in foreign equity up to 51% in existing companies as well as to para 10 and 13. On reading of those paragraphs, it is clear that all other foreign proposals for raising of foreign equity levels in existing companies would be subject to usual procedures and applications and would be made to the Secretariat of Industrial Approvals in the Department for Industrial Development in the prescribed form which would include proposal involving increase in foreign equity upto 51% which did not meet any or all the criteria outlined above.

28. Government of India also issued a Press Note No. 20 dated 13.12.1991 revising the form for Foreign Investment / Technology Investments. Para 3 of the Note refers to FC(RBI) with reference to permission under para 39B(i), 39B(iv), 39C(i) and 39C(ii).

29. Press Note No. 23 dated 31.12.1991 dealing with the procedure for foreign investment in trading companies is also of considerable relevance and the same is given below for easy reference:

Procedure for Foreign Investment in Trading Companies

"1. Government tabled a Statement on Industrial Policy in both the Houses of Parliament on July 24, 1991. The Statement has substantially liberali[illegible]d

simplified the procedures governing foreign investment and foreign technology proposals.

2. Para 39B(iv) of the Statement on Industrial Policy lays down that "majority foreign equity holding upto 51% equity will be allowed for trading companies primarily engaged in export activities. While the thrust would be on export activities, such trading houses shall be at par with domestic trading and export houses in accordance with the Import Export Policy".

3. This Press Note sets out the principles and procedures for approval of foreign equity holding upto 51 per cent in trading companies primarily engaged in export activities.

4. The criteria for grant of Export House, Trading House or Star Trading House certificates are laid down in paragraphs 218 and 226 of the Import Export Policy, 1990-93. As amended by the Ministry of Commerce, Import Trade Control Public Notice No. 242-ITC(PN)/90-93 dated November 8, 1991, effective from April 1, 1992, the average net foreign exchange earnings in the three preceding licensing years should not be less than Rs.6crore for Export House Certification; Rs.30 crore for Trading House Certification; Rs.125 crore for Star Trading House certification. Further, such certification will also be granted if the minimum net foreign exchange earning in the immediate preceding licensing year is not less than Rs.12crore for Export House; Rs.60 crore for Trading House and Rs.150 crore for Star Trading House.

5. Provisions for approval

(i) New Companies

In the case of a new company, the Reserve Bank of India will give automatic approval for foreign investment upto 51 per cent foreign equity on the following basis

(a) Such a company will register itself with the Ministry of Commerce (Office of CCI&E) as a registered exporter/importer.

(b) The repatriation of dividend will be permissible only after the company has registered itself with the Ministry of Commerce (office of CCI&E) as an Export House/Trading House/Star Trading House under the provisions of the prevailing Import Export Policy.

(ii) Existing Companies

In the case of existing companies already registered as Export Trading/Star Trading House, the Reserve Bank will give automatic approval on an application for foreign investment upto 51% foreign equity. The approval will be subject to the following requirements:

(a) On receipt of RBI approval the company must pass a special resolution under Section 81(1A) of the Companies Act proposing preferential allocation of the required volume of fresh equity to the foreign investor.

(b) The CCI will allow preferential allocation of equity in favour of the foreign investor on the basis of the RBI approval for expansion of foreign equity and the adoption of the special resolution by the company. For such cases, the price of new equity will be fixed by the CCI on the basis of market prices, computed on the basis of the average price for the six months period preceding the date on which the application is received in the CCI, with a discount of upto 10% if requested by the shareholders resolution. The market price will take into account any bonus issue which may have been decla d

adjust for the same. For companies undertaking such equity expansion disinvestment, if it occurs in future will also be at market price computed on the same basis.

6. Application Procedure

Applications for approval under the provisions of para 5 above will be filed with the Reserve Bank of India in the prescribed form. The Reserve Bank of India will issue the necessary permission for the foreign equity investment under the Foreign Exchange Regulation Act, 1973(FERA). Inter alia, this permission will include exemption from the operation of sections 26(7), 28, 29 and 31 of FERA.

7. Dividend Balancing:

The outflow of foreign exchange on account of dividend payments are to be balanced by export earning over a period of time in respect ;of all approvals given under the provisions outlined in para 5 above. Monitoring will be done by the Reserve Bank of India. The balancing will be done on the following basis:

(i) The balancing of dividend would be over a period of 7 years reckoned from the date of recognition as Export House/Trading House/Star Trading House for new companies, and from the date of allotment of the shares raising the level of foreign equity to the approved level in the case of existing companies.

(ii) The amount of dividend payment should be covered by export earnings recorded in years prior to the payment of dividend or in the year of payment of dividend.

The Reserve Bank of India will issue appropriate instructions to give effect to these provisions."

30. Press Note mentioned above has, therefore, dealt with para 39B(iv) and stated that majority of foreign equity holding upto 51% equity would be allowed for trading companies primarily engaged in export activities while the thrust would be on export activities. Such trading houses, it was also stated, should be at par with domestic trading and export houses in accordance with the Import-Export Policy.

31. Press Note also indicated that no general permission for investment under automatic route would be given and, on the other hand, an application for permission will have to be filed before the RBI as per para 6 which takes in both new and existing companies. Clause 6, therefore, clearly indicates that the application for approval by RBI is mandatory for the new as well as existing companies. Therefore, if a new trading company indulging in export primarily also will have to make an application to the RBI for automatic approval for foreign investment upto 51% foreign equity and the thrust would be on export activities. Registration of the company as an exporter / importer with the Ministry of Commerce and registration of an export house is also a pre-requisite. In other words, according to the Notification then in existence and the Press Note upto 31.12.1991, the companies engaged primarily in trading activities whether new or existing will have to fulfill certain conditions by applying to the RBI for permission for foreign investment up to 51%.

32. We may now examine the scope of the Notification No. FERA 180/98 dated 13.01.1998 (as amended upto 14.07.1998) and Notification dated 20.01.1998 in the above-mentioned factual background.

33. Notifications referred above h n

conditions and parameters to be complied with by the companies registered in India for automatic approval and those notifications have to be read along with Section 19(1)(a) and (d), Section 29(1) (b) of FERA, the Industrial Policy and the Press Notes. Before examining the scope of Sections 19(1)(a), 19(1)(b) and Section 29(1)(b), let us examine the arguments advanced by the Union of India as to whether respondent Nos. 2 to 4 had violated Section 29(1)(a) of the Act. It was contended that Maple was in reality a foreign company set up by 4th respondent, Lambert Kroger as well as Cliff Roy in violation of Section 29(1)(a). Admittedly, neither permission was sought for nor any permission had been granted by the RBI with regard to Section 29(1)(a) of the FERA. But arguments were addressed by the learned counsel on either side with regard to the scope of the above mentioned provisions and also on the principle of lifting the corporate veil.

34. Mr. Amit Sibal, as already indicated, submitted that by the Foreign Exchange Regulation Amendment Act 29 of 1993 the bar to having more than 40% shares in an Indian Company by a non-resident has been removed with a view to invite foreign persons to invest in India and / or Indian Companies and allow them to do business in India and to deal with assets in India with greater freedom and therefore by virtue of the amendment, Indian company in which non-resident interest is more than 40% can carry on business in India without any permission from RBI. Learned counsel also laid considerable stress on paragraphs 74 to 76 of the judgment of this Court in *Hindustan Lever* (supra).

35. Shri P.P. Malhotra, on the other hand, submitted that section 29(1)(a) puts an injunction on the foreign companies and foreign nationals from establishing or carrying on any business in India or opening any branch in India without obtaining the permission of the RBI. Learned senior counsel also submitted that by virtue of the amendment restrictions were removed only with regard to FERA companies, however, with

regard to the foreigners and foreign companies restrictions remained to exist even after the amendment made in the year 1993 and they also required prior approval of the RBI for the purpose of establishing place of business in India.

36. We may examine whether the judgment in Hindustan Lever concludes the issue as to the interpretation of Section 29(1)(a) of the Act and also the question whether a company in which non-resident interest is more than 40% can carry on business without permission from the RBI. For easy reference, we may extract the above-mentioned paragraphs of that judgment which are as follows:

> "74. Under Section 29 of the Foreign Exchange Regulation Act (as it stood originally), a person resident outside India or a company (other than banking company) which was not incorporated in India or in which the non-resident interest was more than 40%, could not carry on business in India or establish in India a branch office or other place of business. Nor could such a person or company acquire the whole or any part of any undertaking in India of any company carrying on any trade, commerce, or industry or purchase the shares in India of any such company. The object of Section 29, inter alia, was to ensure that a company (other than banking company) in which the non resident interest was more than 40% must reduce it to a level not exceeding 40%. (Needle Industries (India) Ltd. v. Needle Industries Newey (India) Holding Ltd.) But, now this restriction of 40% has been removed by an amendment by Act 29 of 1993. A company in which non-resident interest is more than 40% can carry on business without having to obtain permission from the Reserve Bank of India. The underlying idea of this liberalisation is clear. Non-resident persons were being invited to invest in India and / or in Indian companies. If any non-resident invests in an India company, it is but natural that dividends payable by an Indian company will be enjoy[illegible]t.

All other rights that a shareholder enjoys by virtue of the shareholding will be enjoyed by the non-resident. Merely because a foreign shareholder acquires 51% shares in an Indian company, it cannot be said that this is against public interest of public policy.

76. In view of all these, it is difficult for us to uphold the contention that the Scheme of Amalgamation is against public interest. Merely because 51% of the shares of HLL are being given to a foreign company, the Scheme cannot be said to be against public interest. The foreign Exchange Regulation Act has been amended specifically to encourage foreign participation in business in India. The bar to having more than 40% shares in an Indian company by a non resident has been lifted. The Amending Act 29 of 1973 is not under challenge. In order to give greater freedom to the companies for doing business in India, the MRTP Act has been amended. Prior approval of Government of India is not necessary for amalgamation of companies any more. In fact, it is in public interest that TOMCO with its 60,000 shareholders and also a very large workforce does not deteriorate into a sick company."

37. Above mentioned paragraphs cannot be read out of context. *Hindustan Lever* was a case dealing with disputes between the employees of Hindustan Lever and the company. The question was with regard to the amalgamation of two companies namely Hindustan Lever Ltd. and Tata Oil Mills Company Ltd. giving specific reference to the scheme of amalgamation of a company with a subsidiary of a multiple level company. Observation referred to in paragraphs 74 and 76 have to be seen in that context and this Court has not ruled that no permission whatsoever is required from RBI by an Indian Company where non-resident interest is more than 40%. The language used in Section 29(1)(a) in our view is unambiguous and plain and calls for no interpretation or explanation. Section 29(1)(a) puts a specific bar on the foreign companies and

foreign nationals mentioned in Section 29(1) from establishing or carrying on any business in India or opening any branch in India without obtaining permission of the RBI. Heading of Section can be regarded as a key to the interpretation of the operative portion of the Section and if there is no ambiguity in the language or if it is plain and clear, then the heading used in the section strengthen that meaning. Heading of Section 29 indicates restrictions and the expression "shall not" "except with" general or special permission of the Reserve Bank make the requirements mandatory and the negative words used by the legislature shows its intention that if any act is done in breach thereof will be illegal. Reading the Press Note referred to earlier and the Cabinet Note for the amendment under Section 29, apart from the fact that the language used in Section 29(1)(a) is unambiguous clearly indicates that restrictions have only been liberalized, instead of 40% of the limit, it was increased to 51% and 74% subject to fulfilment of certain conditions as set out in the industrial policy and the various Press Notes. Restrictions imposed under Section 29(1)(a) is not applicable to an Indian company to establish a place of business in India but, on the other hand, restriction has been statutory fixed in respect of foreign company which wants to establish a place of business in India. Section 29(1)(a) deals with following categories of foreign entities:

(i) A person resident outside India; whether a citizen of India or not.

(ii) A person who is not a citizen of India but is a resident of India or

(iii) A company, (other than a banking company) which is not incorporated under any law enforced in India or

(iv) Any branch of such company.

38. Restrictions have therefore be

mentioned entities and they cannot establish a place of business in India except with the general or special permission of the RBI. Subsection (b) of Section 29(1) also puts further restrictions on foreign citizens and foreign companies from acquiring the whole or any part of undertaking in India of any person or company, trade or industry or purchase of shares in India of any such company except with the general or special permission of RBI. Even after the amendment under Section 29, the restrictions continued to apply post amendment to foreign companies and foreign nationals as set out in Section 29(1)(a).

39. We, therefore, find no error in the views expressed by the adjudicating authority on the interpretation of Section 29(1)(a) and the observation made in *Hindustan Lever* is of no assistance to the company and made on different facts/ situations and not to be understood in the way that company sought to interpret.

Lifting of Corporate Veil

40. Shri P.P. Malhotra submitted that the adjudicating authority was justified in reaching the conclusion that Noticees No. 2, 3 and 4 i.e. Lambert Kroger, Cliff Roy and Picadly Invest AG had established a place of business in India in the name and style of Maple Leaf to carry on business activities in India and they fell within the ambit of Section 29(1)(a) for which they required general or special permission from the RBI. Reference was made to the various correspondence and statements exchanged between the parties which according to the learned senior counsel would indicate that they had established the place for business in India without obtaining permission from the RBI. Shri Malhotra also submitted that the second respondent company is virtually a foreign company and a clock of foreigners Cliff Roy, Lambart Kroger and 4th respondent and through the Maple Leaf Trading International Pvt. Ltd., they have in fact established a company in India by adopting a dubious route knowing fully well that this route was not permissible by

the law of this country and hence the adjudicating authority was justified in lifting the corporate veil so as to examine whether they had indulged in any dubious methods so as to overcome statutory provision i.e. Section 29(1)(a) of the Act. In support of his contention, reference was made to the judgments of this court in *New Horizons Limited and Anr. v. Union of India (UOI) and Ors.* 1995(1) SCC 478, *Delhi Development Authority v. Skiper Construction Company (P) Ltd. and another* 1996(4) SCC 622 and *Vodafone International Holdings B . V . vs . Union of India (UOI) and Anr* .2012 (6) SCC 613.

41. Shri Amit Sibal, learned counsel appearing for the respondents on the other hand contended that Indian courts had consistently held that when interpreting a statute, courts would lift the corporate veil more restrictively and that too only if the statute explicitly requires or the purpose of statute necessitates it. Learned counsel also submitted that FERA used to lift the veil under Section 29(1)(a) before the amendment but was not expected to do so after the amendment especially in the light of the judgment in *Hindustan Lever*. Learned counsel also pointed out that lifting the corporate veil in order to apply Section 29(1)(a) to an Indian company militates against the purpose of the amendment of Section 29(1)(a). Reference was also made to the judgments of this Court in *Life Insurance Corporation of India v. Escorts Ltd. And Others* (1986) 1 SCC 264, *Union of India v. Azadi Bachao Andolan* (2004) 10 SCC 1 and also to the judgment of the English Court in *Re. H. PC. Produce Ltd.* (1962) 1 All ER 37.

42. We are of the view that in a given situation the authorities functioning under FERA find that there are attempts to over-reach the provision of Section 29(1)(a), the authority can always lift the veil and examine whether the parties have entered into any fraudulent, sham, circuitous or a devise so as to overcome statutory provisions like Section 29(1)(a). It is trite law that any approval/permission obtained by non-disclosure of all necessary information or making

tantamount to approval/permission obtained by practicing fraud and hence a nullity. Reference may be made to the judgment of this Court in *Union of India and Others v. Ramesh Gandhi* (2012) 1 SCC 476.

43. Even in *Escorts case* (supra), this court has taken the view that it is neither necessary nor desirable to enumerate the classes of cases where lifting the veil is permissible, since that must necessarily depends on the relevant statutory or other provisions, the object sought to be achieved, the impugned conduct, the involvement of the element of the public interest, the effect on parties who may be affected etc. In *Escorts case* (supra), this Court held as follows:

> "Generally and broadly speaking, we may say that the corporate veil may be lifted where a statute itself contemplates lifting the veil or fraud or improper conduct is intended to be prevented or a taxing statute or a beneficent state is sought to be evaded or where associated companies are inextricably connected as to be, in reality, part of one concern."

44. In *Vodafone* judgment (supra), this court has taken the view that once the transaction is shown to be fraudulent, sham circuitous or a device designed to defeat the interests of the shareholders, investors, parties to the contract and also for tax evasion, the court can always lift the corporate veil and examine the substance of the transaction. This court further held lifting the corporate veil doctrine can be applied in tax matters even in the absence of any statutory authorization to that effect. FERA Amendment Act 29 of 1993 has no effect on the principle of lifting the corporate veil and the question as to whether it was established so as to circumvent the provision of Section 29(1)(a) can always be examined.

45. Learned counsel appearing for respondent Nos. 2 to 4 also contended that even if the corporate veil is lifted, it would only reveal that 51% of Maple Leaf issued share capital, is only

held by the foreign company, Picadily and such a share holding will not render Maple Leaf a branch, office or place of business of a foreign company within the meaning of Section 29(1)(a). We find it unnecessary to express any opinion on the alternative argument raised by the learned counsel, since the High Court has rejected the appeals mainly on the ground that no question of law arose for its consideration.

46. The main allegation against the company Maple Leaf was that it had violated the provisions of Section 19(1)(a) and (d) and Section 29(1)(b) read with Sections 9(1)(e), 49 and 68(1) and (2) of FERA leading to penal consequences.

47. We will now examine whether the second respondent company has obtained general permission under Section 29(1)(b) through the automatic route as per Notification dated 13.01.1998 read with Press Notes dated 20.08.1991 and 31.12.1991. For answering the above question, it is necessary to examine the scope of Section 19(1)(a) and (d), Section 29(1)(b) of FERA along with Notification dated 13.01.1998 and the various Press Notes referred to earlier. For easy reference, those provisions are given below:-

"Section 19. Regulation of export and transfer of securities

19. (1) Notwithstanding anything contained in section 81 of the Companies Act, 1956, no person shall, except with the general or special permission of the Reserve Bank,

a. take or send any security to any place outside India;

d. issue, whether in India or elsewhere, any security which is registered or to be registered in India, to a person resident outside India;"

Restrictions on establishment of place of business in India

29. (1) Without prejudice to the pr 8

and section 47 and notwithstanding anything contained in any other provisions of this Act or the provisions of the Companies Act, 1956, a person resident outside India (whether a citizen of India or not) or a person who is not a citizen of India but is resident in India or a company (other than a banking company) which is not incorporated under any law in force in India or any branch of such company, shall not, except with the general or special permission of the Reserve Bank, -

(a)————————-

(b) acquire the whole or any part of any undertaking in India of any person or company carrying on any trade, commerce or industry or purchase the shares in India of any such company.

48. Section 19(1)(a) was intended to regulate export and transfer of securities. Section 19 states that no person shall except with the general or special permission of the Reserve Bank take or send any security to any place outside India or to issue whether in India or elsewhere any security which is registered or to be registered in India to a person resident outside India. Section 19 while intending to regulate export and transfer of securities, Section 29 placed restrictions on establishment of place of business in India. It is in pursuance of clause (a) and clause (d) of sub-section (1) of Section 19 read with clause (b) of sub-section (1) of Section 29 of FERA Notification No. 180/98 dated 13.01.1998 was issued by the RBI.

49. Much of the arguments on either side related to the question as to whether the company has obtained any general permission under Section 29(1)(b) read with Notification dated 13.01.1998 and if so in what activity? With regard to the question whether the company was a trading company and also whether it was primarily engaged in export for availing of the

automatic route, the Union of India's stand was that the company did not obtain any general permission from the RBI vide Notification NO. FERA 180/98 dated 13.01.1998 and that no declaration stating that the company was a trading company or was primarily engaged in exports was indicated in the above mentioned statutory form, assuming, it was a new trading company. Further, it was also stated that there was neither an application for approval nor any form FC[RBI] filled up or filed with RBI by the company for approval for undertaking trading activities for export, a condition precedent for automatic approval for any business specified in the Notification dated 13.01.1998 for an existing and new company. Consequently, the company was not entitled to get the benefit of a trading company primarily engaged in export either new or existing. On the other hand, the company has specifically referred to NIC code 893 which stipulated business and management consultancy, and that the company has not obtained the benefit of automatic route in trading in gold coins in the domestic market.

50. Learned counsel for respondent Nos. 2 to 4 submitted that RBI vide notification No. FERA 180/98 gave general permission *inter alia* for a "newly set up trading company primarily engaged in export" incorporated in India to issue 51% of its equity capital to a company incorporated abroad and that the second respondent company has issued 51% of its shares to respondent No.4 in accordance with the said notification. Further, it is also pointed out by the learned counsel that the UOI has failed to consider the second proviso to the notification which related to a third category companies namely newly setup trading companies which might acquire export/trading house/ star trading house status before they could remit dividends to the foreign investors.

51. Learned counsel pointed out until January 1998, an application for prior clearance from RBI was required for issuance of shares by companies like t[illegible]t

to the foreign investor and the above mentioned notification had further simplified the procedure by stating that prior clearance was no longer required instead within thirty days of the issuance of shares, the issuer was required to file certain documents listed in para 3(viii) of the above mentioned notification.

52. Shri Sibal submitted that the company fell squarely within the category of "newly setup trading company primarily engaged in export" which fell within the purview of the general permission granted by RBI under the automatic route hence there was no contravention under Sections 19(1)(a) and (d), 29(1)(b) or 49(i)(a) of FERA.

53. Learned counsel also submitted that there was no mistake or omission in Form FC [RBI] and submitted that the notification only required companies that conduct activities covered under Annexure III to fill in Form FC [RBI] which did not require trading companies to fill out Form FC [RBI]. Reference was also made to para 3(viii)(a) of the notification and submitted which required the issuer company to file not later than thirty days from the date of issue of one copy of form FC [RBI] duly completed containing NIC code and description of activity in accordance with the said Annexure III. Learned counsel further pointed out that the second respondent had made reference to Notification code 893 since it also provided business consultancy services for a fee to its customers who wished to become partners in his business by promoting the sale of gold coins. In short, contention of the counsel was that the company fell within the notification NO.180/98 as it was a newly trading company primarily engaged in export and the permission was a general permission therefore respondents 2 to 4 could not be held to have contraverted any provision of the FERA in that respect in Form FC[RBI].

54. We have examined in detail the historical background of the Industrial Policy dated July 24, 1991, Press Note No.11 dated 20.8.1991 dealing with the changes in procedures for

foreign investment approvals, Press Note No.23 dated 31.12.1991 dealing with the procedure for foreign investment in trading companies and also Appendix III of Press Note No.10 dealing with Industries for 51% foreign equity approvals, Press Note No.14 dealing with the revised consolidated list for automatic approval for foreign equity upto 50% / 51% / 74% etc. so as to understand the scope of Section 19(1), (d) and Section 29(1)(b) read with Notification dated 13.1.1998 and 20.1.1998.

55. The Automatic Permission Route was found open by the Notifications dated 13.1.1998 and 20.1.1998 and those notifications have laid down certain conditions and parameters for automatic approval which were to be complied with by the issuer company along with the filling of declaration in Form FC [RBI]. Notification had given relaxation to the provisions of Section 19 and Section 29(i)(b) to invest not exceeding 51% to two categories namely all industries mentioned in Annexure III to the Statement of Industrial Policy 1991 or to a trading company primarily engaged in export and is registered as an Export/Trading/Star Trading House with the Ministry of Commerce, Government of India. To claim the benefit of the above-mentioned notifications, it was essential that a true declaration in Form FC [RBI] was required to be filed and benefit of the general permission through automatic route could be obtained only for the activity specified in Form FC [RBI] and there was no automatic approval for any activity not specified in the above-mentioned form. Reading Section 19(1)(a), (b) and 29(1)(b) read with the notifications and the Press Notes show that the intention of the Legislature was to permit company incorporated in India which is engaged or proposing to engage in an activity specified in Annexure III or an Indian Company which is a trading company, primarily engaged in export and is registered as an export/trading/star trading house with the Ministry of Commerce, Government of India to issue equity shares, subject to the conditions mentioned in paragraph 3 of the Notification dated 13.1.1998. The firs n

states that a company existing on the date of the notification, which was not engaged in Annexure III activity would be eligible to issue shares if it had embarked upon expansion programme, predominantly in Annexure III activities, subject to the condition that foreign equity raised by issue of equity shares to the foreign investors was utilized for such expansion. The first proviso goes along with clause (a) of the Notification. The second proviso states that in the case of a newly set-up "trading company", primarily engaged in export, issue of shares shall be subject to the conditions that registration as an export/trading/star trading house was obtained before the dividend is declared to the foreign investors. These provisos go along with clause (b) of the Notification. The Notification, it is clear, was intended to give relaxation to the provisions of Section 19(1)(a), (b) and 29(b) of the Act to the investments not exceeding 51% of the aforesaid two categories, namely, (1) Industries in Annexure III to the statement of Industrial Policy, 1991 or (2) a trading company primarily engaged in export and was registered as an export/trading/star trading house with the Ministry of Commerce, Government of India. Companies which do not fulfill the conditions of the Notification dated 13.01.1998 and 20.01.1998 and all other companies which do not fulfill the conditions mentioned in those Notifications are required to obtain prior permission from FIBP for foreign equity investment.

56. We cannot read the notifications dated 13.01.1998 and 20.01.1998 in isolation, but have to be read along with Section 19(1)(a),(d), Section 29(1)(b), the Industrial Policy of July 1991 especially para 39B(iv), Press Notes dated 20.08.1991, 13.12.1991, 31.12.1991 with specific reference to the trading companies primarily engaged in export activities whether new or existing. We have extensively dealt with the same in the earlier part of this judgment and hence not repeated. Para 39B(iv) of the Policy read with paras 5 and 6 of the Press Note dated 31.12.1991 which indicate that a newly setup trading company primarily engaged in the export will have to file application in prescribed form for approval of foreign equity upto

51% equity.

57. Newly set-up trading company primarily engaged in export has therefore also to satisfy the conditions laid down in clause (b) of paragraph 1 of the Notification dated 13.01.1998 and the contention that a trading company is primarily engaged in export be determined only when it remits dividend cannot be accepted. The expression "further" used in the second proviso makes it more explicit. "Further" as means "additional" meaning thereby a newly set up trading company is not a third category as such but it goes along with second category i.e. "a trading company primarily engaged in export". To get the benefit of the general permission in the automatic route a trading company should be primarily engaged in export, even if it is a newly set up company. A newly set up company also could demonstrate the same by specifying the same in Form FC[RBI] that it is a trading company, whether new or old, and is at least intended to be engaged primarily in export. A reference to the Form FC (RBI) duly submitted by the 2nd respondent is useful.

58. FC[RBI] form specifically directs the applicants to "carefully tick" the "appropriate" box. In the box dealing with the application for approval for foreign investment not to exceed 51% for "service sector in Annexure III", the company has put a tick mark which would indicate that it sought to avail of the automatic route for service sector only as indicated in Annexure III. Noticeably no tick mark was put in the next box referring to "not exceeding 51% of the trading companies engaged in exports. Para VII deals with the "existing activities" which the 2nd respondent indicated as "not applicable" and no supplementary sheet was also attached explaining as to whether it was a newly set up trading company proposing to engage in export activities. Para VIII referring to Item Code ITC (HS) the company has indicated "893", which as per the Code deals with "Business and Management Consultancy Activities". The company stated in the application as "Business Management Consultancy for Trading, Marketing and Selling

of Goods and Services". Even there also, there is no indication whatsoever that the company was set up for trading, but only indicated "consultancy for trading". Further Para IX (iii) called for the description of the products for export trading wherein the company has stated as "not applicable". Resultantly, it is clear that the purpose for which the company had sought for foreign collaboration was not for trading in gold coins either for export or domestic purpose, but for the activities mentioned in the NIC Code 893.

59. We are of the view that the company cannot go back from the information already furnished by it in the application, form which are declared as 'true and correct'. Based on that application RBI vide its communication dated 29.6.1998 granted registration No.FC98NDR1005. Registration, in our view, pertains only to NIC code '893'. No permission was obtained by the second respondent company from the RBI for 51% foreign equity induction, for trading, by way of export. RBI, on the other hand, granted general permission only for dealing with the activities mentioned in NIC Code 893 and not for any trading activities leading to import or export.

60. The High Court, in our view, has committed an error in holding that no questions of law arose for its consideration under Section 54 of FERA and has completely misread and misinterpreted the Industrial Policy, Press Notes and Section 19(1)(a) and (b), Section 29(1)(a) and (b) etc. and issues raised in appeals, which are clearly questions of law which fell within the ambit of Section 56 of FERA and the High Court committed a serious error in rejecting the same holding no questions of law arose for its consideration.

ABN Amro Bank NV (Royal Bank of Scotland NV)

61. We will now examine whether the above Bank has contravened Section 6(5) of FERA and misused the permission granted to it by RBI for importing gold coins. Proceedings were initiated against the company and others as per directions given by RBI dated 8.6.1999 and it was noticed that the bank had

also sold gold coins to the company without being reasonably satisfied about the nature of the business of the company. The adjudicating authority took the view that the Bank as an authorized dealer, should have ascertained whether the company had got necessary permission from the RBI in dealing with the gold coins. The Bank, it is seen, had imported the gold on its own behalf and sold the same to the company and if the Bank was acting as an agent of the company, it would not have sold the gold to the company, but would have charged the commission for acting as an agent. No materials have been placed before us to show that the Bank was acting as an agent of the company. On facts, the Tribunal as well as the High Court took the view that the Bank had not misused the permission granted by the RBI for importing gold coins. We do not find any reason to interfere with those finding of facts.

62. In such circumstances, we find no error in the view taken by the Tribunal as well as the High Court that the proceedings initiated against the Bank that it had violated Sections 6(4) and (5) of FERA was illegal. The appeal filed by the Union of India, so far as the Bank is concerned, stands dismissed.

63. We notice trading in gold is not an activity covered under Notification dated 13.01.1998 and 20.01.1998; perhaps for that reason, fourth respondent also took some steps to establish its 100% subsidiary in India and an application to that effect was filed on 24.08.1998 to FIPB by the company but it was not pursued further, but sought to achieve the same as if RBI had granted automatic permission which cannot be sustained in the eye of law.

64. The appeals are accordingly allowed as above and the order of the tribunal, affirmed by the High Court, is set aside and the Adjudicating Authority is free to proceed in accordance with law.

Kalpana K. Tripathy Appeals allowed.