THE ASSISTANT COMMISSIONER OF INCOME TAX, CHENNAI

v.

M/S A.R. ENTERPRISES

(Civil Appeal No. 2688 of 2006)

JANUARY 14, 2013

[D.K. JAIN, H.L. DATTU AND JAGDISH SINGH KHEHAR, JJ.]

INCOME TAX ACT, 1961

Chapter XIV-B – Scope of – Explained – ss. 158 BB, 158 BC and 158 BD read with ss. 132 and 139 –Detection of undisclosed income of assessee during search of another concern – Plea of assessee that since it had paid Advance Tax, its income could not be said to be undisclosed – Held: Payment of Advance Tax, which is based upon estimated income, cannot tantamount to the disclosure of the total income, which must be declared in the return – Disclosure of total income by filing of return u/s 139 is mandatory even after payment of Advance Tax by an assessee – In view of the fact that the assessee had not filed its return of income by the due date, Assessing Officer was correct in assuming that the assessee would not have disclosed its total income.

s.158 – "Undisclosed income" – Held: Undisclosed income is defined by s. 158B as that income "which has not been or would not have been disclosed for the purposes of this Act" – The only way of disclosing income, on the part of an assessee, is through filing of a return, as stipulated in the Act and, therefore, an "undisclosed income" signifies income not stated in the return filed – Income to be deemed as undisclosed – Explained

s.158 – "Undisclosed income" and tax deducted at

source – Held: Since the tax to be deducted at source is also computed on estimated income of an assessee for relevant financial year, mere deduction of tax at source, also, does not amount to disclosure of income, nor does it indicate the intention to disclose income most definitely when the same is not disclosed in the returns filed for assessment year concerned.

The respondent-assessee, a firm which came into existence in June 1992, on discovery of some documents in a search operation carried out in premises of another concern on 23.2.1996, was found to have not filed return of its taxable income for the assessment year 1995-96. The assessing officer initiated action u/s 158 BD of the Income Tax Act, 1961, and rejected the plea of the assessee that since in relation to assessment year 1995-96 it had already paid Advance Tax in three instalments, income for that period could not be deemed to be undisclosed. The assessing officer proceeded to compute total undisclosed income for the block period 1993-94 to 1995-96 (upto the date of search) treating the income returned by the assessee for the period 1995-96 as nil in terms of s.158 BB(1)(c) of the Act. The Tribunal and the High Court held that the payment of Advance Tax itself implied disclosure of income on which Advance Tax was paid.

In the instant appeals filed by Revenue, the question for consideration before the Court was: whether payment of Advance Tax by an assessee would by itself tantamount to disclosure of income for the relevant assessment year; and whether such income could be treated as undisclosed income for the purpose of application of Chapter XIVB of the Act?

Allowing the appeals, the Court

HELD: Scope of Chapter VIV-B and its provisions:

1.1. Chapter XIV-B of the Income Tax Act, 1961 consisting of ss.158B to 158BH was inserted by the Finance Act, 1995 with effect from 1.07.1995. The heading of Chapter XIV-B reads "Special Procedure for Assessment of Search Cases". It was introduced for the assessment of undisclosed income determined as a result of search carried out u/s 132 of the Act or requisitioning of documents or assets u/s 132A of the Act. The chapter is a self-contained code and gets attracted as a result of search proceedings initiated by the income tax authorities u/s 132 of the Act, notwithstanding any other provisions of the Act except to the extent provided for in the Chapter. In the instant case, resort to this Chapter was required to be made since on conduct of search at the premises of the other concern, documents of the respondent-assessee were recovered, that indicated non-disclosure of income by the latter. In such a scenario, s.158BD gets attracted. [para 11-12] [309-B-G]

1.2. A bare reading of s.158BD makes it clear that the condition precedent for invoking a block assessment is a search conducted u/s 132, or documents or assets requisitioned u/s 132-A. Moreover, s.158BD permits the application of the provisions of this Chapter only on the satisfaction of the assessing officer that the seized documents show undisclosed income of a person other than the person with respect to whom search was conducted or a requisition was made. It is trite law that such satisfaction must be recorded for the benefit of the assessee. [para 13] [310-B-D]

Manish Maheshwari Vs. Asstt. Commissioner of Income Tax & Anr. 2007 (3) SCR 61 = **2007 (3) SCC 794 – referred to.**

1.3. A valid search u/s 132 of the Act is a *sine qua non* for invoking block assessment proceedings under

Chapter XIV-B. Further according to s.158BD of the Act, the assessing officer must record his or her satisfaction that any undisclosed income belongs to any person, other than the person with respect to whom search was made u/s132 of the Act. [para 14] [311-B-C]

Assistant Commissioner of Income Tax Vs. Hotel Blue Moon **2010 (2) SCR 282 = 2010 (3) SCC 259 – relied on**

1.4. The contention that before initiating proceedings u/s 158BD of the Act, the assessing officer had not recorded his satisfaction that any undisclosed income belonged to the assessee or that the assessee did not have the intention to disclose their income, was never urged before the High Court and the Tribunal. [para 15] [311-D-F]

2.1. Sections 158BD and 158BC, along with the rest of Chapter XIV-B, find application only in the event of discovery of "undisclosed income" of an assessee. Undisclosed income is defined by s. 158B as that income "which has not been or would not have been disclosed for the purposes of this Act". The legislature has chosen to define "undisclosed income" in terms of income not disclosed, without providing any definition of "disclosure" of income in the first place. [para 18] [313-G-H; 314-A]

2.2. The only way of disclosing income, on the part of an assessee, is through filing of a return, as stipulated in the Act and, therefore, an "undisclosed income" signifies income not stated in the return filed. Keeping that in mind, it seems that the legislature has clearly carved out two scenarios for income to be deemed as undisclosed: (i) where the income has clearly not been disclosed and (ii) where the income *would* not have been disclosed. If a situation is covered by any one of the two, income would be undisclosed in the eyes of the Act and,

therefore, subject to the machinery provisions of Chapter XIVB. [para 18] [314-A-C]

2.3. The second category, *viz.* where income *would* not have been disclosed, contemplates the likelihood of disclosure; it is a presumption of the intention of the assessee since in concluding that an assessee would or would not have disclosed income, one is *ipso facto* making a statement with respect to whether or not the assessee possessed the intention to do the same. To gauge this, however, reliance must be placed on the surrounding facts and circumstances of the case. [para 18] [314-C-D]

2.4. Payment of Advance Tax may be a relevant factor in construing intention to disclose income or filing return as long as the assessee continues to have the opportunity to file return and disclose his income and has not past the due date of filing return. Therefore, there can be no generic rule as to the significance of payment of Advance Tax in construing intention of disclosure of income. The same depends on the facts of the case, and hinges on the positioning of the search operations qua the due date for filing returns. If the search is conducted after the expiry of the due date for filing return, payment of Advance Tax is irrelevant in construing the intention of the assessee to disclose income. Such a situation would find place within the first category carved out by s.158B of the Act i.e. where income has clearly not been disclosed. The possibility of the intention to disclose does not arise since the opportunity of disclosure has lapsed i.e. through filing of return of income by the due date. If, on the other hand, search is conducted prior to the due date for filing return, the opportunity to file return and disclose income still persists. In which case, payment of Advance Tax may be a material fact for construing whether an assessee intended to disclose. An assessee

is entitled to make the legitimate claim that even though the search or the documents recovered, show an income earned by him, he has paid Advance Tax for the relevant assessment year and has an opportunity to declare the total income, in the return of income, which he would file by the due date. Thus, the fulcrum of such a decision is the due date for filing of return of income vis-à-vis date of search. [para 19] [315-A-D; 314-F-H]

2.5. Payment of Advance Tax and filing of return are functions of completely different notions of income i.e. estimated income and total income respectively. The payment of Advance Tax is based on an *estimation* of the total income that is chargeable to tax and not on the *total income* itself. It is important to bear in mind that *total* income is distinct from the *estimated* income, upon the basis of which, Advance Tax is paid by an assessee. Advance Tax is based on estimated income and, therefore, it cannot result in the disclosure of the total income assessable and chargeable to tax. [para 20 and 26] [315-E-F; 317-H; 318-A]

Commissioner of Income Tax Vs. Smt. Premlata Jalani **[2003] 264 ITR 744 (Raj);** *Bill & Peggy Marketing India Pvt. Ltd. Vs. Assistant Commissioner of Income Tax* **191 (2012) DLT 249;** *Prime Securities Ltd. Vs. Assistant Commissioner of Income Tax* **[2011] 333 ITR 464 (Bom);** *Commissioner of Income Tax Vs. Nilgiri Tea Estate Ltd.* **[2009] 312 ITR 161 (Ker);** *Kwality Biscuits Ltd. Vs. Commissioner of Income Tax* **[2000) 243 ITR 519 (Kar);** *Commissioner of Income Tax Vs. Kwality Biscuits Ltd.* **[2006] 284 ITR 434 (SC); and** *Commissioner of Income Tax Vs. Upper India Steel Mfg. and Engg. Co. Ltd.* **[2005] 279 ITR 123 (P&H) – referred to**

2.6. In every case where the amount of tax payable on the total income earned during the financial year is one thousand five hundred rupees or more, then, an assessee would be liable to pay in the financial year itself,

Advance Tax on such income, also known as "current income." According to s. 210(1) of the Act, every person who is liable to pay Advance Tax u/s 208 (whether or not he has been previously assessed by way of regular assessment) shall, of his own accord, pay Advance Tax on his "current income", calculated in the manner laid down in s. 209. Payment of Advance Tax does not absolve an assessee from an obligation to file return disclosing total income for the relevant assessment year. The disclosure of total income by the filing of return u/s 139 of the Act is mandatory even after the payment of Advance Tax by an assessee. [para 30 and 33] [318-G-H; 319-A, G-H; 320-B-C]

Brij Lal & Ors. Vs. Commissioner of Income Tax, Jalandhar **2010 (11) SCR 1167 = 2011 (1) SCC 1 - referred to**

2.7. This Court is, therefore, of the view that since the Advance Tax payable by an assessee is an estimate of his "current income" for the relevant financial year, it is not the actual total income, to be disclosed in the return of income. The vital distinction being that the "current income" is an estimation or approximation, which may not be accurate or final; whereas the "total income" is the exact income disclosed in a valid return, assessable by the Revenue. The fact that the "current income" is an estimation implies that it is not final and is subject to further adjustments in the form of additions or reductions, as the case may be, and would have to be succeeded by the disclosure of final and total income in a valid return. It will be a misconstruction of the law to construe the undisclosed income for purposes of Chapter XIVB as an "estimate" of the total income, which is assessable and chargeable to tax. Therefore, it cannot be said that payment of Advance Tax based on "current income" involves the disclosure of "total income", as defined in s.

2(45) of the Act, which has to be stated in the return of income. The same is evidenced in the scheme of Chapter XIVB, in particular. [para 37] [323-B-F]

2.8. Thus, for the purposes of computation of undisclosed income under Chapter XIVB, an assessee can rebut the Assessing Officer's finding of undisclosed income by showing that such income was disclosed in the return of income filed by him before the commencement of search or the requisition. When s. 158BB(3) is read with s. 158B(b), which defines undisclosed income, one reaches the conclusion that for income to be considered as disclosed income, the same should have been disclosed in the return filed by the assessee before the search or requisition. On failure to file return of income by the due date u/s 139 of the Act, payment of Advance Tax *per se* cannot indicate the intention of an assessee to disclose his income.[para 39] [323-H; 324-A-C]

2.9. In the instant case, after the search was conducted on 23.2.2006, it was found that for the assessment year 1995-96, the respondent-assessee had not filed its return of income by the due date. It is only when block assessment proceedings were initiated by the assessing officer, that the assessee filed its return for the said assessment year on 11.7.1996 u/s 158BC of the Act, showing its total income. The assessee claimed, that since Advance Tax had been paid in three instalments, it could not have been said that the income had not been disclosed or that there was no intention to disclose income. [para 41] [324-F-H; 325-A]

2.10. The payment of Advance Tax, which is based upon estimated income, cannot tantamount to the disclosure of the total income, which must be declared in the return. [para 41] [325-A]

2.11. The fact that the assessee had not filed its return of income by the due date, the Assessing Officer was correct in assuming that the assessee would not have disclosed its total income. Therefore, the decision of the High Court cannot be sustained. [para 41] [325-B]

C.A. No. 2580/2010

2.12. Since the tax to be deducted at source is also computed on the estimated income of an assessee for the relevant financial year, mere deduction of tax at source, also, does not amount to disclosure of income, nor does it indicate the intention to disclose income most definitely when the same is not disclosed in the returns filed for the assessment year concerned. [para 44] [325-F; 326-A-B]

3. The impugned judgments are set aside. [para 45] [326-B]

B. Noorsingh Vs. Union of India & Ors. **(2001) 249 ITR 378 - cited**

Case Law Reference:

(2001) 249 ITR 378	**cited**	**para 7**
2007 (3) SCR 61	**referred to**	**para 13**
2010 (2) SCR 282	**relied on**	**para 14**
2010 (11) SCR 1167	**referred to**	**para 34**
[2003] 264 ITR 744 (Raj)	**referred to**	**para 35**
191 (2012) DLT 249	**referred to**	**para 35**
[2011] 333 ITR 464 (Bom)	**referred to**	**para 35**
[2009] 312 ITR 161 (Ker)	**referred to**	**para 35**
[2000) 243 ITR 519 (Kar)	**referred to**	**para 35**

[2006] 284 ITR 434 (SC)	**referred to**	**para 35**
[2005] 279 ITR 123 (P&H)	**approved**	**para 36**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2688 of 2006.

From the Judgment & Order dated 8.9.2004 of the High Court of Judicature at Madras in Tax Case (Appeal) No. 238 of 2000.

WITH

C.A. Nos. 3127, 3848 of 2006, 2580 of 2010, 270 & 271 of 2013.

Harish Chandra, Rahul Kaushik, Priya Hingorani, Yatinder Chaudhary, Utkarsh Malhotra, B.V. Balaram Das, Anil Katiyar for the Appellant.

V. Prabhakar, Revathy Raghavan, Jyoti Prashar, Nikhil Swami, Prabha Swami for the Respodent.

The Judgment of the Court was delivered by

D.K. JAIN, J. 1. Leave granted in all the Special Leave Petitions.

2. This batch of six appeals, arises from separate judgments of the High Court of Madras in the appeals preferred by the revenue under Section 260A of the Income Tax Act, 1961 (for short "the Act") rendered in Tax Case (Appeal) Nos.238 of 2000 on 8th September 2004; 1371, 1372, 1373 of 2005 on 2nd January 2006; 687 of 2007 on 18th June 2007; and 620 of 2009 on 21st July 2009. This judgment shall govern all these appeals since they entail a common substantial question of law, as is evident from the adjudication of the High Court. However, to appreciate the issue involved, Civil Appeal No.2688 of 2006 is treated as the lead case. At the outset we may note that despite service of notice, no appearance was entered for the respondent-assesses, except in C.A. No. 2688/2006 and C.A.

No. 2580/2010.

Facts

3. The respondent-assessee is a firm which came into existence on 25th June, 1992. On 23rd February, 1996, a search operation under Section 132 of the Act was carried out at the premises of another concern, *viz.* M/s A.R. Mercantile Private Limited. During the course of search, certain books and documents pertaining to the assessee i. e. M/s A.R. Enterprises, were seized. On scrutiny, the Assessing Officer found that though the assessee had taxable income for the assessment year 1995-96, no return of income had been filed (due to be filed on or before 31st October, 1995) till the date of search. Based on the material seized by virtue of the aforesaid search, the Assessing Officer was satisfied that the assessee had not disclosed their income pertaining to the assessment year 1995-96. Accordingly (without recording any reasons for his satisfaction), he initiated action under Section 158BD of the Act requiring the assessee to file their return of income. The assessee, after filing return for the block period (ten years preceding the previous year), which covered assessment years 1993-94 to 1995-96, pointed out that they had already filed returns for the assessment years 1993-94 and 1994-95. They objected to action initiated under Chapter XIVB of the Act on the ground that in relation to the assessment year 1995-96, Advance Tax had already been paid in three installments and, therefore, income for that period could not be deemed to be undisclosed.

4. Rejecting the plea of the assessee, the Assessing Officer formed the opinion that the assessee had failed to file the return as on the date of search, and the seized documents did show income, which had not been or would not have been declared. Accordingly, he proceeded to compute total undisclosed income for the block period 1993-94 to 1995-96 (upto the date of search), treating the income returned by the assessee for the period 1995-96 as NIL, as stipulated in

Section 158BB (1)(c) of the Act.

5. Against the said order, the assessee preferred an appeal before the Tribunal. Accepting the stand of the assessee, the Tribunal allowed the appeal, and held that having paid the Advance Tax, the assessee had disclosed his income for the relevant assessment year. The Tribunal observed thus:

> "Now coming to the facts of the present case, as stated supra, the assessee has not filed his return in time, but even after that date the assessee has filed his return voluntarily. Moreover not only that the assessee has also estimated his income for the year and paid advance tax thereon as detailed below:
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> | | | |
> |---|---|---|
> | 15.09.1994 | Bank of Baroda, T.Nagard. | Rs.1,60,000 |
> | 12.12.1994 | -do- | Rs.1,60,000 |
> | 16.03.1994 | -do- | Rs.1,60,000 |
> | | | Rs.4,80,000 |
>
> This would indicate that the assessee has made known to the income tax department his income for the year and also paid the income tax thereon well before the due dates and of course well before the date of search also. Even this fact of income was voluntarily disclosed by the assessee to the ADI (inv.)…"

Consequently, the Tribunal declared the said assessment, made under Section 158BD of the Act, as null and void.

6. Being dissatisfied, the Revenue preferred an appeal before the High Court of Madras under Section 260A of the Act, questioning the validity of the order of the Tribunal. Entertaining the appeal, the High Court formulated the following substantial question of law for adjudication:

"Whether the Appellate Tribunal is right in law in cancelling the assessment under Chapter XIV-B in light of the specific provision contained in Section 158BB(1) (c) of the Income Tax Act?"

7. Before the High Court, the stand of the Revenue was that since return for the assessment year 1995-96 had not been filed by the due date, by filing the return after the search, the assessee could not escape the consequences as stipulated in Chapter XIVB of the Act. It was contended that payment of Advance Tax by itself did not establish the intention to disclose the income. In support of the proposition, reliance was placed on the decision of the High Court of Madras in *B. Noorsingh Vs. Union of India & Ors.*[1]. In that judgment, the High Court had observed:

"…Counsel submitted that in cases (sic) whereas in the case of the present petitioner, the assessee had paid advance tax, such payment would clearly indicate his intention to disclose his income and it could not be said that such person would not have disclosed his income. The payment of advance tax by itself does not establish an intent to disclose the income. The disclosure is to be made by filing the return. Even in search cases where the time for filing the return under section 139(1) has not expired, income disclosed in the books of account is not treated as undisclosed income. All that is denied to the assessee in search cases is the opportunity to file a return after the period specified in section 139(1) and to claim that the income that he would have disclosed in a belated return is not to be regarded as undisclosed income. The reason for denying such opportunity in search cases is obvious. After having suffered a search, the assessee is not to be enabled to escape the consequences of his failure to disclose all his income by filing a return after the search

1. (2001) 249 ITR 378.

and after the expiry of the time prescribed under section 139(1) and by disclosing therein income which had remained undisclosed upto the date of the search."

8. Revenue's plea did not find favour with the High Court. *Inter-alia*, observing that payment of Advance Tax itself necessarily implies disclosure of the income on which the advance is paid, the High Court held as follows:

"Under clause (d) of sub-section(1) of section 158BB while assessing the aggregate of the total income, the income recorded in the books of account and other documents maintained in the normal course on or before the date of the search or requisition relating to such previous year shall be taken into consideration where the previous year has not ended or the date of filing the return of the income under sub-section (1) of section 139 has not expired. When the assessee is required to file the self-assessment for payment of the advance tax before the income-tax authorities the return of assessment would fall within the documents maintained in the normal course by the assessee and as such the income disclosed on payment of the advance tax would fall within clause (d) of sub-section (1) of section 158BB. In any case although there is a difference between the regular assessment and the block assessment, as we have already noticed, unless the provisions of the block assessment specifically bar the assessing authority from taking into consideration the income disclosed by the assessee on payment of the advance tax to be taken into consideration, the income disclosed by the assessee on payment of advance tax would be an income disclosed to the Revenue and cannot be treated as an income undisclosed for the relevant assessment year."

9. Aggrieved thereby, as aforesaid, the Revenue is before us in these appeals.

10. The short question for consideration is whether payment of Advance Tax by an assessee would by itself tantamount to disclosure of income for the relevant assessment year and whether such income can be treated as undisclosed income for the purpose of application of Chapter XIVB of the Act?

Scope of Chapter XIV-B and its Provisions

11. Sections 132 and 132A of the Act incorporate provision of search, seizure and requisition which were resorted to for the conduct of search at the premises of M/s A.R. Mercantile Pvt. Ltd. For the evaluation of the material seized during the operation or proceedings under Sections 132 or 132A of the Act, as the case may be, the provisions contained in Chapter XIV-B come into play. This chapter, consisting of sections 158B to 158BH was inserted by the Finance Act, 1995 with effect from 1.07.1995. The heading of Chapter XIV-B reads "Special Procedure for Assessment of Search Cases". It was introduced for the assessment of undisclosed income determined as a result of search carried out under Section 132 of the Act or requisitioning of documents or assets under Section 132A of the Act. The chapter is a self-contained code and gets attracted as a result of search proceedings initiated by the income tax authorities, under Section 132 of the Act, notwithstanding any other provisions of the Act except to the extent provided for in the chapter.

12. In the facts before us, resort to this chapter was required to be made since on conduct of search at the premises of M/s A.R. Mercantile Pvt. Ltd., documents of M/s A.R. Enterprises, i.e. the assessee were recovered, that indicated non-disclosure of income by the latter. In such a scenario, Section 158BD gets attracted, which reads as follows:

"**Undisclosed income of any other person.**

158BD. Where the Assessing Officer is satisfied that any undisclosed income belongs to any person, other than the person with respect to whom search was made under section 132 or whose books of account or other documents or any assets were requisitioned under section 132A, then, the books of account, other documents or assets seized or requisitioned shall be handed over to the Assessing Officer having jurisdiction over such other person and that Assessing Officer shall proceed [under section 158BC] against such other person and the provisions of this Chapter shall apply accordingly."

13. A bare reading of the afore-extracted provision makes it clear that the condition precedent for invoking a block assessment is a search conducted under Section 132, or documents or assets requisitioned under Section 132-A. Moreover, Section 158BD permits the application of the provisions of this chapter only on the satisfaction of the assessing officer that the seized documents show undisclosed income of a person other than the person with respect to whom search was conducted or a requisition was made. It is trite law that such satisfaction must be recorded for the benefit of the assessee. In *Manish Maheshwari Vs. Asstt. Commissioner of Income Tax & Anr.*[2], this Court summarized the prerequisites of Section 158BD of the Act as follows:

"11. …(*i*) satisfaction must be recorded by the assessing officer that any undisclosed income belongs to any person, other than the person with respect to whom search was made under Section 132 of the Act; (*ii*) the books of accounts or other documents or assets seized or requisitioned had been handed over to the assessing officer having jurisdiction over such other person; and (*iii*) the assessing officer has proceeded under Section 158-BC against such other person."

14. In *Assistant Commissioner of Income Tax Vs. Hotel Blue Moon*[3], one of us (H.L. Dattu, J.) while explaining the

2. (2007) 3 SCC 794.

3. (2010) 3 SCC 259 at page 264.

purport of Chapter XIVB of the Act, has observed that a search is the *sine qua non* for the block assessment; the special provisions are devised to operate in the distinct field of undisclosed income and are clearly in addition to the regular assessments covering the previous years falling in the block period, intended to provide a mode of assessment of undisclosed income, which has been detected as a result of search. Hence, from the aforementioned discussion it is clear that a valid search under Section 132 of the Act is a *sine qua non* for invoking block assessment proceedings under Chapter XIVB. Further according to Section 158BD of the Act the assessing officer must record his or her satisfaction that any undisclosed income belongs to any person, other than the person with respect to whom search was made under Section 132 of the Act.

15. It seems that these requisites were in fact not adhered to in the present case. During the course of hearing, learned counsel for the assessee did contend that the Revenue did not have jurisdiction to invoke Chapter XIVB of the Act, against the assessee. According to the learned counsel, before initiating proceedings under Section 158BD of the Act, the assessing officer had not recorded his satisfaction that any undisclosed income belonged to the assessee or that the assessee did not have the intention to disclose their income. Hence, the block assessment proceedings against the assessee should be quashed. However, we are unable to appreciate the submission of the learned counsel at this stage, since the same was never urged before the High Court and the Tribunal. Hence, we refrain from making any observations on a contention that had never been argued before the High Court and the Tribunal. We shall restrict our opinion strictly to the issue before us, *viz.* whether the payment of Advance Tax for the relevant assessment year is tantamount to disclosure of income for the purpose of application of Chapter XIVB of the Act.

16. The relevant provisions for assessment, computation

and procedure of block assessment, which would come into play on the application of Section 158BD, in their erstwhile form at the relevant time, read as follows: -

"**Assessment of undisclosed income as a result of search.**

158BA. (1) Notwithstanding anything contained in any other provisions of this Act, where after the 30th day of June, 1995 a search is initiated under section 132 or books of account, other documents or any assets are requisitioned under section 132A in the case of any person, then, the Assessing Officer shall proceed to assess the undisclosed income in accordance with the provisions of this Chapter.

Procedure for block assessment.

158BC. Where any search has been conducted under section 132 or books of account, other documents or assets are requisitioned under section 132A, in the case of any person, then,—

(*a*) the Assessing Officer shall—

(*i*) in respect of search initiated or books of account or other documents or any assets requisitioned after the 30th day of June, 1995, but before the 1st day of January, 1997, serve a notice to such person requiring him to furnish within such time not being less than fifteen days;

XXXXXX XXX

(*b*) the Assessing Officer shall proceed to determine the undisclosed income of the block period in the manner laid down in section 158BB and the provisions of section 142, sub-sections (2) and (3) of section 143 section 144 and section 145 shall,

so far as may be, apply;..."

[Emphasis supplied]

17. Section 158B of the Act, which encompasses the crux of the issue, reads as follows:

"**Definitions.**

158B. In this Chapter, unless the context otherwise requires, -\

(a) "block period" means the previous years relevant to ten assessment years preceding the previous year in which the search was conducted under section 132 or any requisition was made under section 132A, and includes, in the previous year in which such search was conducted or requisition made, the period up to the date of the commencement of such search or, as the case may be, the date of such requisition;

(b) "Undisclosed income" includes any money, bullion, jewellery or other valuable article or thing or any income based on any entry in the books of account or other documents or transactions, where such money, bullion, jewellery, valuable article, thing, entry in the books of account or other document or transaction represents wholly or partly income or property *which has not been or would not have been disclosed for the purposes of this Act*."

[Emphasis supplied]

18. The genesis of the issue before us lies within the folds of this section. Sections 158BD and 158BC, along with the rest of Chapter XIV-B, find application only in the event of discovery of "undisclosed income" of an assessee. Undisclosed income is defined by Section 158B as that income "which has not been or would not have been disclosed for the purposes of this Act". The legislature has chosen to define "undisclosed income" in

terms of income not disclosed, without providing any definition of "disclosure" of income in the first place. We are of the view that the only way of disclosing income, on the part of an assessee, is through filing of a return, as stipulated in the Act, and therefore an "undisclosed income" signifies income not stated in the return filed. Keeping that in mind, it seems that the legislature has clearly carved out two scenarios for income to be deemed as undisclosed: (i) where the income has clearly not been disclosed and (ii) where the income *would* not have been disclosed. If a situation is covered by any one of the two, income would be undisclosed in the eyes of the Act and hence subject to the machinery provisions of Chapter XIVB. The second category, *viz.* where income *would* not have been disclosed, contemplates the likelihood of disclosure; it is a presumption of the intention of the assessee since in concluding that an assessee would or would not have disclosed income, one is *ipso facto* making a statement with respect to whether or not the assessee possessed the intention to do the same. To gauge this, however, reliance must be placed on the surrounding facts and circumstances of the case.

19. One such fact, as the assessee claims, is the payment of Advance Tax. However, in our opinion, the degree of its material significance depends on the time at which the search is conducted in relation to the due date for filing return. Depending on which side of the due date the search is conducted, material significance of payment of Advance Taxes vacillates in construing the intention of the assessee. If the search is conducted after the expiry of the due date for filing return, payment of Advance Tax is irrelevant in construing the intention of the assessee to disclose income. Such a situation would find place within the first category carved out by Section 158B of the Act i.e. where income has clearly not been disclosed. The possibility of the intention to disclose does not arise since, as held earlier, the opportunity of disclosure has lapsed i.e. through filing of return of income by the due date. If, on the other hand, search is conducted prior to the due date

for filing return, the opportunity to disclose income or, in other words, to file return and disclose income still persists. In which case, payment of Advance Tax may be a material fact for construing whether an assessee intended to disclose. An assessee is entitled to make the legitimate claim that even though the search or the documents recovered, show an income earned by him, he has paid Advance Tax for the relevant assessment year and has an opportunity to declare the total income, in the return of income, which he would file by the due date. Hence, the fulcrum of such a decision is the due date for filing of return of income vis-à-vis date of search. Payment of Advance Tax may be a relevant factor in construing intention to disclose income or filing return as long as the assessee continues to have the opportunity to file return and disclose his income and not past the due date of filing return. Therefore, there can be no generic rule as to the significance of payment of Advance Tax in construing intention of disclosure of income. The same depends on the facts of the case, and hinges on the positioning of the search operations qua the due date for filing returns.

20. Thus, at the very outset, in our view, the question that whether payment of Advance Tax by an assessee *per se* is tantamount to disclosure of total income, for the relevant assessment year, must be answered in the negative. On further scrutiny, we find yet another reason to opine so. Payment of Advance Tax and filing of return are functions of completely different notions of income i.e. estimated income and total income respectively. The payment of Advance Tax is based on an ***estimation*** of the total income that is chargeable to tax and not on the ***total income*** itself.

21. Section 2(45) of Act defines "total income" as-

"total income" means the total amount of income referred to in section 5, computed in the manner laid down in this Act ;"

22. Section 5 of the Act lays down the "scope of total income" as-

"5. (1) Subject to the provisions of this Act, the total income of any previous year of a person who is a resident includes all income from whatever source derived which—

(*a*) is received or is deemed to be received in India in such year by or on behalf of such person ; or

(*b*) accrues or arises or is deemed to accrue or arise to him in India during such year ; or

(*c*) accrues or arises to him outside India during such year :…"

23. Section 158BB(1) of the Act provides the method of computation of undisclosed income for a block period. It is significant to note that the computation of the undisclosed income of the block period shall be the aggregate of the total income of the previous years falling within the block period, computed in accordance with the provisions of the Act. This amount is reduced by the aggregate of the total income, or as increased by the losses returned or determined earlier, in respect of such previous years in accordance with the provisions of this section.

24. Section 158BB(1) reads as follows-

"158BB. (1) The undisclosed income of the block period shall be the aggregate of the total income of the previous years falling within the block period computed, in accordance with the provisions of this Act, on the basis of evidence found as a result of search or requisition of books of account or other documents and such other materials or information as are available with the Assessing Officer and relatable to such evidence, as reduced by the aggregate of the total income, or as the case may be, as increased by the aggregate of the losses of such previous

years, determined,—

(a) XXX XXX XXX

(b) XXX XXX XXX

(c) *where the due date for filing a return of income has expired but no return of income has been filed, as nil*

25. Further, the explanation to Section 158BB(1) reads-

"Explanation: For the purposes of determination of undisclosed income,—

(a) the total income or loss of each previous year shall, for the purpose of aggregation, be taken as the total income or loss computed in accordance with the provisions of Chapter IV without giving effect to set off of brought forward losses under Chapter VI or unabsorbed depreciation under sub-section (2) of section 32;

(b) of a firm, or its partners, the method of computation of undisclosed income and its allocation to the partners shall be in accordance with the method adopted for determining the assessed income or returned income for each of the previous years falling within the block period;..."

26. Hence, the computation of "undisclosed income" for the purposes of Chapter XIVB has to be construed in terms of the "total income" received, accrued, arisen; or which is deemed to have been received, accrued or arisen in the previous year, and is computed according to the provisions of the Act. According to Section 139(1) of the Act, every person who is assessable under the Act, must file a return declaring his or her total income during the previous year on or before the due date, for assessment under Section 143 of the Act. Hence, the 'disclosure of income' is the disclosure of the total income in a valid return under Section 139, subject to assessment and chargeable to tax under the provisions of the Act. It is important

to bear in mind that ***total*** income is distinct from the ***estimated*** income, upon the basis of which, Advance Tax is paid by an assessee. Advance Tax is based on estimated income, and hence, it cannot result in the disclosure of the total income assessable and chargeable to tax.

27. Before we proceed further to elaborate upon this distinction, it would be useful to refer to the provisions relating to payment of Advance Tax under the Act. Chapter XVII of the Act, which deals with "Collection and Recovery of Tax", contains provisions for the payment of Advance Tax and tax deducted at source. Advance Tax is the tax payable on the *estimated* total income of the relevant financial year which is chargeable to tax in the assessment year but is payable in that very financial year.

28. Section 207 of the Act lays down the liability for payment of Advance Tax as:-

"**207.** Tax shall be payable in advance during any financial year, in accordance with the provisions of sections 208 to 219 (both inclusive), in respect of the total income of the assessee which would be chargeable to tax for the assessment year immediately following that financial year, such income being hereafter in this Chapter referred to as "current income."

29. Section 208 specifies the conditions of liability to pay Advance Tax as:-

"**208.** Advance tax shall be payable during a financial year in every case where the amount of such tax payable by the assessee during that year, as computed in accordance with the provisions of this Chapter, is one thousand five hundred rupees or more."

30. Thus, in every case where the amount of tax payable on the total income earned during the financial year is one thousand five hundred rupees or more, then, an assessee would be liable to pay in the financial year itself, Advance Tax on such

income, also known as "current income." It is in this context the following questions arise: (i) What is the nature of the "current income" upon which the Advance Tax is paid and is it the same as the total income? and (ii) Whether the payment of Advance Tax results in the disclosure of the actual total income?

31. Section 210(1) of the Act refers to the payment of Advance Tax by the assessee of his own accord:-

> **"210.** (1) Every person who is liable to pay advance tax under section 208 (whether or not he has been previously assessed by way of regular assessment) shall, of his own accord, pay, on or before each of the due dates specified in section 211, the appropriate percentage, specified in that section, of the advance tax on his current income, calculated in the manner laid down in section 209."

32. Section 209(1)(a) lays down the method of computation of Advance Tax to be paid by an assessee as follows:

> **"209.** [(1) The amount of advance tax payable by an assessee in the financial year shall, subject to the provisions of sub-sections (2) and (3), be computed as follows, namely :—
>
> (*a*) where the calculation is made by the assessee for the purposes of payment of advance tax under sub-section (1) or sub-section (2) or sub-section (5) or sub-section (6) of section 210, he shall first estimate his current income and income-tax thereon shall be calculated at the rates in force in the financial year.."

33. According to Section 210(1) of the Act, every person who is liable to pay Advance Tax under Section 208 (whether or not he has been previously assessed by way of regular assessment) shall, of his own accord, pay Advance Tax on his "current income", calculated in the manner laid down in section 209. Further according to Section 209(1)(a), the assessee shall

first estimate his "current income" and thereafter pay income tax calculated on this *estimated income* on the rates in force in the relevant financial year. It is significant to note that this income is an estimation that is made by the assessee and may not be the exact income, which may ultimately be declared in the return under Section 139 and assessed under Section 143 of the Act. Needless to emphasise that payment of Advance Tax does not absolve an assessee from an obligation to file return disclosing total income for the relevant assessment year. In short, the disclosure of total income by the filing of return under Section 139 of the Act is mandatory even after the payment of Advance Tax by an assessee, since the "current income" which forms the basis of the Advance Tax is a mere estimation and not the *final* total income for the relevant assessment year liable to be assessed.

34. In *Brij Lal & Ors. Vs. Commissioner of Income Tax, Jalandhar*[4], while explaining the scope of the provisions on Advance Tax, this Court expressed the view that the "current income" in respect of which the assessee pays Advance Tax is not the same as understood in Section 2(45). In this regard, the Court held**:**

> "**8.** Liability to pay advance tax arises under Section 207. The said section is based on the principle "pay as you earn". It requires tax to be paid during the financial year. It has to be in respect of the total income of the assessee which would be chargeable to tax under the Act. The said total income is not as understood in Section 2(45) but it is equated to "current income" for the purposes of Chapter XVII. After the amending Act of 1987, advance tax is to be paid on the current income which would be chargeable to tax for the assessment year immediately following the financial year. Section 210 casts the responsibility of payment of advance tax on the assessee without requiring the assessee to submit his estimate of advance tax

4. (2011) 1 SCC 1.

payable. Provision for payment of advance tax is a mode of quick collection of tax.

9. Thus, Section 207 defines liability to pay advance tax in respect of incomes referred to in Section 208. However, advance tax paid is adjustable towards the tax due. Advance tax is collected even before the income tax becomes due and payable. By its very nature, advance tax is pre-assessment collection of taxes either by deduction of tax at source or by payment of advance tax which has to be adjusted towards income tax levied on the total income. The above two methods of realisation even before any assessment is authorised by Section 4(2) are incorporated in Chapter XVII which deals with "collection and recovery".

15. Now, Chapter XVII deals with "collection and recovery". It covers tax deduction at source and advance payment of taxes (see Section 190). Part C Chapter XVII deals with advance payment of taxes. Section 207 refers to liability to pay advance tax whereas Section 209 deals with computation of advance tax. Section 215 refers to interest payable by the assessee. Section 210(1) inter alia provides that every person who is liable to pay interest (*sic* advance tax) under Section 208, shall of his own accord pay, on each of the due dates specified in Section 211, the appropriate percentage of advance tax on his current income calculated in the manner under Section 209."

35. A catena of decisions by various High Courts has reiterated that the Advance Tax payable under Chapter XVII is based on an estimate of the total income of the assessee for the relevant financial year, and is not the final "total income" which must be disclosed for assessment through the filing of a return under Section 139 of the Act in the following assessment year. An estimate always has an element of guesswork. There could be various reasons due to which an estimate may be faulty and inaccurate which is why, there is a provision for

payment of interest on deficient or excess payment of advance tax when there is variation between advance tax paid and actual liability to tax. [See: *Commissioner of Income Tax Vs. Smt. Premlata Jalani*[5]*, Bill & Peggy Marketing India Pvt. Ltd. Vs. Assistant Commissioner of Income Tax*[6]**,** *Prime Securities Ltd. Vs. Assistant Commissioner of Income Tax*[7], *Commissioner of Income Tax Vs. Nilgiri Tea Estate Ltd.*[8]*, Kwality Biscuits Ltd. Vs. Commissioner of Income Tax*[9] which was subsequently affirmed in *Commissioner of Income Tax Vs. Kwality Biscuits Ltd.*[10]].

36. The Punjab and Haryana High Court in *Commissioner of Income Tax Vs. Upper India Steel Mfg. and Engg. Co. Ltd.*[11] made the following important observations:

> "24. We fully concur with the view expressed in the aforesaid judgments. The Madras High Court has correctly pointed out that for the purpose of payment of advance tax, all assessees including companies, are required to make an estimate of their current income. Even before the introduction of the provisions of Section 115J of the Act, companies had been estimating their total income after providing deductions admissible under the Act. In fact, all assessees who maintain books of account have to undertake this exercise for the purpose of payment of advance tax. If a profit and loss account can be drawn up on estimate basis for the purpose of Income-tax Act, it is not understood as to why a similar profit and loss account on estimate basis under the Companies Act cannot be

5. [2003] 264 ITR 744 (Raj).
6. 191 (2012) DLT 249.
7. [2011] 333 ITR 464 (Bom).
8. [2009] 312 ITR 161 (Ker).
9. [2000] 243 ITR 519 (Kar).
10. [2006] 284 ITR 434 (SC).
11. [2005] 279 ITR 123 (P&H).

drawn up. If the explanation of the companies that the profits under Section 115J of the Act can only be determined after the close of the year were to be accepted, then no assessee who maintains regular books of account would be liable to pay advance tax as in those cases also, income can only be determined after the close of the books of account at the end of the year."

37. We are, therefore, of the view that since the Advance Tax payable by an assessee is an estimate of his "current income" for the relevant financial year, it is not the actual total income, to be disclosed in the return of income. To repeat, the vital distinction being that the "current income" is an estimation or approximation, which may not be accurate or final; whereas the "total income" is the exact income disclosed in a valid return, assessable by the Revenue. The fact that the "current income" is an estimation implies that it is not final and is subject to further adjustments in the form of additions or reductions, as the case may be, and would have to be succeeded by the disclosure of final and total income in a valid return. It will be a misconstruction of the law to construe the undisclosed income for purposes of Chapter XIVB as an "estimate" of the total income, which is assessable and chargeable to tax. Therefore, we are unable to accept that payment of Advance Tax based on "current income" involves the disclosure of "total income", as defined in Section 2(45) of the Act, which has to be stated in the return of income. The same is evidenced in the scheme of Chapter XIVB, in particular.

38. Section 158BB(3) of the Act states-

(3) The burden of proving to the satisfaction of the Assessing Officer that any undisclosed income had already been disclosed in any return of income filed by the assessee before the commencement of search or of the requisition, as the case may be, shall be on the assessee.

39. Thus, for the purposes of computation of undisclosed

income under Chapter XIVB, an assessee can rebut the Assessing Officer's finding of undisclosed income by showing that such income was disclosed in the return of income filed by him before the commencement of search or the requisition. In other words, when Section 158BB(3) is read with Section 158B(b), which defines undisclosed income, we reach the conclusion that for income to be considered as disclosed income, the same should have been disclosed in the return filed by the assessee before the search or requisition. In our opinion, on failure to file return of income by the due date under Section 139 of the Act, payment of Advance Tax *per se* cannot indicate the intention of an assessee to disclose his income.

40. If we were to hold that the payment of Advance Tax reflects the intention of the assessee to disclose its income, it could result in a situation where the mandatory obligation of filing a return for disclosure of income under the provisions of the Act, would not be necessary. It will be open to an assessee to contend that payment of Advance Tax is tantamount to disclosure of income. Such a proposition would be contrary to the very purpose of filing of return, which ultimately leads to assessment of total income for the relevant assessment year. Any anomaly in the return entails serious consequences, which may not otherwise be attracted on estimation of income for the purpose of payment of Advance Tax. It would thus, be difficult to accept the plea that payment of Advance Tax is tantamount to the disclosure of income or that it indicates the intention of the assessee to disclose income.

41. In the instant case, after the search was conducted on 23rd February 2006, it was found that for the assessment year 1995-96, the respondent-assessee had not filed its return of income by the due date. It is only when block assessment proceedings were initiated by the assessing officer, that the assessee filed its return for the said assessment year on 11th July, 1996 under Section 158BC of the Act, showing its total income as Rs.7,02,768/-. The assessee claimed, that since Advance Tax had been paid in three installments, it could not

have been said that the income had not been disclosed or that there was no intention to disclose income. We have already held that the payment of Advance Tax, which is based upon estimated income, cannot tantamount to the disclosure of the total income, which must be declared in the return. In our opinion, the fact that the assessee had not filed its return of income by the due date, the Assessing Officer was correct in assuming that the assessee would not have disclosed its total income. For all these reasons, the decision of the High Court cannot be sustained.

42. Lastly, since C.A. No. 2580/2010 refers to a slightly different issue, we deem it fit to record our observations with respect to the same. In this appeal, the issue is whether tax deducted at source (and not payment of Advance Tax) amounts to the disclosure of income.

43. Section 190 of the Act states-

190 (1) Notwithstanding that the regular assessment in respect of any income is to be made in a later assessment year, the tax on such income shall be payable by deduction[12] [or collection] at source or by advance payment[13] [or by payment under sub-section (1A) of section 192], as the case may be, in accordance with the provisions of this Chapter.

(2) Nothing in this section shall prejudice the charge of tax on such income under the provisions of sub-section (1) of section 4.

44. Since the tax to be deducted at source is also computed on the estimated income of an assessee for the relevant financial year, such deduction cannot result in the disclosure of the total income for the relevant assessment year.

12. Inserted by the Direct Tax Laws (Amendment) Act, 1989, w.r.e.f. 1-6-1988.

13. Inserted by the Finance Act, 2002, w.e.f. 1-6-2002.

Subject to the monetary limit of the total income, every person is obligated to file his return of income even after tax is deducted at source. Hence, for the reasons stated in the preceding paragraphs, we are of the opinion that mere deduction of tax at source, also, does not amount to disclosure of income, nor does it indicate the intention to disclose income most definitely when the same is not disclosed in the returns filed for the concerned assessment year.

45. Consequently, we allow the appeals; set aside the impugned judgments and answer the question formulated by the High Court, extracted in para 6 (supra), in favour of the Revenue. The Revenue shall be entitled to costs, quantified at Rs.50,000/- in each set of appeals.

R.P. Appeals allowed

STATE OF RAJASTHAN
v.
SHOBHA RAM
(Criminal Appeal No. 592 of 2008 etc.)

JANUARY 16, 2013.

[H.L. DATTU AND RANJAN GOGOI, JJ.]

PENAL CODE, 1860:

s. 302 read with s. 34 – Murder caused by two brothers – Conviction by trial court of both the accused – High Court affirming conviction of appellant and acquitting his brother – Held: Evidence discloses that both accused brothers had an old enmity with deceased over a well – On date of incident deceased was attacked by both accused inasmuch as appellant assaulted the deceased by stones while his brother facilitated execution of common design by sitting on his chest – Judgment of High Court acquitting one of the accused set aside and that of trial court convicting both restored.

s. 34 – Common intention – Explained.

The appellant (A-1) in Crl. A. No. 593 of 2008, along with his brother (A-2) faced trial for an offence punishable u/s 302/34 IPC on the allegation that because of enmity pursuant to a dispute over a well, the accused caused injuries to the brother of PW 1 with stones resulting in his death. The trial court convicted both the accused of the offence charged and sentenced each of them to imprisonment for life. The High Court affirmed the conviction of A-1, but acquitted A-2.

In the instant appeals, State challenged the acquittal of A-2, whereas A-1 challenged his conviction.

Disposing of the appeals, the Court

HELD: 1.1. PW-6, in his evidence has stated that A-1 was assaulting the deceased with stones and A-2 facilitated execution of the common design by sitting on the chest of the deceased. Despite cross-examination at length, PW-6, has maintained his version, thereby, not leaving any scope for the defense to elicit anything against the prosecution witness. Therefore, the evidence of the said witness is of sterling quality and is reliable and trustworthy, leaving this Court with no other alternative but to accept his evidence. Therefore, this Court declines to interfere with the finding and conclusion reached by the trial court and affirmed by the High Court insofar as conviction of A-1 is concerned. [para 8] [331-G-H; 332-A-C]

1.2. A perusal of s.34, IPC would clearly indicate that there must be two ingredients for convicting a person with the aid of s. 34 IPC. Firstly, there must be a common intention; and secondly, there must be participation by the accused persons in furtherance of the common intention. The facts in the instant case in the light of the evidences on record are that A-1 and A-2 are brothers having an old enmity with the deceased resulting in a constant skirmish over the well located in their lands. On the date of incident, the animosity culminated to an assault on the deceased by the accused persons when A-1 was assaulting the deceased with stones and A-2 remained sitting on his chest. The chain of events gives a clear picture of the whole incident that had taken place on that fateful day. Thus, it can be concluded that both the accused persons had a common intention to assault and kill the deceased pursuant to a pre-concerted plan. [para 11 and 13] [334-F-H; 335-A-B]

Nadodi Jayaraman and Others vs. State of Tamil Nadu **(1992) 3 SCC 161;** *Saravanan and Another vs. State of Pondicherry* **2004 (5) Suppl. SCR 890 = (2004) 13 SCC 238;**

Suresh & Anr. vs. State of U.P. **2001(2) SCR 263 = (2001) 3 SCC 673;** *Ramaswami Ayyangar and Others vs. State of Tamil Nadu* **1976 Suppl. SCR 580 = (1976) 3 SCC 779; and** *Hari Ram vs. State of U.P.* **(2004) 8 SCC 146 – relied on**

1.4. The judgment and order of conviction and sentence against the accused persons passed by the trial court u/s 302 read with s.34, IPC is confirmed and the judgment and order passed by the High Court in acquitting accused A-2 is set aside. [para 14] [335-D-E]

Case Law Reference:

(1992) 3 SCC 161	**relied on**	**para 10**
2004(5) Suppl. SCR 890	**relied on**	**para 10**
2001 (2) SCR 263	**relied on**	**para 11**
1976 (0) Suppl. SCR 580	**relied on**	**para 11**
(2004) 8 SCC 146	**relied on**	**para 12**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 592 of 2008.

From the Judgment and Order dated 03.06.2005 of the High Court of Judicature for Rajasthan, Jaipur Bench, Jaipur in D.B. Criminal Appeal No. 130 of 2000.

WITH

Criminal Appeal No. 593 of 2008.

Sushil Kr. Dubey, Milind Kumar, Subhash Sharma and Mahabir Singh for the appearing parties.

The following Judgment of the Court was delivered by

1. These appeals are directed against the judgment and order passed by the High Court of Judicature for Rajasthan, Jaipur Bench, Jaipur in Criminal Appeal No. 130 of 2000, dated

03.06.2005. The High Court, while affirming the judgment of the Trial Court in Sessions Case No. 49/99, dated 15.03.2000, has convicted Shri Ram - A-1, under Section 302 read with Section 34 of the Indian Penal Code ("the IPC" for short) and reversed the judgment of the Trial Court and acquitted Shobha Ram - A-2. It is the acquittal of A-2, which is called in question by the appellant – State of Rajasthan in Criminal Appeal No. 592 of 2008.

2. Criminal Appeal No. 593 of 2008 is preferred by Shri Ram - A-1, being aggrieved by the order of conviction and sentence passed by the Trial Court and confirmed by the High Court.

3. The facts in brief are: The incident occurred on 16.02.1999 at about 5.30 p.m. PW-1 - Mohanlal, who is the brother of the deceased-Trilokchand had lodged the FIR before S.H.O., Police Station Chechat, regarding the alleged assault on the deceased by the accused persons. On the fateful day, the appellants on account of their past enmity over the well located in their lands, formed common intention to cause death of Trilokchand (since deceased) and in furtherance of their common intention, they caused injuries to the deceased with stones resulting in his death. The FIR was registered and after the completion of the investigation, the investigating agency had filed a charge-sheet against A-1 and A-2 under Section 302 read with Section 34 of the IPC. The accused persons denied the charge and pleaded false implication and, therefore, the Trial had commenced against both the accused A-1 and A-2.

4. During the Trial, the prosecution, in order to prove the guilt of the accused persons had examined several witnesses including PW-1 and PW-2 Smt. Manoharbai wife of the deceased, PW-3 Bhawanishankar, PW-4 Kalulal, PW-6 Basantilal and other witnesses. Prosecution had projected PW-2 and PW-6 as eye witnesses to the incident.

5. The Trial Court after appreciating the evidence of the eye witnesses and others, has come to the conclusion that the testimony of PW-2 does not corroborate with the FIR and other material available on record and, therefore, it could be safely concluded that PW-2 had not seen the occurrence of actual incident and therefore, the evidence at the most can only be an hearsay evidence. However, the Trial Court has believed the evidence of PW-6, who, in his evidence, has categorically stated that A-1 was assaulting the deceased with the stones and A-2 was sitting on the chest of the deceased. The Trial Court placing reliance on the evidence of PW-6 has convicted and sentenced the accused persons under Section 302 read with Section 34 of the IPC to suffer imprisonment for life and to pay a fine of Rs.1000/- each, and in default, to undergo simple imprisonment for a further period of six months.

6. Aggrieved by the order of conviction and sentence passed by the Trial Court, the accused persons had filed appeals before the High Court. The High Court has confirmed the conviction and sentence of A-1 passed by the Trial Court. However, the High Court has acquitted A-2, only on the ground that A-2 had not actively participated in the commission of the offence and, therefore, the Trial Court was not justified in convicting A-2 for an offence punishable under Section 302 read with Section 34 of the IPC.

7. It is the correctness or otherwise of the judgment and order passed by the High Court which is called in question by the appellants in this appeal.

8. We will first take up the appeal of A-1. The Trial Court and the High Court has convicted A-1 based on the evidence of the sole eye-witness, namely, PW-6. In order to satisfy ourselves, we have once again carefully analyzed the evidence on record and the conviction of A-1 by the Trial Court with the aid of the sole eye-witness of PW-6. In his evidence PW-6 has stated, A-2 was acting in concert with A-1 in causing the murder

of the deceased, wherein A-1 was assaulting the deceased with stones and A-2 had facilitated the execution of the common design by sitting on the chest of the deceased. Despite cross-examination at length, PW-6, has maintained his version, thereby, not leaving any scope for the defense to elicit anything against the prosecution witness. Therefore, in our opinion, the evidence of the said witness is of sterling quality and therefore reliable and trustworthy, leaving us with no other alternative but to accept his evidence. Therefore, we decline to interfere with the finding and conclusion reached by the Trial Court insofar as convicting A-1 is concerned. Therefore, we reject the appeal filed by A-1 and confirm the orders passed by the Trial Court and the High Court.

9. While considering the appeal filed by the State of Rajasthan, we have carefully perused the judgment and order passed by the High Court. The High Court has acquitted, A-2, only on the ground that merely sitting on the chest of the deceased rules out the possibility of active participation by A-2 in the commission of offence and therefore has acquitted him from the charges under Section 302 read with Section 34 of the IPC.

10. The nuances of Section 34 of the IPC has been explained by this Court in several decisions, but we will only refer to the decision in the case of *Nadodi Jayaraman and Others vs. State of Tamil Nadu* [(1992) 3 SCC 161] and *Saravanan and Another vs. State of Pondicherry* [(2004) 13 SCC 238]. In the case of *Nadodi Jayaraman and others* (Supra), the Court has observed:-

> " 9. Section 34 of IPC enacts that when a criminal act is done by several persons in furtherance of the common intention of all, each of such persons, is liable for that act in the same manner as if it were done by him alone. The section thus lays down a principle of joint liability in the doing of a criminal act. The essence of that liability is

found in the existence of "common intention" animating the accused leading to the doing of a criminal act in furtherance of such intention. The section is intended to meet a case in which it is difficult to distinguish between the act of individual members of a party and to prove exactly what part was played by each of them. It, therefore, enacts that once it is found that a criminal act has been committed by several persons in furtherance of the common intention of all, each of such persons is liable for the criminal act as if it were done by him alone. It is thus an exception to the general rule of criminal jurisprudence that it is the primary responsibility of the person who actually commits a crime and only that person can be held guilty and punished in accordance with law for his individual act.

15. It is thus clear that the criminal act referred to in Section 34 IPC is the result of the concerted action of more than one person if the said result was reached in furtherance of the common intention and each person must be held liable for the ultimate result as if he had done it himself. "

11. A perusal of Section 34 of the IPC would clearly indicate that there must be two ingredients for convicting a person with the aid of Section 34 of the IPC. Firstly, there must be a common intention and secondly, there must be participation by the accused persons in furtherance of the common intention. If the common intention is proved, it may not be necessary that the acts of the several persons charged with commission of an offence jointly must be the same or identically similar. The acts may be different in character, but must be arising out of the same common intention in order to attract the provision. The said principle is reiterated in a three-judge bench decision in *Suresh & Anr. vs. State of U.P.* [(2001) 3 SCC 673] and *Ramaswami Ayyangar and Others vs. State of Tamil Nadu* [(1976) 3 SCC 779], wherein the court has stated that the acts committed by different confederates in the criminal

action may be different, but all must in one way or the other participate and engage in the criminal enterprise, for instance, one may only stand guard to prevent any person coming to the relief of the victim or to otherwise facilitate the commission of crime. Such a person also commits an "act" as much as his co-participants actually committing the planned crime. In the case of an offence involving physical violence, the person who instigates or aids the commission of the crime must be physically present and such presence of those who in one way or the other facilitate the execution of the common design, is itself tantamount to actual participation in the 'criminal act.'

12. Insofar as common intention is concerned, it is a state of mind of an accused which can be inferred objectively from his conduct displayed in the course of commission of crime and also from prior and subsequent attendant circumstances. As observed in *Hari Ram vs. State of U.P.* [(2004) 8 SCC 146], the existence of direct proof of common intention is seldom available and, therefore, such intention can only be inferred from the circumstances appearing from the proved facts of the case and the proved circumstances. Therefore, in order to bring home the charge of common intention, the prosecution has to establish by evidence, whether direct or circumstantial, that there was plan or meeting of mind of all the accused persons to commit the offence before a person can be vicariously convicted for the act of the other.

13. The facts in the present case in the light of the evidences on record are that, A-1 and A-2 are brothers having an old enmity with the deceased resulting in a constant skirmish over the well located in their lands. On the said date of incident, the animosity culminated to an assault on the deceased by the accused persons when the deceased was nearing his land. It has come in the evidence of PW-6, that A-1 was assaulting the deceased with stones and A-2 was sitting on the chest of the deceased. The aforesaid chain of events gives a clear picture

of the whole incident that had taken place on that fateful day. The evidence of, PW-6, when seen in entirety and in its proper perspective, we can conclude that both the accused persons i.e. A-1 and A-2 had a common intention to assault and kill the deceased person with A-2 as a participant in the crime with the intention of lending weight to the commission of an offence pursuant to a pre-concerted plan. In our opinion, the High Court was not justified in coming to the conclusion that merely because A-2 was sitting on the chest of the deceased person, the said accused person is entitled for the benefit of doubt and thereby an acquittal. In our opinion, the reasoning and conclusion reached by the High Court is against the well settled legal principles.

14. In the result, while allowing the appeal of the appellant-State of Rajasthan (Criminal Appeal No.592 of 2008), we dismiss the appeal filed by Shri Ram – A-1 (Criminal Appeal No.593 of 2008) and confirm the judgment and order of conviction and sentence against the accused persons so passed by the Trial Court under Section 302 read with Section 34 of the IPC and set aside the judgment and order passed by the High Court in acquitting accused A-2. We further direct that the Accused A-2 Shobha Ram shall surrender forthwith to serve out the remaining period of sentence. The Trial Court is directed to send the compliance report to this Court within one month's time from the date of receipt of a copy of this judgment. Registry shall send back the lower court records with a copy of this judgment to the Trial Court forthwith for information and necessary action.

Ordered accordingly.

R.P. Appeals disposed of.

EXPORT CREDIT GUARANTEE CORPN. OF INDIA LTD.
v.
M/S. GARG SONS INTERNATIONAL
(Civil Appeal No.1557 of 2004)

JANUARY 17, 2013

[DR. B.S. CHAUHAN AND V. GOPALA GOWDA, JJ.]

Insurance – Contract of Insurance – Interpretation of – Held: While construing the terms of a contract of insurance, the words used therein must be given paramount importance, and it is not open for the Court to add, delete or substitute any words –Since upon issuance of an insurance policy, the insurer undertakes to indemnify the loss suffered by the insured on account of risks covered by the policy, its terms have to be strictly construed in order to determine the extent of the liability of the insurer – It is not permissible for the court to substitute the terms of the contract itself, under the garb of construing terms incorporated in the agreement of insurance – No exceptions can be made on the ground of equity.

Insurance – Policy terms – Non-compliance – Effect – Appellant, a government company, in the business of insuring exporters – Respondent purchased insurance policy for purpose of insuring shipment to a foreign buyer/importer – Foreign buyer committed default in making payments – Claims presented by respondent-insured rejected by appellant-insurer – Validity – Held: Respondent-insured failed to comply with the requirement under clause 8(b) of the insurance agreement, of informing the appellant-insurer about the non-payment of outstanding dues by the foreign importer within the stipulated time except in two cases – Liability of appellant-insurer exonerated to that extent – Thus, only two claims deserve to be allowed – Other claims dis-allowed.

Contract – Commercial contract – Inapplicability of the rule of contra proferentem – Held: Rule of contra proferentem does not apply in case of commercial contract, for the reason that a clause in a commercial contract is bilateral and has mutually been agreed upon.

The appellant is a government company, in the business of insuring exporters. Respondent purchased insurance policy for the purpose of insuring shipment to a foreign buyer/importer. The foreign buyer committed default in making payments towards such policy, with respect to the said consignment. Respondent- insured sought enhancement of credit limit with respect to the defaulting foreign importer and subsequently, presented 17 claims. The appellant-insurer rejected all the claims on the ground that the respondent-insured failed to communicate information pertaining to the default made by the foreign importer, to the appellant-insurer, within the stipulated period and thus, failed to ensure compliance with the mandatory requirement under Clause 8 (b) of the insurance agreement.

Respondent-insured thereafter filed several complaints before the State Disputes Redressal Commission, which directed the appellant-insurer to make various requisite payments due under different claims, with 9 per cent interest and litigation expenses etc. Aggrieved, the appellant-insurer preferred appeals under Section 19 of the Consumer Protection Act, 1986, before the National Consumer Disputes Redressal Commission, which rejected some of the claims made by the insured while accepting the other claims. Hence, both the parties preferred appeals before this Court.

Disposing of the appeals, the Court

HELD: 1.1. It is a settled legal proposition that while

construing the terms of a contract of insurance, the words used therein must be given paramount importance, and it is not open for the Court to add, delete or substitute any words. It is also well settled, that since upon issuance of an insurance policy, the insurer undertakes to indemnify the loss suffered by the insured on account of risks covered by the policy, its terms have to be strictly construed in order to determine the extent of the liability of the insurer. Therefore, the endeavour of the Court should always be to interpret the words used in the contract in the manner that will best express the intention of the parties. [Para 8] [344-C-E]

1.2. The insured cannot claim anything more than what is covered by the insurance policy. "…the terms of the contract have to be construed strictly, without altering the nature of the contract as the same may affect the interests of the parties adversely." The clauses of an insurance policy have to be read as they are… Consequently, the terms of the insurance policy, that fix the responsibility of the Insurance Company must also be read strictly. The contract must be read as a whole and every attempt should be made to harmonize the terms thereof, keeping in mind that the rule of *contra proferentem* does not apply in case of commercial contract, for the reason that a clause in a commercial contract is bilateral and has mutually been agreed upon. [Para 9] [344-F-H; 345-A]

1.3. It is not permissible for the court to substitute the terms of the contract itself, under the garb of construing terms incorporated in the agreement of insurance. No exceptions can be made on the ground of equity. The liberal attitude adopted by the court, by way of which it interferes in the terms of an insurance agreement, is not permitted. The same must certainly not be extended to the extent of substituting words that were never intended

to form a part of the agreement. [Para 11] [345-E-G]

M/s. Suraj Mal Ram Niwas Oil Mills (P) Ltd. v. United India Insurance Co. Ltd. **(2010) 10 SCC 567: 2010 (13) SCR 138;** *Oriental Insurance Co. Ltd. v. Sony Cheriyan* **AIR 1999 SC 3252: 1999 (1) Suppl. SCR 622;** *Polymat India P. Ltd. v. National Insurance Co. Ltd.* **AIR 2005 SC 286: 2004 (6) Suppl. SCR 535;** *M/s. Sumitomo Heavy Industries Ltd. v. Oil & Natural Gas Company* **AIR 2010 SC 3400: 2010 (9) SCR 176;** *Rashtriya Ispat Nigam Ltd. v. M/s. Dewan Chand Ram Saran* **AIR 2012 SC 2829: 2012 (5) SCC 306;** *Vikram Greentech (I) Ltd. & Anr. v. New India Assurance Co. Ltd.* **AIR 2009 SC 2493: 2009 (5) SCR 437 and** *Sikka Papers Limited v. National Insurance Company Ltd & Ors.* **AIR 2009 SC 2834: 2009 (7) SCC 777 – relied on.**

2.1. In the case at hand, the insurance policy dated 23.3.1995 makes it evident that the insured was required to make a declaration in the prescribed form (Form No. 205), on the 15th of every month as regards whether or not, there was any default committed by the foreign importer, either in part, or in full, for a period exceeding 30 days from the date on which the payment fell due, with respect to shipments made within the policy period. Non-compliance with the said term(s) of contract, will exonerate the insurer of all liability in this regard. [Paras 6, 7] [343-B; 344-A-B]

2.2. The requisite record/chart reveals the factual matrix and clearly establishes that the insured failed to comply with the requirement of clause 8(b) of the agreement informing the insurer about the non-payment of outstanding dues by the foreign importer within the stipulated time except in two cases. Thus, only two claims deserve to be allowed. The others are dis-allowed. [Paras 12, 13 & 14] [345-H; 346-G-H; 347-A]

Case Law Reference

2010 (13) SCR 138	**relied on**	**Para 8**
1999 (1) Suppl. SCR 622	**relied on**	**Para 9**
2004 (6) Suppl. SCR 535	**relied on**	**Para 9**
2010 (9) SCR 176	**relied on**	**Para 9**
2012 (5) SCC 306	**relied on**	**Para 9**
2009 (5) SCR 437	**relied on**	**Para 10**
2009 (7) SCC 777	**relied on**	**Para 10**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1557 of 2004.

From the Judgment & Order dated 18.02.2003 of the National Consumer Disputes Redressal Commission, New Delhi in First Appeal No. 246 of 2001.

WITH

C.A. Nos. 1553, 1548, 1555, 1556, 1549, 1552, 1551, 1558, 1550, 1559, 1543, 1542, 1546, 1544, 1545, 1547 of 2004.

Santosh Paul, Arvind Gupta, Ranjan Kumar, Ashu Gupta, Satinder S. Gulati, Kamaldeep Gulati, K.K. Mohan for the appearing parties.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. All the above-mentioned appeals have been preferred against the common impugned judgment and order dated 18.2.2003 passed by the National Consumer Disputes Redressal Commission, New Delhi, in Revision Petition Nos. 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 933 of 2002 and F.A. 238, 246 and 247 of 2001.

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

A. The appellant herein, Export Credit Guarantee Corporation of India Ltd., (hereinafter referred to as 'the insurer'), is a government company, which is in the business of insuring exporters. Respondent, M/s Garg Sons International, on 23.3.1995 purchased a policy for the purpose of insuring a shipment to foreign buyers i.e. M/s Natural Selection Co. Ltd. of UK, and the said buyer committed default in making payments towards such policy from 28.12.1995 onwards, with respect to the said consignment.

B. The insured, that is M/s Garg Sons International, sought enhancement of credit limit to the tune of Rs.50 lakhs with respect to the said defaulting foreign importer. Subsequently, he presented 17 claims.

C. The insurer rejected all the abovementioned claims on the ground that the insured did not ensure compliance with Clause 8 (b) of the insurance agreement, which stipulated the period within which the insurer is to be informed about any default committed by a foreign importer.

D. Thus, the insured then filed several complaints before the State Disputes Redressal Commission, to which the insurer filed replies. The State Disputes Redressal Commission adjudicated upon the case and disposed of the said complaint, vide order dated 4.6.2001, directing the insurer to make various requisite payments due under different claims, with 9 per cent interest and litigation expenses etc.

E. Being aggrieved against the orders passed in all 17 claims, the insurer preferred appeals under Section 19 of the Consumer Protection Act, 1986, before the National Consumer Disputes Redressal Commission, wherein the impugned judgment and order was disputed, stating that it was evident from the said judgment that 11 claims had been rejected and

that 5 claims made by the insured were accepted.

Hence, both the parties preferred these appeals.

3. Shri Santosh Paul, learned counsel appearing on behalf of the insurer, has submitted that the insured failed to communicate information pertaining to the default made by the foreign importer, to the insurer, within the stipulated period, which was fixed as 45 days from the date on which the payment became due, and thus, failed to ensure compliance with the mandatory requirement under Clause 8 (b), owing to which, the claims with respect to which the said information was not furnished within the time period stipulated in the agreement, have wrongly been allowed. Moreover, it is evident from the judgment that only 5 claims made by the insured were accepted, and that 11 claims were rejected, though in the said order, only 9 claims were found to be rejected and 4 were shown as accepted. As the only numbers of 4 revisions have been mentioned, stating that only these were worth acceptance, and those of 9 revisions have been mentioned, as those that were rejected, which was all stated to show that there were typographical errors in the judgment itself.

In addition thereto, there were also certain appeals and thus, the order was required to be modified to the extent that only two claims which were made in respect of Civil Appeal Nos. 1547 of 2004 and 1557 of 2004, wherein all statutory requirements were complied with deserve to be allowed, while the others, owing to default on the part of the insured, are liable to be rejected.

4. On the other hand, Shri Satinder Singh Gulati, learned counsel appearing on behalf of the insured, has submitted that admittedly, there is in fact a typographical error in the impugned judgment and order, and has stated that the claims of the insured, with respect to which there has been no default on the part of insured, i.e., some claims have wrongly been rejected.

Therefore, the appeals filed by him i.e. Civil Appeal Nos. 1559, 1544, 1545, 1543 and 1546 of 2004 should be allowed and the other appeals, should be rejected accordingly.

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

6. Relevant clauses of the insurance policy dated 23.3.1995, read as under:

"8. Declarations:

(a) **Declaration of shipments** :- …….

(b) **Declaration of overdue payments**: The insured shall also deliver to the Corporation, on or before the 15th of every month, declaration in the term prescribed by the Corporation, of all payments which remained wholly or partly unpaid for more than 30 days from the due date of payment in respect of shipments made within the policy period and such declaration shall continue to be rendered to the Corporation even after the expiry of the policy period so long as any such payment remains overdue.

xx xx xx

19. **Exclusion of Liability**: Notwithstanding anything to the contrary contained in this policy, unless otherwise agreed to by the Corporation in writing, the Corporation shall cease to have any liability in respect of the gross invoice value of any shipment or part thereof, if:

(a) the insured has failed to declare, without any omission, all the shipments required to be declared in terms of clause 8(a) of the policy and to pay premium in terms of clause 10 of the policy;

(b) the insured has failed to submit declaration of overdue payments as required by clause 8(b) of the policy; or

(c) ……."

7. If both the conditions referred to hereinabove are read together, it becomes evident that the insured must make a declaration in the prescribed form (Form No. 205), on the 15th of every month as regards whether or not, there has been any default committed by the foreign importer, either in part, or in full, for a period exceeding 30 days from the date on which the payment fell due, with respect to shipments made within the policy period. Non-compliance with the said term(s) of contract, will exonerate the insurer of all liability in this regard.

8. It is a settled legal proposition that while construing the terms of a contract of insurance, the words used therein must be given paramount importance, and it is not open for the Court to add, delete or substitute any words. It is also well settled, that since upon issuance of an insurance policy, the insurer undertakes to indemnify the loss suffered by the insured on account of risks covered by the policy, its terms have to be strictly construed in order to determine the extent of the liability of the insurer. Therefore, the endeavour of the Court should always be to interpret the words used in the contract in the manner that will best express the intention of the parties. (Vide: *M/s. Suraj Mal Ram Niwas Oil Mills (P) Ltd. v. United India Insurance Co. Ltd.,* (2010) 10 SCC 567).

9. The insured cannot claim anything more than what is covered by the insurance policy. "…the terms of the contract have to be construed strictly, without altering the nature of the contract as the same may affect the interests of the parties adversely." The clauses of an insurance policy have to be read as they are…Consequently, the terms of the insurance policy, that fix the responsibility of the Insurance Company must also be read strictly. The contract must be read as a whole and every attempt should be made to harmonize the terms thereof, keeping in mind that the rule of *contra proferentem* does not apply in case of commercial contract, for the reason that a

clause in a commercial contract is bilateral and has mutually been agreed upon.

(Vide : *Oriental Insurance Co. Ltd. v. Sony Cheriyan* AIR 1999 SC 3252; *Polymat India P. Ltd. v. National Insurance Co. Ltd.,* AIR 2005 SC 286; *M/s. Sumitomo Heavy Industries Ltd. v. Oil & Natural Gas Company,* AIR 2010 SC 3400; and *Rashtriya Ispat Nigam Ltd. v. M/s. Dewan Chand Ram Saran* AIR 2012 SC 2829).

10. In *Vikram Greentech (I) Ltd. & Anr. v. New India Assurance Co. Ltd.* AIR 2009 SC 2493, it was held :

> *"An insurance contract, is a species of commercial transactions and must be construed like any other contract to its own terms and by itself.... The endeavour of the court must always be to interpret the words in which the contract is expressed by the parties. The court while construing the terms of policy is not expected to venture into extra liberalism that may result in re-writing the contract or substituting the terms which were not intended by the parties."*

(See also : *Sikka Papers Limited v. National Insurance Company Ltd & Ors.* AIR 2009 SC 2834).

11. Thus, it is not permissible for the court to substitute the terms of the contract itself, under the garb of construing terms incorporated in the agreement of insurance. No exceptions can be made on the ground of equity. The liberal attitude adopted by the court, by way of which it interferes in the terms of an insurance agreement, is not permitted. The same must certainly not be extended to the extent of substituting words that were never intended to form a part of the agreement.

12. The instant case is required to be considered in light of the aforesaid settled legal propositions. The requisite record reveals the factual matrix as under:

CA No.	Invoice No.	Invoice date	Date of shipment	Due date of payment	Period for payment	Date for submission of Form-205 8(b) compliance	Delay in filing 8(b) compliance (i.e. form 205)	Amount
1555/04	160/95	3.11.95	13.11.95	28.12.95	45 days	17.7.96	More than 5 months	8777/-
1548/04	163/95	8.11.95	20.11.95	5.1.96	45 days	17.7.96	More than 5 months	116424/-
1552/04	165/95	13.11.95	19.11.95	4.1.96	45 days	17.7.96	More than 5 months	96474/-
1549/04	166/95	13.11.95	19.11.95	4.1.96	45 days	17.7.96	More than 5 months	67194/-
1551/04	177/96	2.1.96	3.2.96	18.3.96	45 days	17.7.96	More than 2 months	52629/-
1558/04	182/96	16.1.96	3.2.96	18.3.96	45 days	17.7.96	More than 2 months	249377/-
1553/04	184/96	29.1.96	15.2.96	31.3.96	45 days	17.7.96	More than 2 months	414354/-
1559/04	186/96	7.2.96	6.3.96	6.5.96	60 days	17.7.96	More than 1 month	239656/-
1550/04	191/96	22.2.96	24.2.96	24.4.96	60 days	17.7.96	More than 1 month	242055/-
1544/04	192/96	22.2.96	6.3.96	6.5.96	60 days	17.7.96	More than 1 month	343777/-
1545/04	193/96	26.2.96	28.2.96	30.4.96	60 days	17.7.96	More than 1 month	267229/-
1543/04	195/96	13.3.96	25.3.96	25.5.96	60 days	17.7.96	2 days	306159/
1556/04	196/96	22.3.96	25.3.96	25.5.96	60 days	17.7.96	2 days	264400/
1547/04	200/96	19.4.96	6.5.96	6.7.96	60 days	17.7.96		314961/-
1546/04	162/95	8.11.95	20.11.95	5.1.96	45 days	17.7.96	More than 5 months	528257/-
1557/04	201/96	19.4.96	6.5.96	6.7.96	60 days	17.7.96		1362688/-
1542/04	164/95	11.11.95	19.11.95	4.1.95	45 days	17.7.96	More than 5 months	579766/-

13. The aforesaid chart clearly establishes that the insured failed to comply with the requirement of clause 8(b) of the agreement informing the insurer about the non-payment of outstanding dues by the foreign importer within the stipulated

time except in two cases.

14. Thus, we are of the view that only two claims which are subject-matters in Civil Appeal Nos. 1547 and 1557 of 2004 deserve to be allowed. The others are dis-allowed.

With these observations, all 17 appeals stand disposed of.

B.B.B. Appeals disposed of.

SPEAKER, ORISSA LEGISLATIVE ASSEMBLY

v.

UTKAL KESHARI PARIDA

(Civil Appeal No. 469 of 2013)

JANUARY 17, 2013

[ALTAMAS KABIR, CJI, J. CHELAMESWAR AND VIKRAMAJIT SEN, JJ.]

Orissa Legislative Assembly (Disqualification on Ground of Defection) Rules, 1987:

rr. 6(1) and (2) – Petition for disqualification of Members of Legislative Assembly on ground of defection, filed by a person, who was President of State Unit of political party but was not a Member of Legislative Assembly – Held: Is maintainable – Although, sub-r.(2) of r. 6 provides that a petition in relation to a Member for the purposes of sub-r. (1) may be made in writing to the Speaker by any other Member, such a provision is neither contemplated nor provided for in the Tenth Schedule itself – In a case where all the four Members elected to the Assembly from the political party concerned, changed their allegiance from the said party to the ruling party, there would be no one to bring such fact to the notice of the Speaker and ask for disqualification of the said Members – Therefore, provisions of sub-rr. (1) and (2) of r. 6 have to be read down to make it clear that not only a Member of the House, but any person interested, would also be entitled to bring to the notice of the Speaker the fact that a Member of the House had incurred disqualification under the Tenth Schedule –Constitution of India, 1950 – Tenth Schedule – Para 2(1)(a), 6 and 8 – Interpretation of Statutes – Reading down a provision – Locus standi.

Constitution of India, 1950:

Tenth Schedule – Provisions as to disqualification on ground of defection – 52nd Amendment – Intent and objects of – Explained.

Administrative Law:

Delegated legislation – Orissa Legislative Assembly (Disqualification on Ground of Defection) Rules, 1987 – Held: Being subordinate legislation, the Rules could not make any provision which could have the effect of curtailing the content and scope of the substantive provision, namely, the Tenth Schedule to the Constitution of India, as otherwise, the very object of the introduction of the Tenth Schedule to the Constitution would be rendered meaningless – Constitution of India, 1950 – Tenth Schedule – Para 2(1)(a), 6 and 8 – Orissa Legislative Assembly (Disqualification on Ground of Defection) Rules, 1987 – rr. 6(1) and (2) – Doctrine of reading down.

Consequent upon all the four elected members of the National Congress Party (NCP) in the Orissa Legislative Assembly joining the Biju Janata Dal (BJD), i.e., the ruling party in the State, the respondent-President of the State Unit of NCP filed four petitions before the appellant-Speaker of the House seeking disqualification of the said elected members of NCP on ground of defection. According to the respondent, since the matter was being delayed, he filed a writ petition before the High Court for a direction to the Speaker to dispose of the disqualification petitions expeditiously. On the strength of sub-r. (2) of r. 6 of the Orissa Legislative Assembly (Disqualification on Ground of Defection) Rules, 1987, an objection was taken regarding the maintainability of the writ petition at the instance of the respondent, who though being the President of the State Unit of the NCP, was not a Member of the Legislative Assembly. The High Court overruled the objection.

Dismissing the appeals, the Court

HELD: 1.1. Although, sub-r. (2) of r. 6 of the Orissa Legislative Assembly (Disqualification on Ground of Defection) Rules, 1987 provides that a petition in relation to a Member for the purposes of sub-r. (1) may be made in writing to the Speaker by any other Member, such a provision is neither contemplated nor provided for in the Tenth Schedule to the Constitution of India. In a case such as this, where all the four Members elected to the Assembly from the National Congress Party had changed their allegiance from the National Congress Party to the Biju Janata Dal, there would be no one to bring such fact to the notice of the Speaker and ask for disqualification of the said Members. This was not the intent of or the object sought to be achieved by the 52nd Amendment by which the Tenth Schedule was introduced in the Constitution. The Statement of Objects and Reasons of the Bill, which finally became the Constitution (52nd Amendment) Act, 1985, whereby the Tenth Schedule was added to the Constitution with effect from 1st March, 1985, *inter alia*, indicated that the evil of political defection had become a matter of national concern and if it was not checked, it could very well undermine the very foundation of our democracy and the principles which sustain the same. In such event, if the provisions of the Tenth Schedule are interpreted to exclude the right of any person interested to bring to the notice of the Speaker of the House the fact that any or some of its Members had incurred disqualification from the membership of the House on any of the eventualities indicated in paragraphs 2 and 4 therein, it would render the inclusion of the Tenth Schedule to the Constitution *otiose* and defeat the objects and intent of the 52nd Amendment of the Constitution. [para 16-17] [359-C-H; 360-A-C]

1.2. Although, paragraph 8 of the Tenth Schedule to

the Constitution of India vests the Speaker of the House with powers to make rules for giving effect to the provisions of the Tenth Schedule, the Rules framed under such powers would amount to delegated legislation which cannot override the substantive provisions of the Constitution contained in the Schedule itself. The provisions of sub-rr. (1) and (2) of r. 6 of the 1987 Rules cannot override the provisions of paragraph 2(1)(a) of the Tenth Schedule to the Constitution or for that matter, paragraph 6 which vests the Speaker of the House with the authority to decide the question as to whether a Member of a House had become subject to disqualification under the Schedule. The Rules being in the domain of procedure, were intended to facilitate the holding of an inquiry and not to frustrate or obstruct the same by the introduction of innumerable technicalities. Being subordinate legislation, the Rules could not make any provision which could have the effect of curtailing the content and scope of the substantive provision, namely, the Tenth Schedule, as otherwise, the very object of the introduction of the Tenth Schedule to the Constitution would be rendered meaningless. [para 16,18 and 19] [359-A-C; 360-F-H; 361-A]

Dr. Mahachandra Prasad Singh v. Chairman, Bihar Legislative Council and Others **2004 (5) Suppl. SCR 692 = (2004) 8 SCC 747– relied on.**

Kihoto Hollohan v. Zachillhu and Others, **1992 (1) SCR 686 = 1992 Supp (2) SCC 651***; Rajendra Singh Rana and Others v. Swami Prasad Maurya and Others* **2007 (2) SCR 591= (2007) 4 SCC 270***; Prakash Singh Badal v. Union of India,* **AIR 1987 P & H 263 – referred to.**

1.4. The provisions of sub-rr. (1) and (2) of r. 6 of the 1987 Rules have, therefore, to be read down to make it clear that not only a Member of the House, but any person interested, would also be entitled to bring to the

notice of the Speaker the fact that a Member of the House had incurred disqualification under the Tenth Schedule to the Constitution. On receipt of such information, the Speaker of the House would be entitled to decide under paragraph 6 of the Tenth Schedule as to whether the Member concerned had, in fact, incurred such disqualification and to pass appropriate orders on his findings. The judgment of the High Court is upheld. [para 19-20] [361-A-C]

Case Law Reference:

2004 (5) Suppl. SCR 692	**Relied on**	**Para 5**
1992 (1) SCR 686	**referred to**	**para 5**
2007 (2) SCR 591	**referred to**	**para 5**
AIR 1987 P & H 263	**referred to**	**para 5**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 469 of 2013.

From the Judgment & Order dated 27.09.2012 of the High Court of Orissa at Cuttack in W.P. (C) No. 14869 of 2012.

WITH

C.A. Nos. 470, 471 & 472 of 2013.

K.K. Venugopal, Pitamber Acharya, Raj Kumar Mehta, Antaryami Upadhyay, Rajiv Ranjan Pathak, David, Ankur Talwar for the Appellant.

Amrendera Sharan, Amit Anand Tiwari, Rajiv Yadav, Ashutosh Jha for the Respondent.

The Judgment of the Court was delivered by

ALTAMAS KABIR, CJI. 1. Leave granted.

2. These Appeals raise an interesting issue relating to the

powers of the Speaker of the Orissa Legislative Assembly under Rule 6(1) and (2) of the Members of Orissa Legislative Assembly (Disqualification On Ground Of Defection) Rules, 1987, hereinafter referred to as "the 1987 Rules", in the wake of paragraphs 2(1)(a) and 8 of the Tenth Schedule to the Constitution of India and are taken up together for disposal. The facts giving rise to the said legal question are set out hereinbelow.

3. The Appellant herein is the Speaker of the Orissa Legislative Assembly. There were four elected members of the National Congress Party (NCP) in the Orissa Legislative Assembly. All the said four elected members of the NCP joined the Biju Janata Dal (BJD), which is the Ruling Party in the State of Orissa. On account of such defection, Respondent, Shri Utkal Keshari Parida, who is the President of the State Unit of the NCP in the State of Orissa, filed four separate Disqualification Petitions before the Appellant for disqualification of the said four elected members of the NCP. The Disqualification Petitions were placed before the Appellant on 24.07.2012 and copies thereof were forwarded to the concerned Members of the Legislative Assembly, in terms of Rule 7(3) of the 1987 Rules.

4. Inasmuch as, the matter was being delayed, the Respondent filed Writ Petition (C) No. 14869 of 2012, before the Orissa High Court, *inter alia*, for a direction to the Speaker of the Assembly to dispose of the Disqualification Petitions expeditiously. Before the Division Bench of the said High Court, an objection was taken regarding the maintainability of the Writ Petition at the instance of the Respondent, who though being the President of the State Unit of the NCP, was not a Member of the Legislative Assembly, in view of the provisions of Sub-rule (2) of Rule 6 of the 1987 Rules. Rule 6 of the 1987 Rules, which is relevant for our purpose, is extracted hereinbelow:

> "6 (1) No reference of any question as to whether a Member has become subject to disqualification under the Tenth Schedule shall be made except by a petition in relation to such Member made in accordance with the provisions of this rule.
>
> (2) A petition in relation to a Member may be made in writing to the Speaker by any other Member:
>
> Provided that a petition in relation to the Speaker shall be addressed to the Secretary.
>
> (3) The Secretary shall:-
>
> (a) as soon as may be after the receipt of a petition under the proviso to sub-rule (2) make a report in respect thereof to the House ; and
>
> (b) as soon as may be after the House has elected a Member in pursuance of the proviso to sub-paragraph (1) of paragraph 6 of the Tenth Schedule place the petition before such Member.
>
> (4) Before making any petition in relation to any Member, the petitioner shall satisfy himself that there are reasonable grounds for believing that a question has arisen as to whether such Member has become subject to disqualification under the Tenth Schedule.
>
> (5) Every petition:
>
> (a) shall contain a concise statement of the material facts on which the petitioner relies; and
>
> (b) shall be accompanied by copies of the documentary evidence, if any, on which the petitioner relies and where the petitioner relies on any information furnished to him by any person, a statement containing the names and addresses of such persons and the gist of such information as furnished by each such person.
>
> (6) Every petition shall be signed by the petitioner and verified in the manner laid down in the Code of Civil

Procedure, 1908 (5 of 1908), for the verification of pleadings.

(7) Every annexure to the petition shall also be signed by the petitioner and verified in the same manner as the petition."

5. Relying on the interpretation of the aforesaid Rule in the judgment delivered by this Court in *Dr. Mahachandra Prasad Singh v. Chairman, Bihar Legislative Council and Others,* [(2004) 8 SCC 747], the High Court came to the conclusion that the Writ Petition was maintainable at the instance of the Respondent herein. While arriving at such conclusion, the High Court also took into consideration the decision in *Kihoto Hollohan v. Zachillhu and Others,* [1992 Supp (2) SCC 651] and the provisions of Article 191 read with paragraph 2 of the Tenth Schedule to the Constitution of India.

6. Interpreting the provisions of Rule 6 of the 1987 Rules, the High Court also took into consideration the judgment of this Court in *Rajendra Singh Rana and Others v. Swami Prasad Maurya and Others,* [(2007) 4 SCC 270], in which reference had been made to another decision in the case of *Prakash Singh Badal v. Union of India,* [AIR 1987 P&H 263]. On a consideration of the said two decisions and the other decisions already referred to hereinbefore, the High Court came to the conclusion that it was abundantly clear that if any Member of the House belonging to a political party had joined another political party, which is a disqualification under paragraph 2(1) of the Tenth Schedule, any person interested could make a reference to the Speaker under Rule 6 of the 1987 Rules and it was not necessary that such a reference had to be made by a Member of the Legislative Assembly. On its aforesaid finding, the High Court rejected the contentions made on behalf of the Appellant and held that the same were maintainable under Rule 6 of the 1987 Rules.

7. This Appeal has been preferred by the Speaker of the

Orissa Legislative Assembly questioning the aforesaid decision of the High Court.

8. Appearing in support of the Appeals, Mr. K.K. Venugopal, learned Senior Advocate, submitted that the High Court had wrongly interpreted the provisions of Sub-rules (1) and (2) of Rule 6 of the 1987 Rules in arriving at the erroneous conclusion that the Disqualification Petitions under Rules 6 and 7 of the 1987 Rules could be made not only by Members of the House, but by any interested person also. Mr. Venugopal urged that the language of Sub-rule (2) of Rule 6 of the 1987 Rules clearly indicates that it is only a Member of the House, who in relation to a petition for disqualification of another Member, could apply to the Speaker. Mr. Venugopal urged that giving any other interpretation to the said provisions would do violence to and be contrary to the intention contained in Rule 6 of the 1987 Rules. Mr. Venugopal urged that after the impugned judgment was delivered by the High Court, the matter was referred by the Speaker to the Committee of Privileges of the House on 15.10.2012 under Rule 7(4) of the 1987 Rules. The meeting of the said Committee was convened on 22.12.2012, but no business could be conducted in the meeting on account of lack of quorum.

9. On 2.1.2013, a meeting of the Committee of Privileges was convened to finalise the modalities for hearing of the Disqualification Petitions filed on behalf of the Respondent. However, before the matter came to be decided by the Committee of Privileges, the Special Leave Petition was filed to set aside the judgment of the Division Bench of the Orissa High Court holding that the Disqualification Petitions were maintainable at the instance of a non-Member of the House.

10. Mr. Venugopal urged that in the light of the explicit language used in Sub-rule (2) of Rule 6 of the 1987 Rules, framed by the Speaker of the Assembly under paragraph 8 of the Tenth Schedule to the Constitution, the High Court was clearly wrong in interpreting the said provisions so as to allow

an application for disqualification of a Member of the House to be made by a person who was not a Member thereof. Mr. Venugopal submitted that the Order of the High Court was contrary to the provisions of law and was liable to be set aside.

11. On the other hand, Mr. Amarendra Sharan, learned Senior Advocate, who appeared for the sole Respondent who had made the application for disqualification of the four Members before the Speaker, submitted that the four MLAs who had been elected on the nomination of the NCP, joined the Biju Janata Dal on 5.6.2012, without giving any prior notice of their intention to do so and that they had voluntarily given up the membership of the NCP by joining the BJD, thereby incurring disqualification as Members of the Assembly under paragraph 2(1)(a) of the Tenth Schedule to the Constitution.

12. Mr. Sharan also submitted that the action of the said four MLAs did not amount to a merger of the NCP Legislature Party with the Biju Janata Dal on account of the fact that a merger could only be of a political party with any other political party. Mr. Sharan submitted that the legislature party of a political party by itself had no authority or power to merge with any other political party, without the merger of its original political party. In such circumstances, the provisions of paragraph 2(1)(a) of the Tenth Schedule to the Constitution were squarely attracted to the facts of this case and the same had merely to be brought to the notice of the Speaker for him to hold that the said four MLAs stood disqualified from the membership of the House.

13. On the question of the *locus standi* of the Respondent to maintain the writ petition in his capacity as the President of the State unit of the NCP in the State of Orissa, Mr. Sharan submitted that the said question was no longer *res integra* in view of the decision rendered by this Court in the case of *Dr. Mahachandra Prasad Singh* (supra), in which reference had been made to a Full Bench decision of the Punjab and Haryana High Court in the case of *Prakash Singh Badal* (supra). Mr.

Sharan submitted that the Full Bench of the Punjab & Haryana High Court had considered the question, which has also arisen in this case, and it had held that paragraph (2)(1)(a) of the Tenth Schedule did not contemplate or visualize that the disqualification incurred by a Member of the House would have to be brought to the notice of the Speaker only by a Member of the House. Mr. Sharan submitted that the Full Bench had also indicated that in relation to paragraph 6 of the Tenth Schedule, the only prerequisite is the existence of a question of disqualification of a Member. Such a question could be raised before the Speaker by an interested person for declaring that the said Member stood disqualified from being a Member of the House. It was in that context that in the instant case the Speaker had held that when any Member belonging to a political party joined another political party, which amounted to disqualification under paragraph 2(1)(a) of the Tenth Schedule, any person interested could make a reference to the Speaker under Rule 6 and it was not necessary that such reference would have to be made only by a Member of the Legislative Assembly. Mr. Sharan submitted, that as indicated by this Court in *Dr. Mahachandra Prasad Singh's* case, as President, NCP, the Respondent had the *locus standi* to maintain his application, both before the Speaker, as well as before the High Court.

14. Mr. Sharan submitted that any other interpretation given to the provisions of paragraph 2(1)(a) read with Rule 6 (1) and (2) of the 1987 Rules, would defeat the very object and purpose of the Tenth Schedule to the Constitution.

15. On a consideration of the submissions made on behalf of the respective parties, we are unable to agree with the interpretation sought to be given by Mr. Venugopal to the provisions of Rule 6 of the 1987 Rules read with paragraph 2(1)(a) of the Tenth Schedule to the Constitution on the question of *locus standi* of the Respondent, as the President of the State unit of the National Congress Party in the State of Orissa, to

file the application seeking disqualification of the four Members of the National Congress Party who had switched their loyalties to the Biju Janata Dal.

16. Although, paragraph 8 of the Tenth Schedule vests the Speaker of the House with powers to make rules for giving effect to the provisions of the Tenth Schedule, the Rules framed under such powers would amount to delegated legislation which cannot override the substantive provisions of the Constitution contained in the Schedule itself. The provisions of Sub-Rules (1) and (2) of Rule 6 of the 1987 Rules cannot override the provisions of paragraph 2(1)(a) of the Tenth Schedule to the Constitution or for that matter, paragraph 6 which vests the Speaker of the House with the authority to decide the question as to whether a Member of a House had become subject to disqualification under the Schedule. Although, Rule 6(2) of the 1987 Rules provides that a petition in relation to a Member for the purposes of Sub-Rule (1) may be made in writing to the Speaker by any other Member, such a provision is neither contemplated nor provided for in the Tenth Schedule itself. As has been submitted by Mr. Amarendra Sharan, learned Senior Advocate for the Respondent, in a case such as this, where all the four Members elected to the Assembly from the National Congress Party had changed their allegiance from the National Congress Party to the Biju Janata Dal, there would be no one to bring such fact to the notice of the Speaker and ask for disqualification of the said Members who clearly stood disqualified under the provisions of the Tenth Schedule. In other words, although, disqualified under paragraph 2(1)(a) of the Tenth Schedule, in the absence of any application for disqualification to the Speaker, they would continue to function as Members of the Assembly, which was not the intent of or the object sought to be achieved by the 52nd Amendment by which the Tenth Schedule was introduced in the Constitution.

17. The Statement of Objects and Reasons of the Bill, which finally became the Constitution (52nd Amendment) Act,

1985, whereby the Tenth Schedule was added to the Constitution with effect from 1st March, 1985, *inter alia*, indicated that the evil of political defection had become a matter of national concern and if it was not checked, it could very well undermine the very foundation of our democracy and the principles which sustain the same. In such event, if the provisions of the Tenth Schedule are interpreted to exclude the right of any person interested to bring to the notice of the Speaker of the House the fact that any or some of its Members had incurred disqualification from the membership of the House on any of the eventualities indicated in paragraphs 2 and 4 therein, it would render the inclusion of the Tenth Schedule to the Constitution *otiose* and defeat the objects and intent of the 52nd Amendment of the Constitution.

18. The conundrum presented on account of the provisions of the Tenth Schedule in addition to Rules 6(1) and (2) of the 1987 Rules had fallen for consideration in *Dr. Mahachandra Prasad Singh's* case (supra). Speaking for the Bench, G.P. Mathur, J. (as His Lordship then was), observed in paragraph 16 of the judgment that the purpose and object of the Rules framed by the Chairman in exercise of power conferred by paragraph 8 of the Tenth Schedule was to facilitate the Chairman in discharging his duties and responsibilities in resolving any dispute as to whether the Member of the House had become subject to disqualification under the Tenth Schedule. It was also observed that the Rules being in the domain of procedure, were intended to facilitate the holding of an inquiry and not to frustrate or obstruct the same by the introduction of innumerable technicalities. Being subordinate legislation, the Rules could not make any provision which could have the effect of curtailing the content and scope of the substantive provision, namely, the Tenth Schedule.

19. The aforesaid observation is precisely what we too have in mind, as otherwise, the very object of the introduction of the Tenth Schedule to the Constitution would be rendered

meaningless. The provisions of Sub-rules (1) and (2) of Rule 6 of the 1987 Rules have, therefore, to be read down to make it clear that not only a Member of the House, but any person interested, would also be entitled to bring to the notice of the Speaker the fact that a Member of the House had incurred disqualification under the Tenth Schedule to the Constitution of India. On receipt of such information, the Speaker of the House would be entitled to decide under paragraph 6 of the Tenth Schedule as to whether the Member concerned had, in fact, incurred such disqualification and to pass appropriate orders on his findings.

20. We, accordingly, dismiss all the appeals and uphold the judgment of the High Court impugned therein.

21. In the facts and circumstances of the case, there will be no order as to costs.

R.P. Appeals dismissed.

STATE OF BIHAR & ANR.
v.
SUNNY PRAKASH & ORS.
(Civil Appeal No. 516 of 2013)

JANUARY 18, 2013

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

CONSTITUTION OF INDIA, 1950:

Art. 166 read with Rules of Executive Business, State of Bihar – Agreement/Understanding dated 18.7.2007 entered into between University and College Employees Federation and the State Government declaring non-teaching staff of Universities and constituent Colleges equivalent to the Government staff, not implemented on the plea that the agreement was not in accordance with the Rules of Executive Business – Held: Merely because of change of elected Government and the decision of the previous government not expressed in the name of Governor in terms of Art. 166, valid decision cannot be ignored and it is not open to State to contend that those decisions do not bind them – Further, the provisions of Art. 166 are only directory and not mandatory in character and if they are not complied with, it can be established as a question of fact that the impugned order was issued in fact by State Government – In the instant case, it cannot be said that the decision was not taken by or on behalf of the Government – High Court has not only directed the State Government to implement the Agreement dated 18.07.2007, but also directed the Federation to call off the strike immediately in the interest of the student community – State Government directed to implement the order of the High Court – Service law – Rules of Executive Business, State of Bihar – Public interest litigation – Letter petition.

Non-implementation of the G.O. dated 25.02.1987

issued by Education Department of Government of Bihar declaring the non-teaching staff of Universities and constituent Colleges equivalent to the Government staff, led to repeated strikes by the Bihar State University and College Employees Federation and the agreements/ compromises between the Federation and the State Government and, ultimately, an Agreement/ Understanding was arrived at between the two on 18.07.2007. A letter was issued by the Government on 19.07.2007 for implementation of the Agreement and, consequently, the strikes were recalled. However, as the Agreement/Understanding was again not implemented, the Federation went on an indefinite strike. Thereupon respondent no. 1, a student, addressed a letter to the Chief Justice of the High Court requesting to end the strike, which was treated as public interest litigation. The Federation also filed an intervention application. The High Court by order dated 7.8.2008 directed the Chief Secretary of the State to ensure implementation of the Agreement dated 18.072007. The Federation was also directed to withdraw its strike.

In the instant appeal filed by the State Government, it was contended for the appellants that the Agreement dated 18.07.2007 was not in accordance with the Rules of Executive Business, State of Bihar.

Dismissing the appeal, the Court

HELD: 1.1. Merely because of change of elected Government and the decision of the previous government not expressed in the name of Governor in terms of Art. 166 of the Constitution, valid decision cannot be ignored and it is not open to the State to contend that those decisions do not bind them. [Para 15] [380-D]

State of Bihar and Others vs. Bihar Rajya M.S.E.S.K.K. Mahasangh and Others, **2004 (5) Suppl. SCR 376 = (2005) 9 SCC 129 – relied on.**

1.2. Further, the provisions of Art. 166 of the Constitution are only directory and not mandatory in character and if they are not complied with, it can be established as a question of fact that the impugned order was issued in fact by the State Government. In the case on hand, these are various communications issued by the Government for implementation of the earlier decision. In such circumstance, there is no reason to reject those communications sent by the higher level officers of the State Government. [Para 16] [383-D-E]

R. Chitralekha and Anr. vs. State of Mysore and Others, **1964 SCR 368 = AIR 1964 SC 1823– relied on.**

1.3. In the instant case, the proceedings of the understanding held on 17.07.2007, show that apart from the Chairman, Bihar Legislative Council, Minister concerned, viz., Human Resource Department (HRD) as well as Principal Secretary, HRD and Commissioner, Finance Department as well as various other higher level officers of the State Government participated, deliberated and ultimately accepted the demands of the Federation. It is also to be noted that at the end of the discussion and after recording of the terms and conditions, General Secretary of the Federation, Chairman and Addl. Commissioner-cum-Secretary, HRD signed the same on the very next day i.e., 18.07.2007. Further, even after the discussion on 17.07.2007, on 19.07.2007 itself, Human Resources Development Department of the Government of Bihar sent another communication to the Registrars of all the Universities of the State to implement the decision arrived in the negotiation held on 17.07.2007. In such circumstances, it cannot be said that decision was not taken by or on behalf of the Government. [Para 6, 7 and 9] [369-E; 372-G-H; 373-A-B; 374-D-E]

Haridwar Singh vs. Bagun Sumbrui and Others, **1972 (3) SCR 629 = (1973) 3 SCC 889;** *Punit Rai vs. Dinesh Chaudhary*, **2003 (2) Suppl. SCR 743 = (2003) 8 SCC 204 – held inapplicable.**

State of U.P. vs. Neeraj Awasthi and Others, **(2006) 1 SCC 667 = 2005 (5) Suppl. SCR 906 – referred to.**

1.4. Even by the earliest decision dated 25.02.1987 of the Government of Bihar, Education Department, the General Secretary of the Federation was infomed that facilities which have been provided for Government staff shall also be sanctioned to the non-teaching staff of the Universities and subordinate affiliated colleges. In the light of the various directions of the very same Government, particularly, by the HRD/Education Department, requesting all the Vice Chancellors and Registrars of all the Universities to implement "Government's" decision, it cannot be said that in the absence of any decision by the Cabinet in terms of the Rules of Executive Business, any other agreement or decision is not binding on the Government. There is the commitment made by the State Government as early as in 1987, as also the subsequent demands made by the Federation on various occasions and the final decision by the Minister concerned, various officers including HRD and Finance Departments, representatives of the Federation and all other persons connected with the issue in question. Added to it, directions were also issued to the Vice Chancellors and Registrars of all the Universities for implementing the said "Government's" decision. In such circumstances, it cannot be open to the State to contend that it is not a Government's decision in terms of Art. 162 read with Art. 166 of the Constitution. [Para 9, 10 and 14] [375-E; 376-H; 377-A-B; 378-G-H; 379-A-B]

1.5. Inasmuch as all the persons who were competent to represent were the parties to the said

Agreement and after making such commitment by the State Government, as rightly observed by the High Court, the same has to be honored without any exception. By the impugned order, the High Court has not only directed the State Government to implement the commitment given by it having been reduced into writing on 18.07.2007, honoured by the State Government itself in subsequent letters/correspondences, but also directed the Federation to call off the strike immediately in the interest of the student community. It is also made clear that though the High Court termed the impugned order as interim in nature, considering the fact that the writ petition came to be filed by a student in the interest of the student community by writing a letter which was treated as a PIL, no further order need be passed in the said writ petition, and it stands closed. The State Government is directed to implement the order dated 07.08.2008 passed by the High Court. [Para 17-18] [383-F-H; 384-A-C]

Case Law Reference:

1972 (3) SCR 629	**held inapplicable**	**para 11**
2003 (2) Suppl. SCR 743	**held inapplicable**	**para 12**
2005 (5) Suppl. SCR 906	**referred to**	**para 13**
2004 (5) Suppl. SCR 376	**relied on**	**para 15**
1964 SCR 368	**relied on**	**para 15**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 516 of 2013.

From the Judgment & Order dated 07.08.2008 of the High Court of Patna in C.W.J.C. No. 10870 of 2008.

Rakesh Divedi, K.K. Venugopal, Gopal Singh, Samir Ali Khan, S. Pathak Chandan Kumar, Prem Prakash, Anshul Narayan, Pooja Dhar, Manu Shanker Mishra, Anshuman

Upadhyay, D.K. Pandey, Bijan Kumar Ghosh, Ashok Mathur, Sarla Chandra for the appearing parties.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. Leave granted.

2. This appeal is directed against the judgment and order dated 07.08.2008 passed by the High Court of Judicature at Patna in CWJC No. 10870 of 2008 whereby the Division Bench of the High Court in a Public Interest Litigation (PIL) issued *mandamus* directing the Chief Secretary, Government of Bihar, Patna to ensure that the commitment given by the State Government to the Bihar State University and College Employees Federation (in short "the Federation") is honoured and implemented within one month from the date of the judgment.

3. **Brief facts:**

(a) The Government of Bihar, Education Department, vide G.O. dated 25.02.1987, declared the non-teaching staff of Universities and Constituent Colleges equivalent to the Government staff.

(b) On 16.07.2003, an Agreement/Compromise was arrived at between the Federation and the State Government, regarding parity between the employees of the Constituent Colleges of the University and the State Government. On 21.07.2003, the State Government sent the said Agreement to the Vice Chancellors of all the Universities of the State of Bihar for necessary action.

(c) In 2005, because of the non-implementation of the Agreement arrived at, there was a strike by the Federation in the State of Bihar. Following the strike of the Federation, on 24.08.2005, an understanding was arrived at between the Federation and the Government of Bihar and the strike was

recalled later.

(d) Since the Agreement was not implemented, on 01.07.2007, the Federation again went on strike which led to complete disruption of educational activities in the Colleges and the Universities of Bihar. On 17.07.2007, a meeting was held between the representatives of the Federation and the Government of Bihar and an Agreement/Understanding was again arrived at on 18.07.2007 for consideration of their demands. Pursuant to the same, on 19.07.2007, a letter was issued by the Government for implementation of the Agreement and the strike was recalled.

(e) In July, 2008, again, on account of non-implementation of the Agreement/Understanding, the Federation was again constrained to go on strike. Due to indefinite strike of teaching and non-teaching staff of the Universities, on 14.07.2008, a letter was written by Sunny Prakash (Respondent No. 1 herein), student of Daroga Prasad Roy Degree College, addressed to the Chief Justice of the High Court requesting to end the strike, which was treated as a Public Interest Litigation (PIL). On 28.07.2008, an intervention application was filed by the Federation (R-5) in the PIL before the High Court.

(f) After hearing the parties, the Division Bench of the High Court, vide order dated 07.08.2008, *inter alia*, directed the Chief Secretary, Government of Bihar to ensure that the commitment given by the State Government to the Federation which have been reduced to writing on 18.07.2007, is honoured and implemented within one month. The High Court also directed the Federation to withdraw the strike immediately.

(g) On 22.08.2008, an application was filed by the Government of Bihar for modification of the impugned order, which was also dismissed by the High Court.

(h) Aggrieved by the order dated 07.08.2008 passed by the High Court, the State of Bihar preferred the above appeal

by way of special leave petition before this Court.

4. Heard Mr. Rakesh Dwivedi, learned senior counsel for the appellants, Mr. K.K. Venugopal, learned senior counsel for respondent Nos. 4 and 5, Mr. Manu Shanker Mishra, learned counsel for respondent Nos. 2 and 3 and Mr. Ashok Mathur for respondent No.1.

Discussion:

5. The only grievance of the State is that the Agreement dated 18.07.2007 relied on by the High Court for issuance of impugned direction was not in accordance with the Rules of Executive Business, State of Bihar which are statutory rules framed under Article 166 (3) of the Constitution of India. On the other hand, it is the stand of the Federation that the Agreement executed on 18.07.2007 was a valid one and pursuant to the same, the State Government itself issued directions to the authorities concerned for its implementation.

6. In order to understand the rival claim, it is useful to refer copy of the proceedings of the understanding held on 17.07.2007 which reads as under:-

"Proceeding of discussion on 17.7.07 with respect to implementation of proceeding regarding agreement between the Bihar State University and College Employees federation on 24.8.05 and withdrawal of strike.

Present :-

1. Hon'ble Prof. Arun Kumar, Chairman, Bihar Legislative Council.
2. Hon'ble Sri Vrishan Patel, Minister, Human Resource Department.
3. Hon'ble Vasudev Singh, M.L.C.

4. Hon'ble Kedar Pandey, M.L.C.
5. Hon'ble Mahachandra Prasad Singh, M.L.C.
6. Hon'ble Dilip Kumar Choudhary, M.L.C.
7. Hon'ble Ram Kishore Singh, M.L.C.
8. Hon'ble Srimati Usha Sahni, M.L.C.
9. Principal Secretary, Human Resource Development Department
10. Commissioner, Finance Department
11. Addl. Commissioner, Human Resource Development Department
12. Addl. Commissioner, Finance Department
13. Sri Rajendra Mishra, Patron, Mahasangh (Association)
14. Sri Bimal Prasad Singh, President, Mahasangh
15. Sri Ganga Prasad Jha
16. Sri Ramshankar Mehta, Joint Secretary, Mahasangh
17. Sri Dhanajay Prasad Singh, Vice President, Mahasangh
18. Sri Premchand, Joint Secretary, Mahasangh
19. Sri Rohit Kumar, Treasurer, Mahasangh,
20. Sri. M.P. Jaiswal, Executive Member

Regarding the matter of strike by the non-teaching staffs of the university and colleges of the State, the representatives of the Federation met with the

Hon'ble Chairman of Bihar Legislative Council in his office on their demands and the following points were considered for issuance of government order and it was decided that the strike will be called off by the Federation: -

1. 50% Dearness Allowance may be merged with Basic Pay.

2. Medical Allowance may be increased from Rs. 50/- (Fifty) to Rs. 100/- (Hundred).

3. Facility of ACP may be given to the employees.

4. Head Assistant and Accountant of the colleges may be designated as Section Officer at the departmental level.

5. Pay scale of Rs. 5500-9000 may be granted to the Assistants of colleges and university.

6. Assistant Librarian and PTI who are possessing qualification fixed by UGC, may be granted UGC pay scale.

7. Library Assistant, Sorter, Routine Clerk, Correspondence clerk may be granted a pay scale of Rs. 4000-6000 at Departmental level.

8. Facilities of accumulation of 240 days Earned Leave and encashment may be granted to the employees at par with the employees of state government which will be admissible similarly to the class III and class IV grade employees.

9. Ward servant may be designated as Hostel servant.

10. Anomalies regarding the pay scale of University Engineer, Assistant Engineer and Junior Engineer

and Electrician may be removed.

11. Store Keeper may be treated as an Assistant and pay scale may be given accordingly.

The following points were considered with respect to the period of strike: -

1. No coercive and punishable proceeding will be initiated against any employee for the reason of strike.

2. For strike period, due and admissible earned leave may be sanctioned.

3. Even after above action, if the days of absence remains, the absence that may be sanctioned against earned leave to be earned in future.

4. If earned leave to be earned in future is not sufficient for period of absence the extra-ordinary leave may be sanctioned for remaining period.

After consideration on the above mentioned demands regarding the period of strike were accepted by the Government to be acted upon within one and a half month as per rules.

Sd/-	Sd/-	Sd/-
(Ganga Pd. Jha)	(Dr.Vimal Pd. Sinha)	(Sanjeev Kr. Sinha)
18.07.2007	18.07.2007	18.07.2007
General Secretary	Chairman	Addl.Commissioner cum-Secretary, HRD Patna"

7. The above details show that apart from the Chairman, Bihar Legislative Council, Minister concerned, viz., Human Resource Department (HRD) as well as Principal Secretary,

HRD and Commissioner, Finance Department as well as various other higher level officers of the State Government participated, deliberated and ultimately accepted the demands of the Federation. It is also to be noted that at the end of the discussion and after recording of the terms and conditions, General Secretary of the Federation, Chairman and Addl. Commissioner-cum-Secretary, HRD, Patna signed the same on the very next day i.e., 18.07.2007. In such circumstances, it cannot be contended that decision was not taken by or on behalf of the Government.

8. In addition to the same, Mr. Venugopal, learned senior counsel for the contesting respondents has also brought to the notice of this Court the letter dated 21.07.2003 addressed to the Vice Chancellors of all the Universities of the State of Bihar which reads as under:-

"Letter No.2/D01-04/2003 H.E.
Govt. of Bihar
Higher Education Department

From:
Sh. Aditya Narayan Singh
Deputy Secretary to the Govt.

To:

The Vice Chancellors
All the Universities of the
State of Bihar

Patna, dated: 21st July, 2003

Sub: The Proceedings of the agreement dated 16.07.2003 between Bihar State Universities and Colleges Staff Federation and Govt. of Bihar

Sir,

Copy of the proceedings of the agreement dated

16.07.2003 between Bihar State Universities and Colleges Staff Federation and State Govt. is being sent having annexed for necessary action.

Faithfully

Sd/-
21.07.2003
Aditya Narayan Singh
Deputy Secretary to the Govt.

Rajendra/19.07.2003

Memorandum No.2/D01-04/2003

Dated 21.07.2003"

9. In addition to the same, it is also brought to our notice that even after the discussion on 17.07.2007, on 19.07.2007 itself, Human Resources Development Department of the Government of Bihar sent another communication to the Registrars of all the Universities of the State to implement the decision arrived in the negotiation held on 17.07.2007. The said letter reads as under:-

"Letter No.2/D 1-04/2003-1107
Government of Bihar
Human Resources Development Department

From:
Gopal Ji
Deputy Director,
Human Resources Development Department

Patna, Dated 19.07.2007

To
The Registrar
All the Universities of the State
Bihar

Subject: For the implementation of the agreement reached with the Bihar State University and

College Employees Federation on 24.08.2005 and the proceedings of the negotiation held on 17.07.2007 for recalling the strike.

Sir,

As directed for the implementation of the agreement reached with the Bihar State University and College Employees Federation on 24.08.2005 and a copy of the proceedings of the negotiation held on 17.07.2007 for recalling the strike are being sent for information and necessary action.

Yours faithfully,
Sd/-
(Gopal Ji)
Deputy Director (Higher Education)"

In order to appreciate the stand of both sides, it is useful to refer the earliest decision of the Government of Bihar, Education Department dated 25.02.1987 informing the General Secretary of the Federation, that facilities which have been provided for Government staff shall also be sanctioned to the non-teaching staff of the Universities and subordinate affiliated colleges. The said communication reads as under:-

"No. 123/C
Govt. of Bihar
Education Department

From:

Sh. Bhaskar Banerjee
Secretary to the Govt.
Education Department,
Bihar

To:

General Secretary
Bihar State Universities
and Colleges Non-teaching
Staff Federation,
Patna

Dated: 25th February, 1987

Sir,

This is to inform as per direction that the compromise which has taken place by the Govt. with Govt. staff in regard to the recent strike and the facilities which have been provided, the same shall also be sanctioned to the non-teaching staff of universities and subordinate affiliated colleges. The Govt. has already taken the decision to declare the same as equivalent to Govt. staff.

The copy of this letter is being sent to the Vice Chancellors of all Universities for kind information and necessary action.

Yours faithfully,
Sd/-
Bhaskar Banerjee
25.02.1987
Secretary to the Govt.,
Education Department
Bihar, Patna"

10. Mr. Rakesh Dwivedi, learned senior counsel for the State contended that in the absence of any decision by the Cabinet in terms of the Rules of Executive Business, any other agreement or decision is not binding on them. However, in the light of the various directions of the very same Government, particularly, by the HRD/Education Department, requesting all the Vice Chancellors and Registrars of all the Universities to implement "Government's" decision, the said contention is liable to be rejected.

11. In support of his claim, Mr. Dwivedi, learned senior counsel for the State relied on a decision of this Court in *Haridwar Singh vs. Bagun Sumbrui and Others,* (1973) 3 SCC 889 wherein while relying on Rule 10 of the Rules of Executive Business and finding that as per Rule 10 (2), prior consultation with the Finance Department is required for a proposal and Cabinet alone would be competent to take a decision, this Court allowed the appeal and set aside the contrary direction issued by the High Court. According to us, the above decision is not applicable to the case on hand since we have already noted that the Commissioner, Finance Department as well as various other higher level officers of the State Government participated in the discussion. Further, in the said decision, when the Finance Department was consulted, the Department did not agree for the said proposal whereas this was not the situation in the case on hand.

12. The next decision relied on by learned senior counsel for the State is *Punit Rai vs. Dinesh Chaudhary,* (2003) 8 SCC 204. He pressed into service the following observations made by this Court:

> **"42.** The said circular letter has not been issued by the State in exercise of its power under Article 162 of the Constitution of India. It is not stated therein that the decision has been taken by the Cabinet or any authority authorized in this behalf in terms of Article 166(3) of the Constitution of India. It is trite that a circular letter being an administrative instruction is not a law within the meaning of Article 13 of the Constitution of India. (See *Dwarka Nath Tewari* v. *State of Bihar, AIR 1959 SC 249*.)

First of all, the said decision relates to a question, namely, whether the respondent therein belonged to Scheduled Caste community or not? On going through the same, we are of the view that the same is not applicable to the case on hand.

13. Finally, learned senior counsel for the State relied on a decision of this Court reported in *State of U.P. vs. Neeraj Awasthi and Others,* (2006) 1 SCC 667. This case relates to the jurisdiction of the High Court to issue a direction for framing a scheme for regularization of the employees of the U.P. Agricultural Produce Market Board. Learned senior counsel relied on the statement made in para 41 which reads thus:-

> **"41.** Such a decision on the part of the State Government must be taken in terms of the constitutional scheme i.e. upon compliance with the requirement of Article 162 read with Article 166 of the Constitution. In the instant case, the directions were purported to have been issued by an officer of the State. Such directions were not shown to have been issued pursuant to any decision taken by a competent authority in terms of the Rules of Executive Business of the State framed under Article 166 of the Constitution."

This decision makes it clear that a decision of the State Government must be in compliance with the requirement of Article 162 read with Article 166 of the Constitution and a direction issued by an officer of the State without following such procedure is not binding on the Government. We are in respectful agreement with the same.

14. In the case on hand, we have already extracted the commitment made by the State Government as early as in 1987, subsequent demands made by the Federation on various occasions and the final decision by the Minister concerned, various officers including HRD and Finance Departments, representatives of the Federation and all other persons connected with the issue in question. Added to it, directions were also issued to the Vice Chancellors and Registrars of all the Universities for implementing the said "Government's" decision. In such circumstances, as observed earlier, it cannot be open to the State to contend that it is not a Government's decision in terms of Article 162 read with Article

166 of the Constitution.

15. Mr. Venugopal, learned senior counsel for the contesting respondents heavily relied on the principles laid down in *State of Bihar and Others vs. Bihar Rajya M.S.E.S.K.K. Mahasangh and Others,* (2005) 9 SCC 129. The said decision also arose from a dispute concerning the absorption of about 4000 employees working in teaching and non-teaching posts in 40 colleges affiliated to various Universities which were taken over as Constituent Colleges in accordance with the provisions of the Bihar State Universities Act, 1976. It was contended on behalf of the State of Bihar that power to sanction additional posts and appointments against the same in the affiliated colleges is within the exclusive jurisdiction and power of the State under Section 35 of the Act. It was also contended that certain decisions of the Government that were taken after the change of elected Government had no prior approval of the Council of Ministers. The decision by the Cabinet, approval by the Chief Minister on behalf of the Cabinet is *sine qua non* for treating any resolution as a valid decision of the Government. It was also stated that in the absence of Cabinet approval, the order dated 01.02.1988 which was issued by the Deputy Secretary to the Government of Bihar has no legal efficacy. It was further argued by the State that any valid order of the Government has to be formally expressed in the name of the Governor in accordance with Article 166 of the Constitution. In para 64, this Court has held thus:

> **64.** So far as the order dated 18-12-1989 is concerned, the State being the author of that decision, merely because it is formally not expressed in the name of the Governor in terms of Article 166 of the Constitution, the State itself cannot be allowed to *resile* or go back on that decision. Mere change of the elected Government does not justify dishonouring the decisions of previous elected Government. If at all the two decisions contained in the

> orders dated 1-2-1988 and 18-12-1989 were not acceptable to the newly elected Government, it was open to it to withdraw or rescind the same formally. In the absence of such withdrawal or rescission of the two orders dated 1-2-1988 and 18-12-1989, it is not open to the State of Bihar and State of Jharkhand (which has been created after reorganisation of the State of Bihar) to contend that those decisions do not bind them.
>
> From the above conclusion, it is clear that merely because of change of elected Government and the decision of the previous government not expressed in the name of Governor in terms of Article 166 of the Constitution, valid decision cannot be ignored and it is not open to the State to contend that those decisions do not bind them.

16. It is also useful to refer a Constitution Bench decision of this Court in *R. Chitralekha and Anr. vs. State of Mysore and Others,* AIR 1964 SC 1823. In order to understand the principles laid down by the Constitution Bench, it is useful to quote paras 4 and 5 which read thus:

> "(4). The next contention advanced is that Annexure IV was invalid as it did not conform to the requirements of Art. 166 of the Constitution. As the argument turns upon the form of the said annexure it will be convenient to read the material part thereof.
>
> "Sir,
>
> Sub : Award of marks for the "interview" of the candidates seeking admission to Engineering Colleges and Technical Institutions.
>
> With reference to your letter No. AAS.4.ADW/63/2491, dated the 25th June, 1963, on the subject mentioned above, I am directed to state that Government have decided that 25 per cent of the maximum marks.....

Yours faithfully,

Sd/- S. NARASAPPA,

Under Secretary to Government, Education Department."

Ex facie this letter shows that it was a communication of the order issued by the Government under the signature of the Under Secretary to the Government, Education Department. Under Art. 166 of the Constitution all executive action of the Government of a State shall be expressed to be taken in the name of the Governor, and that orders made in the name of the Governor shall be authenticated in such manner as may be specified in rules to be made by the Governor and the validity of an order which is so authenticated shall not be called in question on the ground that it is not an order made by the Governor.

If the conditions laid down in this Article are complied with, the order cannot be called in question on the ground that it is not an order made by the Governor. It is contended that as the order in question was not issued in the name of the Governor the order was void and no interviews could be held pursuant to that order. The law on the subject is well-settled. In *Dattatreya Moreshwar Pangarkar v. The State of Bombay* 1952 SCR 612 at p.625: (AIR 1952 SC 181 at pp. 185-186). Das J., as he then was, observed:

"Strict compliance with the requirements of article 166 gives an immunity to the order in that it cannot be challenged on the ground that it is not an order made by the Governor. If, therefore, the requirements of that article are not complied with, the resulting immunity cannot be claimed by the State. This, however, does not vitiate the order itself..... Article 166 directs all executive action to be expressed and authenticated in the

manner therein laid down but an omission to comply with those provisions does not render the executive action a nullity. Therefore, all that the procedure established by law requires is that the appropriate Government must take a decision as to whether the detention order should be confirmed or not under section 11(1)."

The same view was reiterated by this Court in *The State of Bombay v. Purshottam Jog Naik,* 1952 SCR 674: (AIR 1952 SC 317), where it was pointed out that though the order in question then was defective in form it was open to the State Government to prove by other means that such an order had been validly made. This view has been reaffirmed by this Court in subsequent decisions : see *Ghaio Mall and Sons v. The State of Delhi* ((1959) S.C.R. 1424), and it is, therefore, settled law that provisions of Art. 166 of the Constitution are only directory and not mandatory in character and, if they are not complied with, it can be established as a question of fact that the impugned order was issued in fact by the State Government or the Governor. The judgment of this Court in *Bachhittar Singh v. The State of Punjab* ((1962) Supp. 3 S.C.R. 713) does not help the appellants, for in that case the order signed by the Revenue Minister was not communicated to the party and, therefore, it was held that there was no effective order.

(5) In the light of the aforesaid decisions, let us look at the facts of this case. Though Annexure IV does not conform to the provisions of Art. 166 of the Constitution, it ex facie says that an order to the effect mentioned therein was issued by the Government and it is not denied that it was communicated to the selection committee. In neither of the affidavits filed by the appellants there was any specific averment that no such order was issued by the Government. In the counter-affidavit filed by B. R. Varma, Deputy Secretary to the Government of Mysore, Education

> Department, there is a clear averment that the Government gave the direction contained in Annexure IV and a similar letter was issued to the selection committee for admissions to Medical Colleges and this averment was not denied by the appellants by filing any affidavit. In the circumstances when there are no allegation at all in the affidavit that the order was not made by the Government, we have no reason to reject the averment made by the Deputy Secretary to the Government that the order was issued by the Government. There are no merits in this contention."

From this decision, it is clear that the provisions of Article 166 of the Constitution are only directory and not mandatory in character and if they are not complied with, it can be established as a question of fact that the impugned order was issued in fact by the State Government. In the case on hand, we have already demonstrated various communications issued by the Government for implementation of the earlier decision. In such circumstance, we have no reason to reject those communications sent by the higher level officers of the State Government.

17. Inasmuch as all the persons who were competent to represent were the parties to the said Agreement referred to above and after making such commitment by the State Government, as rightly observed by the High Court, we are also of the view that the same has to be honored without any exception. By the impugned order, the High Court has not only directed the State Government to implement the commitment given by it having been reduced into writing on 18.07.2007, honoured by the State Government itself in subsequent letters/ correspondences but also directed the Federation to call off the strike immediately in the interest of the student community. We also make it clear that though the High Court termed the impugned order as interim in nature, considering the fact that the writ petition came to be filed by a student in the interest of

the student community by writing a letter which was treated as a PIL, no further order need be passed in the said writ petition, namely, CWJC No. 10870 of 2008 pending on the file of the High Court at Patna and it stands closed.

18. In view of our conclusion, we direct the State of Bihar to implement the impugned order of the High Court dated 07.08.2008 within a period of three months from the date of receipt of copy of this judgment. The appeal filed by the State of Bihar is dismissed with the above direction. There will be no order as to costs.

R.P. Appeal dismissed.

GOPAL & ANR.
v.
STATE OF RAJASTHAN
(Criminal Appeal No. 1156 of 2007)

JANUARY 18, 2013

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

Penal Code, 1860 – ss. 96, 97, 100, 102, 105 and s.302 r/w s. 34 – Double murder – Fight between two rival groups – Death of two persons 'R' and 'P' due to lathi blows inflicted by the appellants – Evidence of injured eye-witnesses (PW-7 and PW-8) and son of 'P' (PW-10) – Conviction of appellants u/s.302 r/w s.34 IPC – Challenge to – Appellants taking plea of right of private defence – Held: 'R', PW-7 and PW-8 had gone to the field of the appellants and there was a fight between both the groups – Appellants fought to repel the attack and in course of the incident, both sides sustained injuries, as a result of which, 'R' died – In the circumstances, appellants entitled to plea of private defence insofar as death of 'R' was concerned, however, they had no right to invoke the right of self defence by chasing 'P' and causing fatal injuries on him – 'P' was not present at the place where 'R' was assaulted – After inflicting injuries on the person of 'R', the appellants ran towards 'P', who was standing 10 steps away from the place of incident – Reasonable apprehension from the side of the appellants disappeared when they noticed that 'P' was running away from the scene in order to escape – Appellants exceeded their limit when they chased 'P' at some distance, pushed him down and inflicted several blows with lathis due to which he died – Conviction of appellants u/s.302 r/w s.34 IPC and the life sentence awarded to them, thus, justified – Evidence Act, 1872 – s.105.

The prosecution case was that grudge over a money settlement agreement resulted in a fight between two rival

groups, in course of which two persons, 'R' and 'P' were beaten to death by the accused party with *lathi* blows. There were in all six accused persons including the two appellants (A-1 and A-3). In support of their claim, the prosecution heavily relied on the evidence of PW-7 and PW-8 – injured eye-witnesses and PW-10 – son of 'P'. The trial Court convicted the appellants under Section 302 read with Section 34 IPC and sentenced them to rigorous imprisonment (RI) for life. In appeal, High Court confirmed the conviction and sentence imposed upon the two appellants, and therefore the instant appeal.

The appellants raised the following contentions before this Court: 1) that members of the complainant's party were the aggressors and they came to the field of the accused persons and attacked them; 2) that the appellants also received injuries at the hands of the complainant's party and the prosecution had failed to explain the same and 3) that since the members of the complainant's party were the aggressors and attacked on the accused persons causing injuries to the appellants, the accused had a right of private defence, consequently, they were entitled for acquittal.

Dismissing the appeal, the Court

HELD: 1.1 The materials placed and relied on by the prosecution show that 'R', PW-7 and PW-8 had gone to the field of the appellants and there was a fight between both the groups. It is also clear that the appellants fought to repel the attack and in the course of incident, both sides sustained injuries, as a result of which, 'R' died. In such circumstances, it would be possible for this Court to accept the claim of the appellants that since they were defending themselves, they had a right of private defence. [Para 12] [393-F-H; 394-A]

1.2. Under Section 105 of the Evidence Act, 1872, the

burden of proof is on the accused, who sets up the plea of self-defence, and, in the absence of proof, it is not possible for the court to presume the truth of the plea of self defence. Where the right of private defence is pleaded, the defence must be a reasonable and probable version satisfying the court that the harm caused by the accused was necessary for either warding off the attack or for forestalling the further reasonable apprehension from the side of the accused. It is true that the burden on an accused person to establish the plea of self-defence is not as onerous as the one which lies on the prosecution and that while the prosecution is required to prove its case beyond reasonable doubt, the accused need not establish the plea to the hilt and may discharge his onus by establishing a mere preponderance of probabilities either by laying basis for that plea in the cross-examination of prosecution witnesses or by adducing defence evidence. The accused need not prove the existence of the right of private defence beyond reasonable doubt. It is enough for him to show as in a civil case that the preponderance of probabilities is in favour of his plea. Based on the above principles, in view of the discussion of the prosecution witnesses, viz., PWs 7, 8 and 10 coupled with the fact that the incident occurred in the field of the appellants, who also sustained injuries which is evident from the evidence of the doctor (who examined the injuries of the appellants) the stand of the appellants is to be accepted. However, as per the prosecution story, not only 'R' but in the same incident 'P' also died due to lathi blows inflicted by the appellants. [Para 13] [394-F-G; 395-B-F-H; 396-A-C]

1.3. The evidence of PWs 7, 8 and 10 clearly established that 'P' was not present at the place where 'R' was assaulted. After inflicting injuries on the person of 'R', the appellants ran towards 'P', who was standing 10 steps away from the place of incident. After seeing the

incident relating to the death of 'R', 'P' started running and he was chased by the accused persons and they inflicted lathi blows on his person. In such a situation, the appellants have no right to invoke the right of self defence by chasing 'P' and causing fatal injuries on him. Reasonable apprehension had disappeared when they noticed that 'P' was running away from the scene in order to escape, in such circumstances though the appellants were entitled to the plea of private defence insofar as the death of 'R' is concerned, they were not justified in availing the same for the cause of death of 'P'. On the other hand, they exceeded their limit and the materials placed by the prosecution clearly show that they chased 'P' at some distance, pushed him down and inflicted several blows with *lathis* due to which he died. In such circumstances, the trial Court was justified in convicting the appellants under Section 302 read with Section 34 of IPC and sentencing them to suffer RI for life. Taking note of all these aspects, it is clear that the High Court was fully justified in confirming the order of conviction and sentence insofar as the appellants. [Para 14] [396-D-H; 397-A-B]

V. Subramani & Anr. v. State of T.N. **(2005) 10 SCC 358: 2005 (2) SCR 536 – relied on.**

Case Law Reference:

2005 (2) SCR 536	**relied on**	**Para 13**

CRIMINAL APPELLATE JURISDICTION:: Criminal Appeal No. 1156 of 2007.

From the Judgment & Order dated 15.04.2006 of the High Court of Rajasthan, bench at Jaipur in D.B. Crl Appeal No. 247 of 2001.

Kanhaiya Priyadarshi for the Appellants.

Ram Naresh Yadav, Vibhuti Sushant, Pragati Neekhra for the Respondent.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. This appeal is filed against the judgment and order dated 15.04.2006 passed by the High Court of Judicature for Rajasthan at Jaipur Bench in D.B. Criminal Appeal No. 247 of 2001 whereby the High Court dismissed the appeal in respect of the appellants herein and confirmed their conviction and sentence awarded by the Court of Additional Sessions Judge, Shahpura, District Jaipur, Rajasthan vide judgment dated 18.04.2001 in Session Case No. 24 of 2000.

2. **Brief facts:**

(a) As per the prosecution case, Rameshwar (since deceased) was the guarantor for money settlement agreement between one Santosh and Jagdish, residents of Tehsil Bishangarh, P.S. Manoharpur, Jaipur, Rajasthan. When Jagdish started demanding money from Santosh prior to the expiry of the agreement, Rameshwar intervened between them. Since then Jagdish started keeping a grudge against him which is the root cause of the case in hand and resulted into death of two persons in a fight between them.

(b) On 16.07.2000, at 07.30 a.m., when Bhagwan Sahai (PW-8), Bodu Ram (PW-7) and Rameshwar (since deceased) were going towards the well of Padmawati while crossing the field of one Prabhat (since deceased), at that time, Gopal (A-1), Jagdish, Mahesh (A-3), Patasi, Teeja, Gokali and Sita belaboured Rameshwar by inflicting lathi and axe blows. Due to the attack, Rameshwar died on the spot. When Bhagwan Sahai and Bodu Ram tried to intervene, they were also beaten by the accused party. When Prabhat (since deceased), who was working in his field along with his son-Badri Yadav (PW-

10), approached towards Rameshwar for help, he was also beaten to death by the accused persons.

(c) On the very same day, at 09.45 a.m., Badri Yadav (PW-10) submitted a written report at P.S. Manoharpur relating to the above-said incident. On the basis of the aforesaid report, a case under Sections 147, 148, 149, 302 and 323 of the Indian Penal Code, 1860 (in short 'the IPC') was registered against the accused persons, viz., Gopal (A-1), Jagdish, Mahesh (A-3), Teeja, Patasi and Gokali and the same was committed to the Court of Additional Sessions Judge, Shahpura, District Jaipur, Rajasthan and numbered as Sessions Case No. 24 of 2000.

(d) The Additional Sessions Judge, Shahpura after trial, by order dated 18.04.2001, convicted Teeja under Section 302 of IPC and Gopal, Jagdish and Mahesh under Section 302 read with Section 34 of IPC and sentenced them to suffer rigorous imprisonment (RI) for life alongwith a fine of Rs.1,000/- each, in default, to further undergo simple imprisonment for 3 months. Gokali and Patasi Devi were convicted under Section 323 of IPC and were sentenced to the period already undergone by them in custody.

(e) Challenging the said order of conviction and sentence, the accused persons filed appeal being D.B. Criminal Appeal No. 247 of 2001 before the High Court. By impugned order dated 15.04.2006, the High Court while modifying the order dated 18.04.2001 of the Additional Sessions Judge, allowed the appeal in respect of Teeja, Jagdish, Gokali and Patasi and dismissed the appeal in respect of Gopal (A-1) and Mahesh (A-3), the appellants herein, and confirmed their conviction and sentence awarded to them.

3. Heard Mr. Kanhaiya Priyadarshi, learned *amicus curiae* appearing for the appellants and Mr. Ram Naresh Yadav, learned counsel appearing for the respondent-State.

Contentions:

4. After taking us through the entire material relied on by the prosecution and the defence, learned *amicus curiae* appearing for the appellants submitted that it is evident from the site plan that the members of the complainant's party were the aggressors and they came to the field of the accused persons and attacked them. He also submitted that the appellants also received injuries at the hands of the complainant's party and the prosecution had failed to explain the same. Finally, he submitted that since the members of the complainant's party were the aggressors and attacked on the accused persons causing injuries to Gopal (A-1) and Mahesh (A-3) (the appellants herein), the accused had a right of private defence, consequently, they are entitled for acquittal.

5. On the other hand, learned counsel for the respondent-State supported the findings of the trial Court and the order of the High Court affirming the conviction and sentence insofar as the appellants are concerned and, consequently, prayed for dismissal of this appeal.

6. We have carefully considered the rival contentions and perused the relevant materials.

Discussion :

7. It is a case of double murder. Admittedly, Rameshwar and Prabhat were died in the incident in question. Though, initially, the prosecution proceeded against 6 persons and the trial Court convicted and sentenced all of them, in the appeal before the High Court, except the present appellants (A-1 & A-3), others were acquitted.

8. In support of their claim, the prosecution heavily relied on the evidence of Bodu Ram (PW-7) and Bhagwan Sahai (PW-8) – injured eye-witnesses and Badri Yadav (PW-10) – son of Prabhat (since deceased). Bodu Ram (PW-7), in his

evidence has stated that about 4 months back, at about 7.30 a.m., he along with his brother Bhagwan Sahai and uncle - Rameshwar was going to work at the well. When they reached near the field of Gopal (A-1), they found that Gopal (A-1), Jagdish, Mahesh (A-3), Patasi, Teeja, Gokuli were plucking round gourd *(Tinda)* from their field and on seeing them, they attacked on them and, thereafter, they went to the police station at 10 o' clock.

9. Bhagwan Sahai (PW-8), in his evidence has stated that at 7.30 a.m., when he along with Rameshwar (since deceased) and Bodu Ram (PW-7) reached near the field of Gopal (A-1), they noticed that the accused persons were plucking round gourd *(Tinda)* and on seeing them, they started fighting with them. He further explained that Teeja had an axe and other accused persons were having lathis. Rameshwar was beaten by Mahesh (A-3) with lathi and he fell down. Teeja hit Rameshwar with an axe on his forehead and she also gave a hit at his armpit and one at his back. He further stated that he was hit by Gopal (A-1), Patasi and Jagdish with lathis. Bodu Ram (PW-7) was hit by Gokuli on his forehead and Jagdish and Mahesh (A-3) hit him at his hand and armpit side respectively. He further deposed when Prabhat, who was working in the field alongwith his son Badri (PW-10), approached us in order to help, at that time, Gopal (A-1), Mahesh (A-3) and Jagdish ran after him and he (Prabhat) ran back towards Durga-ki-Dhani and all the three accused after chasing him hit him with lathis. Banshi, Murli, Gopal and mother and wife of Badri had also seen Prabhat (since deceased) being beaten by them. Prabhat and Rameswhwar both died in the incident. Like Bodu Ram (PW-7), Bhagwan Sahai (PW-8) also sustained injuries and he categorically stated that on seeing that Prabhat was running towards Durga-Ki-Dhani, the present appellants and other accused persons chased him and hit him with lathis due to which he died. His evidence corroborates with the statement of Bodu Ram (PW-7) and proves the case of the prosecution.

10. Badri Yadav (PW-10), in his evidence has stated that about 4 months back, at about 7 to 8 a.m., when he was working in his field behind his house alongwith his father Prabhat (since deceased) who was sitting there, at that time, he noticed Bodu Ram (PW-7), Bhagwan Sahai (PW-8) and Rameshwar (since deceased) going towards the well. He further deposed that when they reached near the field of Gopal (A-1), who was plucking vegetables in his field along with Mahesh (A-3), Jagdish, Gokali, Teeja and Patasi, on seeing them coming, they attacked on the complainant's party. Teeja hit Rameshwar with an axe on his neck. When Bodu Ram (PW-7) and Bhagwan Sahai (PW-8) tried to save him, Gokali and Mahesh (A-3) fought with them and Bhagwan Sahai (PW-8) was beaten by Patasi, Gopal and Jagdish. He further stated that he saw the incident from a distance of 20 steps. He also stated that when his father – Prabhat (since deceased) ran towards Durga-Ki-Dhani, Gopal (A-1), Jagdish and Mahesh (A-3) beat him with lathis. He further explained that due to lathi blows, Rameshwar and Prabhat died. From his evidence, it is seen that the incident occurred in the field of Gopal (A-1) and after killing Rameshwar, the accused persons chased Prabhat and inflicted lathi blows, due to which, he also died.

11. Dr. Shiv Kumar Tanwar, who did post mortem, was examined as PW-25. He also explained that the death of Rameshwar and Prabhat was due to the injuries inflicted with lathis.

12. The materials placed and relied on by the prosecution show that Rameshwar (since deceased), Bodu Ram (PW-7) and Bhagwan Sahai (PW-8) had gone to the field of the appellants and there was a fight between both the groups. It is also clear that the appellants fought to repel the attack and in the course of incident, both sides sustained injuries, as a result of which, Rameshwar died. In such circumstances, it would be possible for this Court to accept the claim of the appellants that since they were defending themselves, they had a right of

private defence. In fact, the High Court has accepted the above stand.

13. Regarding the plea of private defence, it is useful to refer a decision of this Court in *V. Subramani & Anr. Vs. State of T.N.* (2005) 10 SCC 358. The following principles and conclusion are relevant:

> "11. The only question which needs to be considered is the alleged exercise of right of private defence. Section 96 IPC provides that nothing is an offence which is done in the exercise of the right of private defence. The section does not define the expression "right of private defence". It merely indicates that nothing is an offence which is done in the exercise of such right. Whether in a particular set of circumstances, a person legitimately acted in the exercise of the right of private defence is a question of fact to be determined on the facts and circumstances of each case. No test in the abstract for determining such a question can be laid down. In determining this question of fact, the court must consider all the surrounding circumstances. It is not necessary for the accused to plead in so many words that he acted in self-defence. If the circumstances show that the right of private defence was legitimately exercised, it is open to the court to consider such a plea. In a given case the court can consider it even if the accused has not taken it, if the same is available to be considered from the material on record. Under Section 105 of the Indian Evidence Act, 1872 (in short "the Evidence Act"), the burden of proof is on the accused, who sets up the plea of self-defence, and, in the absence of proof, it is not possible for the court to presume the truth of the plea of self-defence. The court shall presume the absence of such circumstances. It is for the accused to place necessary material on record either by himself adducing positive evidence or by eliciting necessary facts from the witnesses examined for the prosecution. An accused taking the plea

of the right of private defence is not necessarily required to call evidence; he can establish his plea by reference to circumstances transpiring from the prosecution evidence itself. The question in such a case would be a question of assessing the true effect of the prosecution evidence, and not a question of the accused discharging any burden. Where the right of private defence is pleaded, the defence must be a reasonable and probable version satisfying the court that the harm caused by the accused was necessary for either warding off the attack or for forestalling the further reasonable apprehension from the side of the accused. The burden of establishing the plea of self-defence is on the accused and the burden stands discharged by showing preponderance of probabilities in favour of that plea on the basis of the material on record. (See *Munshi Ram v. Delhi Admn*. (1968) 2 SCR 455, *State of Gujarat v. Bai Fatima*,(1975) 2 SCC 7, *State of U.P. v. Mohd. Musheer Khan, (1977) 3 SCC 562,* and *Mohinder Pal Jolly v. State of Punjab,(1979) 3 SCC 30*.) Sections 100 to 101 define the extent of the right of private defence of body. If a person has a right of private defence of body under Section 97, that right extends under Section 100 to causing death if there is reasonable apprehension that death or grievous hurt would be the consequence of the assault. The oft-quoted observation of this Court in *Salim Zia v. State of U.P.,(1979) 2 SCC 648* runs as follows: (SCC p. 654, para 9)

"It is true that the burden on an accused person to establish the plea of self-defence is not as onerous as the one which lies on the prosecution and that while the prosecution is required to prove its case beyond reasonable doubt, the accused need not establish the plea to the hilt and may discharge his onus by establishing a mere preponderance of probabilities either by laying basis for that plea in the cross-examination of prosecution witnesses or by adducing defence evidence."

The accused need not prove the existence of the right of private defence beyond reasonable doubt. It is enough for him to show as in a civil case that the preponderance of probabilities is in favour of his plea."

Based on the above principles, in view of the discussion of the prosecution witnesses, viz., PWs 7, 8 and 10 coupled with the fact that the incident occurred in the field of the appellants, who also sustained injuries which is evident from the evidence of the doctor, who examined the injuries of Gopal (A-1) and Mahesh (A-3)-appellants herein, the stand of the appellants, as rightly argued by learned *amicus curiae*, is to be accepted. However, as per the prosecution story, not only Rameshwar but in the same incident Prabhat also died due to lathi blows inflicted by the appellants herein.

14. The only moot question for consideration is whether the right of private defence is still available to the appellants when they chased Prabhat near Durga-ki-Dhani and inflicted lathi blows on him? We have already noted the evidence of PWs 7, 8 and 10 which clearly established that Prabhat (since deceased) was not present at the place where Rameshwar was assaulted. It is also seen that after inflicting injuries on the person of Rameshwar, the appellants ran towards Prabhat, who was standing 10 steps away from the place of incident. It is further seen from their evidence that after seeing the incident relating to the death of Rameshwar, Prabhat started running towards Durga-ki-Dhani and he was chased by the accused persons and they inflicted lathi blows on his person. In such a situation, we are of the view that the appellants have no right to invoke the right of self defence by chasing Prabhat and causing fatal injuries on him. In other words, the reasonable apprehension has disappeared when they noticed that Prabhat was running away from the scene in order to escape, in such circumstances though the appellants were entitled to the plea of private defence insofar as the death of Ramehwar is concerned, they are not justified in availing the same for the

cause of death of Prabhat. On the other hand, they exceeded their limit and the materials placed by the prosecution clearly show that they chased Prabhat at some distance near Durga-Ki-Dhani, pushed him down and inflicted several blows with lathis due to which he died. In such circumstances, the trial Court was justified in convicting the appellants under Section 302 read with Section 34 of IPC and sentencing them to suffer RI for life. Taking note of all these aspects, we are of the view that the High Court was fully justified in confirming the order of conviction and sentence insofar as the present appellants and dismissing the appeal in respect of them.

15. In the light of the above discussion, we find no merit in the appeal and the same is accordingly dismissed. We wish to record our appreciation for the assistance rendered by Mr. Kanhaiya Priyadarshi, learned *amicus curiae* in putting forth the case of the appellants.

B.B.B. Appeal dismissed.

SHYAM LAL VERMA
v.
CENTRAL BUREAU OF INVESTIGATION
(Criminal Appeal No. 171 of 2013)

JANUARY 21, 2013

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

Prevention of Corruption Act, 1988 – Offences under – Applicability of the Probation of Offenders Act – Appellant, a retired employee of Post Office – Allegation that he misappropriated money – Trial court convicted appellant u/s.477A IPC r/w s.13(1)(c) and 13(2) of the Prevention of Corruption Act – However, instead of awarding sentence, the trial court released the appellant under the Probation of Offenders Act – High Court allowed appeal of the CBI and sentenced appellant to one year under ss.477A IPC and u/s.13(1)(c) read with s.13(2) of the Prevention of Corruption Act for a further period of one year – Both sentences directed to run concurrently – Whether the Probation of Offenders Act is applicable to offences under the Prevention of Corruption Act – Held: Since s.7 as well as s.13 of the Prevention of Corruption Act provide for a minimum sentence of six months and one year respectively in addition to the maximum sentences as well as imposition of fine, claim for grant of relief under the Probation of Offenders Act is not permissible – In cases where a specific provision prescribes a minimum sentence, the provisions of the Probation Act cannot be invoked – No valid ground to interfere with the impugned order of the High Court – Appellant to surrender and to undergo remaining period of sentence – Probation of Offenders Act, 1958 – Penal Code, 1860 – s.477A.

State Through SP, New Delhi v. Ratan lal Arora **2004 (4) SCC 590: 2004 (1) Suppl. SCR 631 and** *State Represented*

by Inspector of Police, Pudukottai T.N. v. A. Parthiban **2006 (11) SCC 473: 2006 (7) Suppl. SCR 35 – relied on.**

Case Law Reference:

2004 (1) Suppl. SCR 631	**relied on**	**Para 8**
2006 (7) Suppl. SCR 35	**relied on**	**Para 8**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 171 of 2013.

From the Judgment & Order dated 13.03.2012 of the High Court of Uttarakhand at Nainital in Criminal Appeal No. 291 of 2004.

Fakhruddin, Raj Kishor Choudhary Sheeba Fakhruddin Adil, Surya Kamal Mishra Ashok Mathur for the Appellant.

Prakriti Purnima, T.A. Khan, B.V. Balram Das, Arvind Kumar Sharma for the Respondent.

The following Order of the Court was delivered

O R D E R

1. Leave granted.

2. The appellant is a retired employee of Post Office. The incident occurred in 1993-94. The allegation against him is that he misappropriated to the extent of Rs.1,35,240/- (Rupees one lakh thirty five thousand and two hundred forty). The employees of various departments deposited their amount, but the appellant did not remit the amount and failed to make entry in the ledger. He was charged under Section 477-A IPC read with Section 3(1)(c) and 13(2) of the Prevention of Corruption Act 1988.

3. After fullfleged trial, the Trial Court convicted him under the above mentioned Sections. However, instead of awarding

sentence, the Trial Court released the appellant under the Probation of Offenders Act,1958 on executing a personal bond in the sum of Rs.50,000/- and furnishing two sureties each of the like amount for a period of one year. He was also directed to maintain peace and good behaviour during this period.

4. Aggrieved by the above decision of the Trial Court, the CBI filed an appeal before the High Court. Admittedly, the accused did not file any appeal challenging the order of conviction. By the impugned order, the High Court allowed the appeal of the CBI and sentenced him for a period of one year under Sections 477-A IPC and under Section 13(1)(c) read with Section 13(2) for a further period of one year. Both the sentences were directed to run concurrently.

5. Questioning the order of the High Court sentencing him, as stated above, the accused preferred the present appeal by way of special leave.

6. Heard learned senior counsel appearing on behalf of the appellant and learned counsel appearing on behalf of the respondent-CBI.

7. The only point for consideration in this appeal is, whether the Probation of Offenders Act is applicable to offences under the Prevention of Corruption Act? The Trial Court applied Probation of Offenders Act and sentenced him accordingly. This was reversed by the High Court and ultimately imposed substantive sentence of one year.

8. It is not in dispute that the issue raised in this appeal has been considered by this Court in 2004 (4) SCC 590 – *State Through SP, New Delhi Versus Ratan lal Arora* wherein in similar circumstances, this Court held that since Section 7 as well as Section 13 of the Prevention of Corruption Act provide for a minimum sentence of six months and one year respectively in addition to the maximum sentences as well as imposition of fine, in such circumstances claim for granting relief under the

Probation of Offenders Act is not permissible. In other words, in cases where a specific provision prescribed a minimum sentence, the provisions of the Probation Act cannot be invoked. Similar view has been expressed in 2006 (11) SCC 473 – *State Represented by Inspector of Police, Pudukottai, T.N. Vs. A. Parthiban.*

9. In view of the settled legal position, we find no valid ground to interfere with the impugned order of the High Court. Consequently, the appeal is dismissed.

10. In view of the dismissal of the appeal, the appellant shall surrender and has to undergo remaining period of sentence. His bail bonds executed pursuant to our order dated 05.07.2012 shall stand cancelled.

B.B.B. Appeal dismissed.

DEEPAK AGGARWAL
v.
KESHAV KAUSHIK AND OTHERS
(Civil Appeal No. 561 of 2013)

JANUARY 21, 2013

[R.M. LODHA, ANIL R. DAVE AND RANJAN GOGOI, JJ.]

CONSTITUTION OF INDIA, 1950:

Art. 233(2) – Appointment to the post of Additional District Judge through direct recruitment from Bar – Eligibility – Held: One of the essential requirements articulated by the expression "if he has been for not less than seven years an advocate" in Art. 233(2) is that such person must with requisite period be continuing as an advocate on the date of application.

Art. 233(2) – Expression 'advocate or pleader' – Held: Refers to legal practitioner and, thus, it means a person who has a right to act and/or plead in court on behalf of his client — For the purposes of Art. 233(2) both a Public Prosecutor and an Assistant Public Prosecutor are covered by the expression 'advocate'– Rendering of service as a Public Prosecutor or as Assistant Public Prosecutor is deemed to be practice as an advocate – Code of Civil Procedure, 1908 – ss. 2 (7) and 2(15) – 'Government pleader' – 'Pleader' – Code of Criminal Procedure, 1973 – ss. 2(4) (as applicable in State of Haryana) 24 and 25 – Public Prosecutor – Assistant Public Prosecutor – Bar Council of India Rules – rr. 43 and 49.

Art. 233(2) – Appointment to the post of Additional District Judge through direct recruitment from Bar – Assistant District Attorney/Public Prosecutor/Deputy Advocate General –

Eligibility – Held: Since private appellants did not cease to be advocate while working as Assistant District Attorney/Public Prosecutor/Deputy Advocate General, the period during which they have been working as such has to be considered as the period practicing law – Thus, all of them have been advocates for not less than seven years and were enrolled as advocates and were continuing as advocates on the date of the application – They fulfilled the eligibility under Art. 233 (2) of the Constitution and r. 11 of the HSJS Rules on the date of application – Haryana Superior Judicial Service Rules, 2007 – rr. 5(ii) and 11.

Art. 233 (2) – Expression "the service" occurring in Art. 233(2) means "judicial service" – Other members of the service of Union or State are excluded because Art. 233 contemplates only two sources from which District Judges can be appointed: (i) judicial service; and (ii) the advocate/pleader or in other words from Bar.

The five private appellants, while working as Assistant District Attorney/Public Prosecutor/Deputy Advocate General, were selected through direct recruitment to the post of Additional District and Sessions Judge in the Haryana Superior Judicial Service (HSJS). However, the High Court, in writ petition quashed their selection holding that they did not have the requisite criteria to qualify for the recruitment as contemplated in Art. 233 of the Constitution of India and that except appellant 'RM', the other appellants did not have requisite experience.

In the instant appeals filed by the five candidates and the High Court on administrative side, the questions for consideration before the Court were: (i) What is meant by Advocate' or 'pleader' under Art. 233(2)"? (ii) Whether a District Attorney/Additional District Attorney/Public Prosecutor/Assistant Public Prosecutor/ Assistant Advocate General, who is full time employee of the

Government and governed and regulated by the statutory rules of the State and is selected by direct recruitment through the Public Service Commission, is eligible for appointment to the post of District Judge under Article 233(2) of the Constitution?" (iii) "What is the meaning of the expression "the service" under Article 233(2) of the Constitution"?

Allowing the appeals, the Court

HELD: 1.1. Clause (2) of Art. 233 of the Constitution of India, 1950 lays down three essentials for appointment of a person to the post of District Judge; (i) a person shall not be in service of the Union or of the State; (ii) he has been for not less than seven years an advocate or a pleader; and (iii) his name is recommended by the relevant High Court for appointment. Thus, as regards a person not already in service what is required is that he should be an advocate or pleader of seven years' standing and that his name is recommended by the High Court for appointment as District Judge. [para 42] [432-D-F]

1.2. The expression, 'the service' in Art. 233(2) of the Constitution means the "judicial service". Other members of the service of Union or State are, as it is, excluded because Art. 233 contemplates only two sources from which the District Judges can be appointed. These sources are: (i) judicial service; and (ii) the advocate/ pleader or in other words from the Bar. District Judges can, thus, be appointed from no source other than judicial service or from amongst advocates. Article 233(2) excludes appointment of District Judges from the judicial service and restricts eligibility of appointment as District Judges from amongst the advocates or pleaders having practice of not less than seven years and who have been recommended by the High Court as such. [para 46] [439-A-C]

Chandra Mohan v. State of U.P. and Others **AIR 1966 SC 1987;** *Satya Narain Singh v. High Court of Judicature at Allahabad and Others* **1985 (2) SCR 112 = 1985 (1) SCC 225 – relied on.**

Rameshwar Dayal v. State of Punjab and Others **1961 SCR 874 = 1961 AIR 816 - referred to**

2. Despite the differences in the role and position of Public Prosecutor and Assistant Public Prosecutor, for the purposes of Art. 233(2) there is not much difference between the two and both of them are covered by the expression 'advocate'. It is so for more than one reason. In the first place, a Public Prosecutor u/s 24 Cr.P.C. is appointed by the State Government or the Central Government for conduct of prosecution, appeal or other proceedings on its behalf in the High Court or for a district; and Assistant Public Prosecutor is appointed u/s 25 Cr.P.C. by the State Government or the Central Government to conduct prosecution on its behalf in the courts of Magistrates. So the main function of Public Prosecutor as well as Assistant Public Prosecutor is to act and/or plead on behalf of the Government in a court; both of them conduct cases on behalf of the government. Secondly and remarkably, for the purposes of counting experience as an advocate as prescribed in sub-ss. 24(7) and 24(8) CrPC, the period, during which a person has rendered service as a Public Prosecutor or as Assistant Public Prosecutor, is treated as being in practice as an advocate u/s 24(9) Cr.P.C. Thus, the rendering of service as a Public Prosecutor or as Assistant Public Prosecutor is deemed to be practice as an advocate. [para 74] [467-E-H; 468-A-B]

Sushma Suri v. Government of National Capital Territory of Delhi and Another **1998 (2) Suppl. SCR 187 = 1999 (1) SCC 330 – relied on**

Smt. Jyoti Gupta v. Registrar General, High Court of M.P., Jabalpur and Another **2008 (2) MPLJ 486;** *K. Appadurai v. The Secretary to Government of Tamil Nadu and Another* **2010-4-L.W.454 - approved**

State of U.P. & Another v. Johri Mal **2004 (1) Suppl. SCR 560 = 2004 (4) SCC 714;** *Mahesh Chandra Gupta v. Union of India and Others* **2009 (10) SCR 921 = 2009 (8) SCC 273;** *State of U.P. v. Ramesh Chandra Sharma and others* **1995 (4) Suppl. SCR 383 = 1995 (6) SCC 527;** *Satish Kumar Sharma v. Bar Council of H.P.* **2001 (1) SCR 34 = 2001 (2) SCC 365;** *Sudhakar Govindrao Deshpande v. State of Maharashtra and Others* **(1986)** Labour & Industrial **Cases 710;** *K.R. Biju Babu v. High Court of Kerala & Another* **(2008) Labour & Industrial Cases 1784;** *Chandra Mohan v. State of U.P. and Others* **AIR 1966 SC 1987;** *Sunil Kumar Goyal v. Rajasthan Public Service Commission* **2003 (1) Suppl. SCR 220 = 2003 (6) SCC 171;** *Mukul Dalal and Others v. Union of India and Others* **1988 (3) SCR 868 = 1988 (3) SCC 144** *Sidhartha Vashisht alias Manu Sharma v. State (NCT of Delhi)* **2010 (4) SCR 103 = 2010 (6) SCC 1;** *Shiv Kumar v. Hukam Chand and Another* **(1999) 7 SCC 467 and** *Hitendra Vishnu Thakur and Others v. State of Maharashtra and Others* **(1994) 4 SCC 602;** *Centre for Public Interest Litigation and Others v. Union of India and Others* **2012 (3) SCC 117,** *Sheonandan Paswan v. State of Bihar and Others* **1987 (1) SCR 702 = 1987 (1) SCC 288;** *S.B. Shahane and Others v. State of Maharashtra and Another* **1995 (3) SCR 672 = 1995 Supp (3) SCC 37- referred to**

Samarendra Das, Advocate v. State of West Bengal and Others **2004 (1) SCR 532 = 2004 (2) SCC 274 - overruled**

Harry Berger v. United States of America **295 U.S. 78 - referred to.**

The Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders; *Standards of*

Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors; European Guidelines on Ethics and Conduct for Public Prosecutors; The Budapest Guidelines **adopted in the Conference of Prosecutors General of Europe on 31st May, 2005 – referred to**

3.1. There is no doubt about the meaning of the expression "advocate or pleader" in Art. 233(2) of the Constitution. This should bear the meaning it had in law preceding the Constitution and as the expression was generally understood. The expression "advocate or pleader" refers to legal practitioner and, thus, it means a person who has a right to act and/or plead in court on behalf of his client. There is no indication in the context to the contrary. It refers to the members of the Bar practising law. The expression "advocate or pleader" in Art. 233(2) has been used for a member of the Bar who conducts cases in court or, in other words acts and/or pleads in court on behalf of his client. [para 77] [472-A-C]

Sushma Suri v. Government of National Capital Territory of Delhi and Another **1998 (2) Suppl. SCR 187 = 1999 (1) SCC 330 – relied on**

Satish Kumar Sharma v. Bar Council of H.P. **2001 (1) SCR 34 = 2001 (2) SCC 365;** *Mallaraddi H. Itagi and Others v. The High Court of Karnataka, Bangalore and Another* **2002 (4) Karnataka Law Journal 76;** *Mundrika Prasad Sinha v. State of Bihar* **1980 (1) SCR 759 = 1979 AIR 1871;** *Kumari Shrilekha Vidyarthi and Others v. State of U.P. and Others* **1990 (1) Suppl. SCR 625 = 1991 (1) SCC 212;** *State of U.P. and Others v. U.P. State Law Officers Association and Others* **1994 (1) SCR 348 = 1994 (2) SCC 204 ;** *Gurjot Kaur and Others v. High Court of Jammu and Kashmir and Another* **decided on 14.09.2010,** *Akhilesh Kumar Misra and Others v. The High Court of Judicature at Allahabad and Others* **AIR (1995) Allahabad 148 – referred to.**

3.2. What r. 49 of the BCI Rules provides is that an advocate shall not be a full time salaried employee of any person, government, firm, corporation or concern so long as he continues to practice. The 'employment' spoken of in r. 49 does not cover the employment of an advocate who has been solely or, in any case, predominantly employed to act and/or plead on behalf of his client in courts of law. If a person has been engaged to act and/or plead in court of law as an advocate although by way of employment on terms of salary and other service conditions, such employment is not what is covered by r. 49 as he continues to practice law but, on the other hand, if he is employed not mainly to act and/or plead in a court of law, but to do other kinds of legal work, the prohibition in r. 49 immediately comes into play and then he becomes a mere employee and ceases to be an advocate. The bar contained in r. 49 applies to an employment for work other than conduct of cases in courts as an advocate. In this view of the matter, the deletion of second and third para by the Resolution dated 22.6.2001 has not materially altered the position insofar as advocates who have been employed by the State Government or the Central Government to conduct civil and criminal cases on their behalf in the courts are concerned. [para 84] [476-C-G]

3.3. The Division Bench of the High Court has in respect of all the five private appellants – Assistant District Attorney, Public Prosecutor and Deputy Advocate General – recorded undisputed factual position that they were appearing on behalf of their respective States primarily in criminal/civil cases and their appointments were basically under the C.P.C. or Cr.P.C. That means their job has been to conduct cases on behalf of the State Government/C.B.I. in courts. Each one of them continued to be enrolled with the respective State Bar Council. In view of this factual position and the legal position, it

cannot be said that these appellants were ineligible for appointment to the office of Additional District and Sessions Judge. None of the five private appellants, on their appointment as Assistant District Attorney/Public Prosecutor/Deputy Advocate General, ceased to be 'advocate' and since each one of them continued to be 'advocate', they cannot be considered to be in the service of the Union or the State within the meaning of Art. 233(2). [para 87] [478-A-C-D-E]

4.1. As regards construction of the expression, "if he has been for not less than seven years an advocate" in Art. 233(2) of the Constitution, this expression means seven years as an advocate immediately preceding the application and not seven years any time in the past. This is clear by use of 'has been'. The present perfect continuous tense is used for a position which began at some time in the past and is still continuing. Therefore, one of the essential requirements articulated by the expression in Art. 233(2) is that such person must with requisite period be continuing as an advocate on the date of application. [para 88] [478-F-H; 479-A]

4.2. Rule 11 of the HSJS Rules provides for qualifications for direct recruits in Haryana Superior Judicial Service. Clause (b) of this rule provides that the applicant must have been duly enrolled as an advocate and has practised for a period not less than seven years. Since these five private appellants did not cease to be advocate while working as Assistant District Attorney/Public Prosecutor/Deputy Advocate General, the period during which they have been working as such has to be considered as the period practising law. Thus, all of them have been advocates for not less than seven years and were enrolled as advocates and were continuing as advocates on the date of the application. [para 89] [479-B-D]

5. This Court, accordingly, holds that the five private

appellants (Respondent Nos. 9,12,13,15 and 18 in CWP No. 9157/2008 before the High Court) fulfilled the eligibility under Art. 233(2) of the Constitution and r.11 (b) of the HSJS Rules on the date of application. The impugned judgment as regards them and is set aside. [para 90] [479-D-E]

Case Law Reference:

1980 (1) SCR 759	cited	para 21
1988 (3) SCR 868	cited	para 21
1990 (1) Suppl. SCR 625	cited	para 21
AIR 1966 SC 1987	cited	para 21
1985 (2) SCR 112	cited	para 21
1998 (2) Suppl. SCR 187	cited	para 21
2001 (1) SCR 34	cited	para 21
2003 (1) Suppl. SCR 220	cited	para 21
1961 SCR 874	referred to	para 28
(2008) Labour & Industrial Cases 1784	referred to	para 39
(1986) Labour & Industrial Cases 710	referred to	para 39
AIR (1995) Allahabad 148	referred to	para 39
1994 (1) SCR 348	referred to	para 49
1995 (3) SCR 672	relied on	para 50
2004 (1) Suppl. SCR 560	referred to	para 54
2009 (10) SCR 921	referred to	para 55
2002 (4) Karnataka Law Journal 76	referred to	para 56

2008 (2) MPLJ 486	**referred to**	**para 60**
2010-4-L.W.454	**referred to**	**para 61**
1995 (4) Suppl. SCR 383	**referred to**	**para 62**
2004 (1) SCR 532	**overruled**	**para 62**
295 U.S. 78	**referred to**	**para 66**
2010 (4) SCR 103	**referred to**	**para 72**
2010 (6) SCC 1	**referred to**	**para 72**
(1994) 4 SCC 602	**referred to**	**para 72**
2012 (3) SCC 117	**referred to**	**para 73**
1987 (1) SCR 702	**referred to**	**para 73**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 561 of 2013.

From the Judgment & Order dated 18.05.2010 of the High Court of Punjab & Haryana at Chandigarh in CWP No. 9157 of 2008.

WITH

562-567, 568-572, 573-578, 579-584, 585-590 & 591-596 of 2013.

P.P. Rao, B.H. Marlapalle, Mahabir Singh, Chetan Sharma, Rajiv Datta, Rupinder Singh Suri, Rakesh K. Khanna, P.S. Patwalia, Raju Ramchandran, A.K. Ganguli, J.S. Attri, P.P. Khurana, A. Mariarputham, Vikas Singh, Manjit Singh, AAG, Mahalakshmi Pavani, G. Balaji, Apeksha Sharan, Mukesh Kumar Singh, Ajay Sharma, Rajeev Sharma, Keshav Kaushik, Kanica, Govind N. Kaushik, Dr. Kailash Chand, S.S. Ray, R.S. Gulia, Vaibhav Gulia, Rakhi Ray, Rakesh Dahiya, D.Mahesh Babu, Sudeepa, Aman S. Bhardwaj, Shailendra Bhardwaj, Ajay Veer Singh, R.K. Verma, Nitin Jain, Anisha Jain, Mohd. Irshad Hanif, Pallavi Tayal, Bela Khattar Chauhan, Surender Chauhan,

Vibhuti Sushant Gupta, Govind Narayan Kaushik, Seema Rao, Ashok K. Mahajan, Nikhil Nayyar, T.V.S. Raghavendra Sreyas, Pritha Srikumar, Siddharth Mittal, S.K. Sabharwal, Prashant Bhushan, Rameshwar Prasad Goyal, Priyanka Bharihoke, Jayshree Wad, Rajesh Singh Chauhan, Tamali Wad, Ashish Wad, Kanika Bhutani (for J.S. Wad & Co.), Annam D.N. Rao Neelam Jain, Yusuf Khan, Sudhir Talwar, Nitin Mishra, Prashant Chaudhary, Pratap Venugopal, Surekha Raman, Namrata Sood, Ajay Sharma (for K.J. John & Co), Gurvinder Suri, J.H. Jafri, Nidhi Gupta, Tarun Gupta, S. Janani, Gagan Gupta, Ajay Pal, P.D. Sharma, Ajay Bansal, Devendra Singh, Dhiraj Gupta, Gaurav Yadav, Ajay Choudhary, Surya Kant, Dushyant Parasar, Purnima Jauhari, Jayant Kumar Mehta, Sukant Vikram, Abhinav Sharma, Pardeep Dahiya, Anupama Bansal, Achin Mittal, Shiel Sethi, Ashwani Kumar, Rajeev Kumar Bansal, Akshay K. Ghai, Sanjeev Bansal, Tarun Gupta, Rahul Kaushik, S. Wasim A. Qadri, M.P.S. Tomar, B.V. Balram Das, Sadhana Sandhu, Anil Katiyar, Kamal Mohan Gupta, Sivan Madathil, Usha Nandini V., Biju P. Raman for the appearing parties.

The Judgment of the Court was delivered by

R.M. LODHA, J. 1. Leave granted. What is the meaning of the expression 'the service' in Article 233(2) of the Constitution of India? What is meant by 'advocate' or 'pleader' under Article 233(2)? Whether a District Attorney/Additional District Attorney/Public Prosecutor/Assistant Public Prosecutor/ Assistant Advocate General, who is full time employee of the Government and governed and regulated by the statutory rules of the State and is appointed by direct recruitment through the Public Service Commission, is eligible for appointment to the post of District Judge under Article 233(2) of the Constitution? These are the questions which have been raised for consideration in this group of appeals.

2. The above questions and some other incidental questions in these appeals have arisen from the judgment of the Punjab and Haryana High Court delivered on 18.05.2010.

The Division Bench of the High Court by the above judgment disposed of 12 writ petitions wherein challenge was laid to the selection and appointment of certain candidates to the post of Additional District and Sessions Judge in the Haryana Superior Judicial Service (HSJS) on diverse grounds. The High Court by its judgment disposed of the writ petitions in the following manner :

"(A) Selections/appointments of respondents no. 9 – (Dinesh Kumar Mittal), 12 (Rajesh Malhotra), 13 (Deepak Aggarwal), 15 (Chandra Shekhar) and 18 (Desh Raj Chalia) in CWP No. 9157 of 2008 (wherever they may be in other writ petitions) as Additional District and Sessions Judges, are hereby quashed. This direction shall, however, remain in abeyance for a period of two months to enable the High Court to make alternative arrangements;

(B) As a consequence of the quashment of the selections/ appointments of above named respondents, the resultant five vacancies shall be filled up from the candidates next in the order of merit, out of the panel prepared by the Selection Committee;

(C) The appointment of Fast Track Court Judges by a process of absorption after further examination and selection contained in the recommendation of the Selection Committee dated 18.03.2008 is affirmed.

(D) Order dated 22.09.2008 (Annexure P-8 in CWP No. 17708 of 2008 rejecting the request of the High Court for de-reservation of six vacancies (four Scheduled Caste, 2 Backward Classes) is hereby quashed. Resultantly, the matter is remitted back to the Government to re-consider the request of the High Court for de-reservation in relaxation of rules by the competent authority empowered under the Government instructions dated 7.9.2008 and Rule 31 of the Haryana Superior Judicial Service Rules, 2007. The process of re-consideration shall be completed within six weeks and the decision be communicated to the High Court.

(E) If on such re-consideration, the State decides to de-reserve the vacancies, candidates recommended by the High Court vide its recommendation letter dated 25.4.2008, shall be appointed."

3. The appellants in this group of seven appeals are, Deepak Aggarwal, Dinesh Kumar Mittal, Rajesh Malhotra, Chandra Shekhar and Desh Raj Chalia, whose selections/ appointments as Additional District and Sessions Judges have been quashed by the High Court, and the Punjab and Haryana High Court, Chandigarh on its administrative side.

4. On 18.05.2007, the Punjab and Haryana High Court, Chandigarh through its Registrar General issued a notification inviting applications for recruitment to certain posts of Additional District and Sessions Judge. The written examinations were conducted pursuant to the said notification wherein 64 candidates were recommended for the interview. After conducting the interview, the High Court recommended the names of 16 candidates in order of merit to the post of Additional District and Sessions Judge in the State of Haryana by direct recruitment. Of the 16 candidates recommended by the High Court, 5 were the appellants. At the time of appointment, Deepak Aggarwal was working as Assistant District Attorney in Himachal Pradesh; Chandra Shekhar and Desh Raj Chalia were working as Assistant District Attorney in the State of Haryana, Rajesh Malhotra was working as Public Prosecutor in the office of Central Bureau of Investigation and Dinesh Kumar Mittal was working as Deputy Advocate General in the office of the Advocate General, Punjab.

5. Based on the recommendation of the High Court, the State of Haryana issued appointment orders. Some of the unsuccessful candidates filed writ petitions before the High Court raising diverse grounds of challenge. However, as indicated above, the appointments of five appellants who were working as Assistant District Attorney/Public Prosecutor/Deputy

Advocate General have been quashed holding that they did not have the requisite criteria to qualify for the recruitment as contemplated in Article 233 of the Constitution and that some of the candidates did not have requisite experience.

6. Article 233 of the Constitution of India provides for appointment of District Judges. It reads as follows:

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

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

7. Haryana Superior Judicial Service Rules, 2007 (for short, 'HSJS Rules') regulate the appointment of subordinate judges in the State of Haryana. Part III of these Rules deals with method of recruitment. Rules 5, 6 and 11 of the HSJS Rules are relevant for the purposes of consideration of these appeals and they read as under :

"R.5. Recruitment to the Service shall be made by the Governor,—

(i) by promotion from amongst the Haryana Civil Service (Judicial Branch) in consultation with the High Court; and

(ii) by direct recruitment from amongst eligible Advocates on the recommendations of the High Court on the basis of the written and *viva voce* test conducted by the High Court.

R.6. (1) Recruitment to the Service shall be made,—

(a) 50 per cent by promotion from amongst the Civil

Judges (Senior Division)/Chief Judicial Magistrates/Additional Civil Judges (Senior Division) on the basis of principle of merit-cum-seniority and passing a suitability test;

(b) 25 per cent by promotion strictly on the basis of merit through limited competitive examination of Civil Judges (Senior Division) having not less than five years qualifying service as Civil Judges (Senior Division)/Chief Judicial Magistrates/Additional Civil Judges (Senior Division); and who are not less than thirty five years of age on the last date fixed for submission of applications for taking up the limited competitive examinations; and

(c) 25 per cent of the posts shall be filled by direct recruitment from amongst the eligible Advocates on the basis of the written and *viva voce* test, conducted by the High Court.

(2) The first and second post would go to category (a) (by promotion on the basis of merit-cum-seniority), third post would go to category (c) (direct recruitment from the bar) and fourth post would go to category (b) (by limited competitive examination) of rule 6, and so on.

R. 11. The qualifications for direct recruits shall be as follows :

(a) must be a citizen of India;

(b) must have been duly enrolled as an Advocate and has practiced for a period not less than seven years;

(c) must have attained the age of thirty five years and have not attained the age of forty five years on the 1st day of January of the year in which the applications for recruitment are invited."

8. It will be convenient at this stage to refer to some other provisions which have bearing in the matter and are relevant

for the purpose of these appeals. Section 2(u) of the Code of Criminal Procedure, 1973 (for short, 'Cr.P.C.') defines 'Public Prosecutor' to mean any person appointed under Section 24 and includes any person acting under the directions of a Public Prosecutor. Section 24 deals with 'Public Prosecutors'. It reads as under:

"24. Public Prosecutors,— (1) For every High Court, the Central Government or the State Government shall, after consultation with the High Court, appoint a Public Prosecutor and may also appoint one or more Additional Public Prosecutors for conducting in such court, any prosecution, appeal or other proceeding on behalf of the Central Government or State Government, as the case may be.

(2) The Central Government may appoint one or more Public Prosecutors for the purpose of conducting any case or class of cases in any district, or local area.

(3) For every district the State Government shall appoint a Public Prosecutor and may also appoint one or more Additional Public Prosecutors for the district:

Provided that the Public Prosecutor or Additional Public Prosecutor appointed for one district may be appointed also to be a Public Prosecutor or an Additional Public Prosecutor, as the case may be, for another district.

(4) The District Magistrate shall, in consultation with the Sessions Judge, prepare, a panel of names of persons, who are, in his opinion fit to be appointed as Public Prosecutors or Additional Public Prosecutors for the district.

(5) No person shall be appointed by the State Government as the Public Prosecutor or Additional Public Prosecutor for the district unless his name appears in the panel of names prepared by the District Magistrate under sub-section (4).

(6) Notwithstanding anything contained in sub-section (5), where in a State there exists a regular Cadre of Prosecuting Officers, the State Government shall appoint a Public Prosecutor or an Additional Public Prosecutor only from among the persons constituting such Cadre:

Provided that where, in the opinion of the State Government, no suitable person is available in such Cadre for such appointment that Government may appoint a person as Public Prosecutor or Additional Public Prosecutor, as the case may be, from the panel of names prepared by the District Magistrate under sub-section (4).

Explanation - For the purposes of this sub-section,—

(a) "regular Cadre of Prosecuting Officers" means a Cadre of Prosecuting Officers which includes therein the post of a Public Prosecutor, by whatever name called, and which provides for promotion of Assistant Public Prosecutors, by whatever name called, to that post;

(b) "Prosecuting Officer" means a person, by whatever name called, appointed to perform the functions of a Public Prosecutor, an Additional Public Prosecutor or an Assistant Public Prosecutor under this Code.

(7) A person shall be eligible to be appointed as a Public Prosecutor or an Additional Public Prosecutor under sub-section (1) or sub-section (2) or sub-section (3) or sub-section (6), only if he has been in practice as an advocate for not less than seven years.

(8) The Central Government or the State Government may appoint, for the purposes of any case or class of cases, a person who has been in practice as an advocate for not less than ten years as a Special Public Prosecutor:

"Provided that the Court may permit the victim to engage an advocate of his choice to assist the prosecution under this sub-section."

(9) For the purposes of sub-section (7) and sub-section (8), the period during which a person has been in practice, as a pleader, or has rendered (whether before or after the commencement of this Code) service as a Public Prosecutor or as an Additional Public Prosecutor or Assistant Public Prosecutor or other Prosecuting Officer, by whatever name called, shall be deemed to be the period during which such person has been in practice as an advocate."

9. Some of the States have amended Section 24 Cr.P.C. Insofar as Haryana is concerned, an explanation has been added to sub-section (6) of Section 24 with effect from 29.11.1985 which provides that for the purpose of sub-section (6), the persons constituting the Haryana State Prosecution Legal Service (Group A) or Haryana State Prosecution Legal Service (Group B) shall be deemed to be a regular Cadre of Prosecuting Officers.

10. Section 25 Cr.P.C deals with Assistant Public Prosecutors for conducting prosecutions in the court of Magistrates. Section 25A was brought in the Cr.P.C. by Act 25 of 2005. It, inter alia, provides that the State Government may establish a Directorate of Prosecution consisting of a Director of Prosecution and as many Deputy Directors of Prosecution as it thinks fit. Sub-section (5) of Section 25A makes a provision that every Public Prosecutor, Additional Public Prosecutor and Special Public Prosecutor appointed by the State Government under sub-section (1) or under sub-section (8) of Section 24 to conduct cases in the High Court shall be subordinate to the Director of Prosecution. In terms of sub-section (6) of Section 25A, every Public Prosecutor, Additional Public Prosecutor and Special Public Prosecutor appointed by the State Government under sub-section (3) or under sub-section (8) of Section 24 to conduct cases in district courts and every Assistant Public Prosecutor appointed under sub-section (1) of Section 25 shall be subordinate to the Deputy Director of Prosecution. Sub-section (8), however, clarifies that the

Advocate General for the State while performing the functions of public prosecutor shall not be covered by Section 25A.

11. Section 2(7) of the Code of Civil Procedure, 1908 (for short, 'CPC') defines 'government pleader'. According to this provision, 'government pleader' includes any officer appointed by the State Government to perform all or any of the functions expressly imposed by the CPC on the government pleader and also any pleader acting under the directions of the government pleader.

12. Section 2(15) CPC defines 'pleader' which means any person entitled to appear and plead for another in court, and includes an advocate, a vakil and an attorney of a High Court.

13. Prior to Indian Advocates Act, 1961, [The Indian] Bar Councils Act, 1926 (for short, '1926 Act') dealt with the functions of the Bar Council and the admission and enrolment of advocates. Section 2(1)(a) of the 1926 Act had defined 'advocate' as meaning an advocate entered in the roll of advocates of a High Court under the provisions of that Act.

14. Section 8(1) of the 1926 Act provided as under:

"8.Enrolment of advocates. – (1) No person shall be entitled as of right to practice in any High Court, unless his name is entered in the roll of the advocates of the High Court maintained under this Act:

Provided that nothing in this sub-section shall apply to any attorney of the High Court."

15. Section 9 of the 1926 Act dealt with qualifications and admission of advocates while Section 14 provided for right of advocates to practice.

16. On constitution of the State Bar Council under the Advocates Act, 1961 (for short, '1961 Act'), the relevant provisions of the 1926 Act stood repealed. Section 17 of the 1961 Act provides that every State Bar Council shall prepare and maintain a roll of advocates. It further provides that no

person shall be enrolled as an advocate on the roll of more than one State Bar Council. Section 24 provides for the eligibility of the persons who may be admitted as advocates on State roll. Inter alia, it states that a person shall be qualified to be admitted as an advocate on a State roll if he fulfills such other conditions as may be specified in the rules made by the State Bar Council under Chapter III. Section 28 empowers a State Bar Council to make rules to carry out the purposes of Chapter III. Clause (d), sub-section (2) of Section 28 states that such rules may provide for the conditions subject to which a person may be admitted as an advocate on the State roll. Chapter IV of the 1961 Act deals with the right to practice. This Chapter comprises of five sections. Section 29 provides that from the appointed day, there shall be only one class of persons entitled to practice profession of law, namely, advocates. Section 30 provides for right of advocates to practice. Section 33 makes a provision that except as otherwise provided in the Act or in any other law for the time being in force, no person shall on or after the appointed day, be entitled to practice in any event or before any authority or person unless he is enrolled as advocate under the Act.

17. Section 49 gives power to the Bar Council of India to make rules for discharging its functions and also to frame rules in respect of the subjects enumerated in clauses (a) to (j). Clause (ah) deals with the conditions subject to which an advocate shall have the right to practice and the circumstances under which a person shall be deemed to practice as an advocate in a court. The first proviso following the main Section provides that no rules made with reference to clause (c) or (gg) shall have effect unless they have been approved by the Chief Justice of India. The second proviso provides that no rules made with reference to clause (e) shall have effect unless they have been approved by the Central Government. Pursuant to the power given under Section 49, the Bar Council of India has framed the Bar Council of India Rules (for short, 'BCI Rules'). Rule 43 provides that an advocate, who has taken a full-time service or part-time service or engaged in business or any

avocation inconsistent with his practising as an advocate, shall send a declaration to that effect to the respective State Bar Council within 90 days. On his failure to do so or in the absence of sufficient cause for not doing so, he may face suspension of licence to practice. Prior to 2001, Rule 49 of the BCI Rules read as under :

> "49. An advocate shall not be a full-time salaried employee of any person, government, firm, corporation or concern, so long as he continues to practice, and shall, on taking up any such employment, intimate the fact to the Bar Council on whose roll his name appears, and shall thereupon cease to practice as an advocate so long as he continues in such employment.
>
> Nothing in this rule shall apply to a Law Officer of the Central Government or a State or of any Public Corporation or body constituted by statute who is entitled to be enrolled under the rules of his State Bar Council made under Section 28(2)(d) read with Section 24(1)(e) of the Act despite his being a full time salaried employee.
>
> Law Officer for the purpose of this Rule means a person who is so designated by the terms of his appointment and who, by the said terms, is required to act and/or plead in courts on behalf of his employer.

18. By resolution dated 22.06.2001, the Bar Council of India deleted the second and third para of the above rule. The said resolution was published in the Government Gazette on 13.10.2001. The Chief Justice of India gave his consent to the said deletion on 23.04.2008. Rule 49 in its present form, consequent on amendment, reads as under:

> "An advocate shall not be a full-time salaried employee of any person, government, firm, corporation or concern, so long as he continues to practice, and shall, on taking up any employment, intimate the fact to the Bar Council on whose roll his name appears, and shall thereupon cease

to practise as an advocate so long as he continues in such employment".

19. The High Court has held, and in our view rightly, that the consent of Chief Justice of India was not needed because rule in respect of eligibility is traceable to clause (ah). The amendment thus became effective in any case on its publication in the Government Gazette on 13.10.2001.

20. The High Court while considering the issue relating to eligibility of the appellants for selection and appointment under Article 233(2), dealt with Sections 17, 22, 24, 29 and 33 of the 1961 Act and Rule 49 of the BCI Rules and observed that an advocate could not be a full-time salaried employee of any person, government, firm, corporation or concern so long as he continues to practice.

21. The High Court referred to various decisions including decisions of this Court in *Mundrika Prasad Sinha v. State of Bihar*[1], *Mukul Dalal and others v. Union of India and Others*[2], *Kumari Shrilekha Vidyarthi and Others v. State of U.P. and Others*[3], *Chandra Mohan v. State of U.P. and Others*[4], *Satya Narain Singh v. High Court of Judicature at Allahabad and Others*[5], *Sushma Suri v. Government of National Capital Territory of Delhi and Another*[6], *Satish Kumar Sharma v. Bar Council of H.P.*[7], *Sunil Kumar Goyal v. Rajasthan Public Service Commission*[8] and finally held that Dinesh Kumar Mittal, Rajesh Malhotra, Deepak Aggarwal, Chandra Shekhar and Desh Raj Chalia were ineligible at the time of their appointment

1. AIR 1979 SC 1871.
2. (1988|) 3 SCC 144.
3. (1991) 1 SC 212.
4. AIR 1966 SC 1987.
5. (1985) 1 SCC 225.
6. (1999) 1 SCC 330.
7. (2001) 2 SCC 365.
8. (2003) 6 SCC 171.

as Additional District and Sessions Judge. The Bench formulated its opinion on account of the following :

> "They were in regular government service with the Union or the State. Their recruitment to the posts of Deputy Advocate General, Assistant District Attorney's/ Prosecutors was pursuant to their selection by the respective Public Service Commission/Government. All of them were in the graded pay scale and subjected to all rigors of service conditions of a government servant known to service jurisprudence. We may not be misunderstood to mean that the Law Officers as a genre are ineligible for judicial appointment. Disqualification/ineligibility is attracted only to such category of Law Officers who opt for regular Government employment. However, no such ineligibility is attached to the other category of Law Officers who are practicing lawyers and are engaged on behalf of the Government or any other organization/authority, even on salary to appear on their behalf either under any contractual arrangement or on case to case basis, without subjecting themselves to the conditions of regular government employment such as the Advocate General, Additional Advocate General in the State, Assistant Solicitor General or Central Government Standing counsel or any other Law Officer engaged by various Government Corporations or otherwise who are engaged to represent them in courts of law."

22. The High Court also held that except Rajesh Malhotra, the other four, namely, Dinesh Kumar Mittal, Deepak Aggarwal, Chandra Shekhar and Desh Raj Chalia were having less than seven years of practice at the Bar before their engagement as Assistant District Attorneys/Public Prosecutors.

23. Mr. P.P. Rao, learned senior counsel who led the arguments on behalf of the appellants, argued that Article 233(2) of the Constitution is a self-contained Code. Service of a Public Prosecutor or an Assistant Public Prosecutor or a Government Pleader does not render a person ineligible for

appointment as a District Judge if he has been for not less than seven years an advocate or a pleader. According to him, it is open to the State to appoint a Government Pleader in terms of Section 2(7) of C.P.C. for conducting civil cases and Public Prosecutors under Section 24 of Cr.P.C. for criminal cases on mutually agreed terms, either on a case to case basis or piece-rate basis for each item of work done or on a tenure basis or on a permanent basis. Though called 'appointment', it is in reality and in substance an engagement of an advocate for conducting cases in courts. Advocates with experience are only eligible for these posts and even after appointment as Government Pleader or Public Prosecutor or Assistant Public Prosecutor or Assistant District Attorney, their job is exclusively or mainly to conduct cases as advocates in courts. The nature of their functions remains the same. They are always Officers of the Court. 24. It was submitted by Mr. P.P. Rao that the 1961 Act and the BCI Rules, including Rule 49 , must be read harmoniously with the relevant provisions of C.P.C. and Cr.P.C. having regard to the object and scheme of appointment of the Government Pleaders, Public Prosecutors, Assistant Public Prosecutors or Assistant District Attorneys etc. He contended that rule making power by Bar Council of India cannot be exercised inconsistent with the provisions contained in CPC and Cr.P.C; it is not an overriding power and the persons who are eligible in terms of Article 233(2) of the Constitution cannot be made ineligible by a rule made by the Bar Council of India. According to him, the meaning of the word, 'advocate' occurring in Article 233(2) must be fixed and identified which the Constitution makers had in mind. Neither the 1961 Act nor the BCI Rules framed thereunder can curtail the meaning of the word 'advocate' that is understood under Article 233(2) of the Constitution.

25. Mr. P.P. Rao, learned senior counsel submitted that it could never be the intention of the Bar Council of India when it made Rule 49 that appointment of advocate by the Government for conducting its cases in courts as an advocate on a full time

salary basis would attract the bar in Rule 49. The bar applies to employees engaged for work other than conducting cases in courts as advocates. He suggested that in order to save the operation of Rule 49, it needs to be read down and the test laid down by this Court in *Satish Kumar Sharma*[7] and *Sushma Suri*[6] must be applied, i.e. whether a person is engaged to act and/or plead in a court of law as an advocate and not whether such person is engaged on terms of salary or payment of remuneration. In his view, what is important is not the employment but the functions that a Public Prosecutor or a Government Pleader discharges.

26. The contention of Mr. P.P. Rao is that the BCI Rules cannot override the operation of any law made by the Parliament, including the CPC or the Cr.P.C., much less Article 233(2) of the Constitution which contains the word 'advocate' having a definite meaning i.e., person enrolled as a member of the Bar to conduct cases in courts. He highlighted the consistent practice before the Constitution and after the Constitution of the Government Pleaders and Public Prosecutors on regular or permanent basis with fixed emoluments being appointed as District Judges by way of direct recruitment in view of their experience in conducting government cases. He submitted that to declare them ineligible would defeat the object of recruitment underlying Article 233(2) of the Constitution.

27. Mr. A.K. Ganguli, learned senior counsel appearing in the appeals preferred by Dinesh Kumar Mittal adopted the arguments of Mr. P.P. Rao and further submitted that it is right to practice that determines whether one is advocate or not and that is what must be understood by the term 'advocate' occurring in Article 233(2) of the Constitution.

28. Mr. B.H. Marlapalle, learned senior counsel for the appellant Desh Raj Chalia, submitted that Article 233(2) provided two different sources of appointment to the post of District Judge, namely, by promotion from service and by nomination from the law practitioners with practice of not less

than seven-years. The requirement of practice for not less than seven-years is only for the appointment by nomination. He relied upon decisions of this Court in *Rameshwar Dayal v. State of Punjab and Others*[9], *Chandra Mohan*[4] and *Satya Narain Singh*[5]. Learned senior counsel argued that Section 24, Cr.P.C. is the source of power for appointment of the Public Prosecutor/Additional Public Prosecutor either as part of the regular service cadre or from the panel prepared by the District Magistrate. The scheme of Section 24 Cr.P.C. cannot be allowed to be defeated by Rule 49 of the BCI Rules as amended by the resolution dated 22.06.2001. Learned senior counsel submitted that a Public Prosecutor appointed by State Government as a part of regular service cadre cannot be excluded from the scheme of Section 30 of the 1961 Act just because he has chosen to appear for the State Government. Any law practitioner/advocate has the choice to restrict his practice. He heavily relied upon the observations made by this Court in paragraphs 6, 10 and 11 of the decision in *Sushma Suri*[6] and submitted that principles laid down therein were fully applicable to the appellant's submission that he is eligible for being selected by nomination to the post of District Judge from amongst the law practitioners.

29. Mr. B.H. Marlapalle referred to various provisions of the 1961 Act and Rule 49 of the BCI Rules and submitted that any person who is a law officer of the State/Central Government and who by the said term is required to act and plead in a court on behalf of his employer is entitled to be admitted as an advocate to the State roll. Rule 49, as amended by the Bar Council of India, cannot be interpreted to mean that every Public Prosecutor/Additional Public Prosecutor, who is appointed by the State Government as a part of regular service cadre, ceases to be an advocate. If a Public Prosecutor forming part of service cadre, ceases to be an advocate then his tenure as a Public Prosecutor under Section 24, Cr.P.C.

9. AIR 1961 SC 816.

would automatically come to an end. Such an interpretation of Rule 49 of the BCI Rules would not be proper.

30. Learned senior counsel also challenged the finding recorded by the High Court with regard to appellant Desh Raj Chalia that he did not complete seven years of law practice. According to him, his tenure as Assistant District Attorney was required to be counted for the purpose of computing period of practice and the appellant had completed more than 11 years of law practice.

31. Mr. S.S. Ray, learned counsel appearing for one of the appellants, argued that the amendment to Rule 49 in 2001 has not affected the position of the appellant as an advocate in any manner and the judgment of this Court in *Sushma Suri6* is squarely applicable. Learned counsel would submit that 'advocate' means any person who pleads for his client. The word, 'advocate' is genus whereas expressions, Law Officer/ Assistant District Attorney/Public Prosecutor are species. They are covered within the meaning of term 'advocate'. Suspension of the licence or deleting the name from the roll of advocates cannot exclude a Public Prosecutor or Assistant District Attorney from the definition of word 'advocate'. He further argued that if Public Prosecutor and Assistant District Attorney are taken out from the definition of 'advocate' then they cannot plead the case before the court even on behalf of the Government. He submitted that the provisions contained in CPC and Cr.P.C. should prevail over the BCI Rules. With regard to interpretation of Article 233(2), he adopted the arguments of Mr. P.P. Rao.

32. Mr. Raju Ramchandran, learned senior counsel appeared for the High Court of Punjab and Haryana on administrative side. He submitted that District Attorney, Public Prosecutor and Assistant Advocate General are in essence lawyers. Even though Rule 49 was amended by the Bar Council of India, yet under the amended rule District Attorneys, Public Prosecutors/Assistant Advocate General continue to appear as

advocates as they continue to have their licence. Rule 49 *per se* does not bar them from appearing before a court. Reference was made to the provisions of Haryana State Prosecution Legal Service (Group 'C') Rules, 1979 to show that the Government Pleader and Public Prosecutor may be fully engaged by the Government but in essence they are lawyers representing the Government. He submitted that High Court failed to notice the explanation to Section 24(6) and its interplay with Section 24(9) Cr.P.C. Learned senior counsel suggested that the test enunciated in *Sushma Suri*[6] , namely, whether he is engaged to act or plead on behalf of the employer in a court of law as an advocate should be applied to find out whether the private appellants whose appointments have been cancelled met the prescribed eligibility or not.

33. Learned senior counsel sought to distinguish the decision of this Court in *Mallaraddi H. Itagi & Ors. v. High Court of Karnataka* by highlighting that Karnataka Department of Prosecution and Government Litigation Recruitment Rules, 1962 did not allow the Public Prosecutors to appear as advocates before the Court; the candidates therein admitted that they were government servants; and the candidates therein had surrendered their licence.

34. A plea of estoppel was also raised on behalf of the High Court and it was submitted that the writ petitioners were estopped from challenging the selection process as they had taken a chance to get selected and after having remained unsuccessful, they have now challenged the appointment of successful candidates.

35. On the other hand, Mr. Prashant Bhushan, learned counsel for the respondent – Keshav Kaushik (writ petitioner before the High Court) in the appeal preferred by Deepak Aggarwal, referred to Article 233(2) of the Constitution and submitted that in order to be eligible, the candidate must not be in the service of Union or the State and must have been an advocate for at least seven years. It was submitted that the

expression, "if he has been for not less than seven years an advocate" must be read to mean seven years immediately preceding his appointment/ application. It cannot mean any seven years any time in the past. If that interpretation were to be accepted, it would mean that a person who is enrolled as an advocate for seven years and thereafter took up a job for the last twenty years would also become eligible for being appointed as District Judge. This would defeat the object of the qualification prescribed in Article 233(2).

36. Mr. Prashant Bhushan contended that a Public Prosecutor being a full time employee of the Government, ceases to be an advocate by virtue of Rule 49 of the BCI Rules. The candidates whose appointment was challenged were in full time employment of the Government; were liable to be transferred and posted with the Government Companies as law officers and they have several functions other than appearances in courts as Public Prosecutors. Merely because one of the functions of these Public Prosecutors is to appear in courts would not make them advocates and eligible for appointment under Article 233 (2) of the Constitution. He justified the view of the High Court.

37. Mr. P.S. Patwalia, learned senior counsel also arguing for respondent no. 1 in the appeal by Chandra Shekhar, submitted that Rule 49 expressly debars a person from practising as an advocate on taking up employment. Rule 43 of BCI Rules makes it imperative on any such person to file a declaration within 90 days on taking up employment failing which the State Bar Council can suspend the licence of such a person to practice. It was submitted that full time employees have a limited right of appearance before the courts by virtue of Section 24 Cr.P.C. and Section 2(7) C.P.C. Such employees can only appear in briefs marked to them by State Government for specified courts.

38. Chapter IV of the 1961, Act which deals with right to practice, was referred to by the learned senior counsel, particularly, Sections 29 to 33, and it was submitted that on a

conjoint reading of these provisions with Rules 43 to 49 of the BCI Rules and Section 24 Cr.P.C. and Section 2(7) C.P.C., Additional District Attorney/Public Prosecutor/Assistant Advocate General cannot be said to practice law. Reference was made to the Resolution passed by Bar Council of India in this regard which provides that if a Public Prosecutor/Additional District Attorney is a whole time employee drawing regular salary, he will not be entitled to be enrolled as an advocate.

39. In support of the above submissions, Mr. P.S. Patwalia relied upon decision of this Court in *Satish Kumar Sharma*[7] and a decision of this Court in *Mallaraddi H. Itagi.* Reference was also made to the decision of the Karnataka High Court in *Mallaraddi H. Itagi* from which the appeals were preferred before this Court. Learned senior counsel submitted that the view taken by Karnataka High Court and upheld by this Court is the view which has been taken by various other high courts, namely, Kerala High Court in *K.R. Biju Babu v. High Court of Kerala & Another*[10]*, Jammu and Kashmir High Court in Gurjot Kaur and Others v. High Court of Jammu and Kashmir and Another* decided on 14.09.2010, Bombay High Court in *Sudhakar Govindrao Deshpande v. State of Maharashtra and Others*[11]*,* Allahabad High Court in *Akhilesh Kumar Misra and Others v. The High Court of Judicature at Allahabad and Others*[12] Rajasthan High Court in *Pawan Kumar Vashistha v. High Court of Judicature for Rajasthan, Jodhpur and Another* decided on 21.02.2012.

40. Mr. P.S. Patwalia referred to Article 233(2) of the Constitution and the decision of this Court in *Chandra Mohan4* and submitted that a person already employed in the executive service of a State is ineligible to be appointed. He heavily relied upon paragraphs 49 and 50 of the impugned judgment and submitted that the findings returned by the High Court were in accord with law.

10. (2008) Labour & Industrial Cases 1784.

11. (1986) Labour & Industrial Cases 710.

12. AIR (1995) Allahabad 148.

41. On behalf of the respondents in the appeal by Dinesh Kumar Mittal, it was submitted that Article 233(2) of the Constitution lays down three essentials for appointment of a person to the post of District Judge and all of them are mandatorily required to be fulfilled and are to be read simultaneously. It was submitted that independence of judiciary is the basic structure of the Constitution. The Public Prosecutors holding a regular post in regular pay scale are government servants and they can not be treated as 'advocate' within the meaning of Sections 24, 29 and 30 of the 1961 Act read with Rule 49 of the BCI Rules. It was suggested that the words "has been" in Article 233(2) must be read to mean the advocate or pleader who continues to be so at the time of his appointment.

42. Article 233 of the Constitution makes provision for appointment and qualification for District Judges. Under clause (1) of Article 233 no special qualifications are laid down. The Governor can appoint a person who is already in service of the Union or of the State as a District Judge in consultation with the relevant High Court. Clause (2) of Article 233 lays down three essentials for appointment of a person to the post of District Judge; (i) a person shall not be in service of the Union or of the State; (ii) he has been for not less than seven years an advocate or a pleader; and (iii) his name is recommended by the relevant High Court for appointment. In other words, as regards a person not already in service what is required is that he should be an advocate or pleader of seven years' standing and that his name is recommended by the High Court for appointment as District Judge. We have to find out what is the meaning of the expression "the service" under Article 233 (2) of the Constitution. The expression "the service" occurring in clause (2) of Article 233 came up for consideration before a Constitution Bench of this Court in *Chandra Mohan*[4].

43. In the case of *Chandra Mohan*[4] the facts were these: during 1961 and 1962, the Registrar of the Allahabad High Court called for applications for recruitment with regard to ten

vacancies in the Uttar Pradesh Higher Judicial Service from Barristers, Advocates, Vakils and Pleaders of more than seven years' standing and from judicial officers. The Selection Committee, constituted under the Rules, selected six candidates for appointment to the said service. The three of the selected candidates were advocates and three were judicial officers. The Selection Committee sent two lists, one comprising the names of three advocates and the other comprising the names of three judicial officers to the High Court. Chandra Mohan, who was Member of U.P. Civil Services (Judicial Branch) and who was at that time acting as a District Judge, and some other officers who were similarly situated, filed writ petitions in the High Court of Allahabad under Article 226 challenging the selection of the six candidates for appointment to the U.P. Higher Judicial Service. The matter was heard by the Division Bench. The members of the Bench agreed that selection from the Bar was good but as regards selection from the cadre of judicial officers, there was difference of opinion on the aspect of non-issuance of notification under Article 237 of the Constitution. The matter was referred to a third Judge who agreed with one of the Judges who held that selection from the judicial officers was also good. Thus, the writ petitions were dismissed. The High Court on the application for certificate to appeal to this Court certified the case a fit one for appeal, consequently, the appeal was filed. As there was some debate on the scope of the certificate granted by the High Court, this Court also granted Special Leave to Appeal against the order of the High Court. Diverse arguments were advanced on behalf of the appellants before this Court. While dealing with the question whether the Governor can directly appoint persons from services other than the judicial service as District Judges in consultation with the High Court and on a further question whether the Governor can appoint judicial officers as District Judges, this Court dealt with Articles 233, 234, 236 and 237 of the Constitution and observed in paragraph 15 of the Report (pgs. 1993-94) as follows:

> "The gist of the said provisions may be stated thus. Appointments of persons to be, and the posting and promotion of district judges in any State shall be made by the Governor of the State. There are two sources of recruitment namely (i) service of the Union or of the State, and (ii) members of the Bar. The said Judges from the first source are appointed in consultation with the High Court and those from the second source are appointed on the recommendation of the High Court. But in the case of appointments of persons to the judicial service other than as district Judges they will be made by the Governor of the State in accordance with rules framed by him in consultation with the High Court and the Public Service Commission. But the High Court has control over all the district Courts and Courts subordinate thereto, subject to certain prescribed limitations."

This Court then in paragraphs 16 and 17 (pg. 1994) of the Report observed as follows:

> "16. So far there is no dispute. But the real conflict rests on the question whether the Governor can appoint as district Judges persons from services other than the judicial service; that is to say, can he appoint a person who is in the police, excise, revenue or such other service as a district Judge? The acceptance of this position would take us back to the pre-independence days and that too to the conditions prevailing in the Princely States. In the Princely States one used to come across appointments to the judicial service from police and other departments. This would also cut across the well-knit scheme of the Constitution and the principle underlying it, namely, the judiciary shall be an independent service. Doubtless if Art. 233(1) stood alone, it may be argued that the Governor may appoint any person as a district Judge, whether legally qualified or not, if he belongs to any service under the State. But Art. 233(1) is nothing more than a declaration of the general power of the Governor in the matter of

appointment of district Judges. It does not lay down the qualifications of the candidates to be appointed or denote the sources from which the recruitment has to be made. But the sources of recruitment are indicated in Cl (2) thereof. Under Cl. (2) of Art. 233 two sources are given, namely, (i) persons in the service of the Union or of the State, and (ii) advocate or pleader. Can it be said that in the context of Ch. VI of Part VI of the Constitution "the service of the Union or of the State" means any service of the Union or of the State or does it mean the judicial service of the Union or of the State? The setting, viz., the chapter dealing with subordinate Courts, in which the expression "the service" appears indicates that the service mentioned therein is the service pertaining to Courts. That apart, Art. 236(2) defines the expression "judicial service" to mean a service consisting exclusively of persons intended to fill the post of district Judge and other civil judicial posts inferior to the post of district Judge. If this definition, instead of appearing in Art. 236, is placed as a clause before Art. 233(2), there cannot be any dispute that "the service" in Art. 233(2) can only mean the judicial service. The circumstance that the definition of "judicial service" finds a place in a subsequent Article does not necessarily lead to a contrary conclusion. The fact that in Article 233(2) the expression "the service" is used whereas in Arts. 234 and 235 the expression "judicial service" is found is not decisive of the question whether the expression "the service" in Art. 233(2) must be something other than the judicial service, for, the entire chapter is dealing with the judicial service. The definition is exhaustive of the service. Two expressions in the definition bring out the idea that the judicial service consists of hierarchy of judicial officers starting from the lowest and ending with district Judges. The expressions "exclusively" and "intended" emphasise the fact that the judicial service consists only of persons intended to fill up the post of district Judges and other civil judicial posts and that is the

exclusive service of judicial officers. Having defined "judicial service" in exclusive terms, having provided for appointments to that service and having entrusted the control of the said service to the care of the High Court, the makers of the Constitution would not have conferred a blanket power on the Governor to appoint any person from any service as a district Judge.

17. Reliance is placed upon the decision of this Court in *Rameshwar Dayal v. State of Punjab,* (AIR 1961 SC 816), in support of the contention that "the service" in Art. 233(2) means any service under the State. The question in that case was, whether a person whose name was on the roll of advocates of the East Punjab High Court could be appointed as a district Judge. In the course of the judgment S.K. Das, J., speaking for the Court, observed :

> "Article 233 is a self-contained provision regarding the appointment of District Judges. As to a person who is already in the service of the Union or of the State, no special qualifications are laid down and under Cl. (1) the Governor can appoint such a person as a district Judge in consultation with the relevant High Court. As to a person not already in service, a qualification is laid down in Cl. (2) and all that is required is that he should be an advocate or pleader of seven years' standing."

This passage is nothing more than a summary of the relevant provisions. The question whether "the service" in Art. 233 (2) is any service of the Union or of the State did not arise for consideration in that case nor did the Court express any opinion thereon."

Explaining the meaning of the expression, 'the service', this is what this Court said in paragraph 20 of the Report (Pg. 1995) in *Chandra Mohan4*.

"…….Though S. 254(1) of the said Act was couched in general terms similar to those contained in Art. 233 (1) of

the Constitution, the said rules did not empower him to appoint to the reserved post of district Judge a person belonging to a service other than the judicial service. Till India attained independence, the position was that district Judges were appointed by the Governor from three sources, namely, (i) the Indian Civil Service, (ii) the Provincial Judicial Service, and (iii) the Bar. But after India attained independence in 1947, recruitment to the Indian Civil Service was discontinued and the Government of India decided that the members of the newly created Indian Administrative Service would not be given judicial posts. Thereafter district Judges have been recruited only from either the judicial service or from the Bar. There was no case of a member of the executive having been promoted as a district Judge. If that was the factual position at the time the Constitution came into force, it is unreasonable to attribute to the makers of the Constitution, who had so carefully provided for the independence of the judiciary, an intention to destroy the same by an indirect method. What can be more deleterious to the good name of the judiciary than to permit at the level of district Judges, recruitment from the executive departments? Therefore, the history of the services also supports our construction that the expression "the service" in Art. 233(2) can only mean the judicial service."

44. The Constitution Bench in *Chandra Mohan*[4] has thus clearly held that the expression 'the service' in Article 233(2) means the judicial service.

45. In *Satya Narain Singh*[5], this Court again had an occasion to consider Article 233 of the Constitution. This Court referred to an earlier decision of this Court in *Rameshwar Dayal*[9] and construed Article 233 as follows:

"…….The first clause deals with "appointments of persons to be, and the posting and promotion of, District Judges in any State" while the second clause is confined in its application to persons "not already in the service of the

Union or of the State". We may mention here that "service of the Union or of the State" has been interpreted by this Court to mean Judicial Service. Again while the first clause makes consultation by the Governor of the State with the High Court necessary, the second clause requires that the High Court must recommend a person for appointment as a District Judge. It is only in respect of the persons covered by the second clause that there is a requirement that a person shall be eligible for appointment as District Judge if he has been an advocate or a pleader for not less than 7 years. In other words, in the case of candidates who are not members of a Judicial Service they must have been advocates or pleaders for not less than 7 years and they have to be recommended by the High Court before they may be appointed as District Judges, while in the case of candidates who are members of a Judicial Service the 7 years' rule has no application but there has to be consultation with the High Court. A clear distinction is made between the two sources of recruitment and the dichotomy is maintained. The two streams are separate until they come together by appointment. Obviously the same ship cannot sail both the streams simultaneously……".

After referring to *Chandra Mohan*[4], this Court in paragraph 5 (pg. 230) stated as under :

"5. Posing the question whether the expression "the service of the Union or of the State" meant any service of the Union or of the State or whether it meant the Judicial Service of the Union or of the State, the learned Chief Justice emphatically held that the expression "the service" in Article 233(2) could only mean the Judicial Service. But he did not mean by the above statement that persons who are already in the service, on the recommendation by the High Court can be appointed as District Judges, *overlooking* the claims of all other seniors in the

Subordinate Judiciary contrary to Article 14 and Article 16 of the Constitution."

46. From the above, we have no doubt that the expression, 'the service' in Article 233(2) means the "judicial service". Other members of the service of Union or State are as it is excluded because Article 233 contemplates only two sources from which the District Judges can be appointed. These sources are: (i) judicial service; and (ii) the advocate/pleader or in other words from the Bar. District Judges can, thus, be appointed from no source other than judicial service or from amongst advocates. Article 233(2) excludes appointment of District Judges from the judicial service and restricts eligibility of appointment as District Judges from amongst the advocates or pleaders having practice of not less than seven years and who have been recommended by the High Court as such.

47. The question that has been raised before us is whether a Public Prosecutor/Assistant Public Prosecutor/District Attorney/Assistant District Attorney/Deputy Advocate General, who is in full time employ of the Government, ceases to be an advocate or pleader within the meaning of Article 233(2) of the Constitution.

48. In *Kumari Shrilekha Vidyarthi*[3], this Court dealt with scheme of the Cr.P.C. relating to Public Prosecutors and it was held that the Code invests the Public Prosecutors with the attribute of the holder of public office. In paragraph 14 of the Report (Pgs. 232-233) this Court stated as under :

"…….This power of the Public Prosecutor in charge of the case is derived from statute and the guiding consideration for it, must be the interest of administration of justice. There can be no doubt that this function of the Public Prosecutor relates to a public purpose entrusting him with the responsibility of so acting only in the interest of administration of justice. In the case of Public Prosecutors, this additional public element flowing from statutory provisions in the Code of Criminal Procedure,

undoubtedly, invest the Public Prosecutors with the attribute of holder of a public office which cannot be whittled down by the assertion that their engagement is purely professional between a client and his lawyer with no public element attaching to it."

49. In *State of U.P. and Others v. U.P. State Law Officers Association and Others*[13], this Court, while distinguishing the judgment of this Court in *Kumari Shrilekha Vidyarthi*[3], observed that appointment of lawyers by the Government and the public bodies to conduct work on their behalf and their subsequent removal from such appointment have to be examined from three different angles, namely, the nature of the legal profession, the interest of the public and the modes of the appointment and removal. With regard to the legal profession, this Court said in paras 14 and 15 (pg. 216) as under:

"14. Legal profession is essentially a service-oriented profession. The ancestor of today's lawyer was no more than a spokesman who rendered his services to the needy members of the society by articulating their case before the authorities that be. The services were rendered without regard to the remuneration received or to be received. With the growth of litigation, lawyering became a full-time occupation and most of the lawyers came to depend upon it as the sole source of livelihood. The nature of the service rendered by the lawyers was private till the Government and the public bodies started engaging them to conduct cases on their behalf. The Government and the public bodies engaged the services of the lawyers purely on a contractual basis either for a specified case or for a specified or an unspecified period. Although the contract in some cases prohibited the lawyers from accepting private briefs, the nature of the contract did not alter from one of professional engagement to that of employment. The lawyer of the Government or a public body was not its

13. (1994) 2 SCC 204.

employee but was a professional practitioner engaged to do the specified work. This is so even today, though the lawyers on the full-time rolls of the Government and the public bodies are described as their law officers. It is precisely for this reason that in the case of such law officers, the saving clause of Rule 49 of the Bar Council of India Rules waives the prohibition imposed by the said rule against the acceptance by a lawyer of a full-time employment.

15. The relationship between the lawyer and his client is one of trust and confidence. The client engages a lawyer for personal reasons and is at liberty to leave him also, for the same reasons. He is under no obligation to give reasons for withdrawing his brief from his lawyer. The lawyer in turn is not an agent of his client but his dignified, responsible spokesman. He is not bound to tell the court every fact or urge every proposition of law which his client wants him to do, however irrelevant it may be. He is essentially an adviser to his client and is rightly called a counsel in some jurisdictions. Once acquainted with the facts of the case, it is the lawyer's discretion to choose the facts and the points of law which he would advance. Being a responsible officer of the court and an important adjunct of the administration of justice, the lawyer also owes a duty to the court as well as to the opposite side. He has to be fair to ensure that justice is done. He demeans himself if he acts merely as a mouthpiece of his client. This relationship between the lawyer and the private client is equally valid between him and the public bodies."

50. In *S.B. Shahane and Others v. State of Maharashtra and another*[14], this Court held in para 12 (Pg. 43) as under:

"12. When Assistant Public Prosecutors are appointed under Section 25 of the Code for conducting prosecutions in courts of Magistrates in a district fairly and impartially,

14. 1995 Supp (3) SCC 37.

separating them from the police officers of the Police Department and freeing them from the administrative or disciplinary control of officers of the Police Department, are the inevitable consequential actions required to be taken by the State Government which appoints such Assistant Public Prosecutors, inasmuch as, taking of such actions are statutory obligations impliedly imposed upon it under sub-section (3) thereof. When such consequential actions are taken by the State Government in respect of large number of persons appointed as Assistant Public Prosecutors, it becomes necessary for putting them on a separate cadre of Assistant Public Prosecutors and creating a separate Prosecution Department as suggested by the Law Commission in its Report making those Assistant Public Prosecutors subject to control of their superiors in the hierarchy in matters of administration and discipline, with the head of such Prosecution Department being made directly responsible to the State Government in respect of conduct of prosecutions by the Assistant Public Prosecutors of his department. Since the aforesaid notification dated 1-4-1974 issued by the Government of Maharashtra under Section 25 of the Code merely appoints the appellants and others, as mentioned in Schedule to the notification, the police prosecutors of the Police Department as Assistant Public Prosecutors without freeing such Assistant Public Prosecutors from the administrative and disciplinary control of the Police Department to which they belonged earlier, and without creating a separate department of prosecution for them with the head of that department or departments being made directly responsible to the Government, the Government of Maharashtra has failed to discharge its statutory obligation impliedly imposed upon it in that regard under sub-section (3) of Section 25 of the Code."

51. In *Sushma Suri*[6], a three-Judge Bench of this Court considered the meaning of the expression "advocate" occurring

in Article 233 (2) of the Constitution and unamended Rule 49 of the BCI Rules. In paragraph 6 of the Report (Pg. 335) this Court held as under :

> "6. If a person on being enrolled as an advocate ceases to practise law and takes up an employment, such a person can by no stretch of imagination be termed as an advocate. However, if a person who is on the rolls of any Bar Council is engaged either by employment or otherwise of the Union or the State or any corporate body or person practises before a court as an advocate for and on behalf of such Government, corporation or authority or person, the question is whether such a person also answers the description of an advocate under the Act. That is the precise question arising for our consideration in this case."

Then in paragraph 8 of the Report, this Court observed that for the purposes of the 1961 Act and the BCI Rules, a law officer (Public Prosecutor or Government Pleader) would continue to be an advocate. Not accepting the view of Delhi High Court in *Oma Shanker Sharma v. Delhi Administration* case (C.W.P. No. 1961 of 1987), this Court having regard to the object of recruitment under Article 233(2) held in paragraph 9 (Pg. 336):

> "……To restrict it to advocates who are not engaged in the manner stated by us earlier in this order is too narrow a view, for the object of recruitment is to get persons of necessary qualification, experience and knowledge of life. A Government Counsel may be a Public Prosecutor or Government Advocate or a Government Pleader. He too gets experience in handling various types of cases apart from dealing with the officers of the Government. Experience gained by such persons who fall in this description cannot be stated to be irrelevant nor detrimental to selection to the posts of the Higher Judicial Service. The expression "members of the Bar" in the relevant Rule would only mean that particular class of persons who are actually practising in courts of law as

> pleaders or advocates. In a very general sense an advocate is a person who acts or pleads for another in a court and if a Public Prosecutor or a Government Counsel is on the rolls of the Bar Council and is entitled to practise under the Act, he answers the description of an advocate."

With regard to unamended Rule 49 of the BCI Rules, this Court held as under :

> "10. Under Rule 49 of the Bar Council of India Rules, an advocate shall not be a full-time employee of any person, Government, firm, corporation or concern and on taking up such employment, shall intimate such fact to the Bar Council concerned and shall cease to practise as long as he is in such employment. However, an exception is made in such cases of law officers of the Government and corporate bodies despite his being a full-time salaried employee if such law officer is required to act or plead in court on behalf of others. It is only to those who fall into other categories of employment that the bar under Rule 49 would apply. An advocate employed by the Government or a body corporate as its law officer even on terms of payment of salary would not cease to be an advocate in terms of Rule 49 if the condition is that such advocate is required to act or plead in courts on behalf of the employer. The test, therefore, is not whether such person is engaged on terms of salary or by payment of remuneration, but whether he is engaged to act or plead on its behalf in a court of law as an advocate. In that event the terms of engagement will not matter at all. What is of essence is as to what such law officer engaged by the Government does — whether he acts or pleads in court on behalf of his employer or otherwise. If he is not acting or pleading on behalf of his employer, then he ceases to be an advocate. If the terms of engagement are such that he does not have to act or plead, but does other kinds of work, then he becomes a mere employee of the Government or the body corporate. Therefore, the Bar Council of India has

understood the expression "advocate" as one who is actually practising before courts which expression would include even those who are law officers appointed as such by the Government or body corporate."

52. The authority most strongly relied on for the appellants is the decision of this Court in *Sushma Suri*[6]. Their contention is that the decision in *Sushma Suri6* is on all fours irrespective of amendment in Rule 49 of the BCI Rules. On the other hand, the High Court has held – and the respondent (successful writ petitioner) supports the view of the High Court – that Rule 49 in the present form has altered the legal position and *Sushma Suri6* has no application. We shall deal with this aspect a little later.

53. In *Satish Kumar Sharma*[7], the facts were these : the appellant was initially appointed as Assistant (Legal) by the Himachal Pradesh State Electricity Board (for short, 'Board'); the said post was re-designated as Law Officer Grade-II. Later on, the appellant was allowed to act as an advocate of the Board and, accordingly, his application seeking enrollment was sent by the Board to the Bar Council of Himachal Pradesh. The Bar Council of Himachal Pradesh communicated to the Board that the appellant did not meet the requirements of the Rules; he should be first designated as Law Officer and the order of appointment and the terms of such appointment be communicated. Consequent on the communication received from the Bar Council of Himachal Pradesh, the Board designated the appellant as Law Officer. The Bar Council of Himachal Pradesh issued a certificate of enrolment dated 9.7.1984 to the appellant. Subsequently, the appellant was given ad hoc promotion to the post of Under Secretary, (Legal)-cum-Law Officer and then promoted as Under Secretary, (Legal)-cum-Law Officer on officiating basis. Bar Council of Himachal Pradesh issued a notice to the appellant to show cause why his enrolment be not withdrawn. The appellant responded to the said notice. In the meanwhile, appellant was also promoted as Deputy Secretary (Legal)-cum-Law Officer on *ad hoc* basis. On

12.5.1996, the Bar Council of Himachal Pradesh passed an order withdrawing the enrolment of the appellant with immediate effect and directed him to surrender the enrolment certificate within 15 days therefrom. It was this resolution which was challenged by the appellant before the Himachal Pradesh High Court. However, he was unsuccessful before the High Court and he approached this Court. This Court referred to Sections 24, 28 and 49 of the 1961 Act and Rule 49 of the BCI Rules. This Court also considered the terms of appointment, nature of duties and service conditions relating to the appellant and in paragraph 17 (Pg. 377) of the Report noted as follows :

"17. Looking to the various appointment/promotion orders issued by the Board to the appellant and regulation of business relating to Legal Cell of the Board aforementioned, we can gather that:

(*1*) the appellant was a full-time salaried employee at the time of his enrolment as an advocate and continues to be so, getting fixed scales of pay;

(*2*) he is governed by the conditions of service applicable to the employees of the Board including disciplinary proceedings. When asked by us, the learned counsel for the appellant also confirmed the same;

(*3*) he joined the services of the Board as a temporary Assistant (Legal) and continues to head the Legal Cell after promotions, a wing in the Secretariat of the Board;

(*4*) his duties were/are not exclusively or mostly to act or plead in courts; and

(*5*) promotions were given from time to time in higher pay scales as is done in case of other employees of the Board on the basis of recommendation of Departmental Promotion Committee."

53.1. Then with regard to Rule 49 of the BCI Rules, this Court in paragraph 18 (pgs. 377-378) observed as under :

"18. On a proper and careful analysis, having regard to the plain language and clear terms of Rule 49 extracted above, it is clear that:

(*i*) the main and opening paragraph of the rule prohibits or bars an advocate from being a full-time salaried employee of any person, Government, firm, corporation or concern so long as he continues to practice and an obligation is cast on an advocate who takes up any such employment to intimate the fact to the Bar Council concerned and he shall cease to practice so long as he continues in such employment;

(*ii*) para 2 of the rule is in the nature of an exception to the general rule contained in main and opening paragraph of it. The bar created in para 1 will not be applicable to Law Officers of the Central Government or a State or any public corporation or body constituted by a statute, if they are given entitlement under the rules of their State Bar Council. To put it in other way, this provision is an enabling provision. If in the rules of any State Bar Council, a provision is made entitling Law Officers of the Government or authorities mentioned above, the bar contained in Rule 49 shall not apply to such Law Officers despite they being full-time salaried employees;

(*iii*) not every Law Officer but only a person who is designated as Law Officer by the terms of his appointment and who by the said terms is required to act and/or plead in courts on behalf of his employer can avail the benefit of the exception contained in para 2 of Rule 49."

53.2. In paragraph 19, this Court noted that no rules have been framed by the Bar Council of Himachal Pradesh in respect of Law Officer appointed as a full time salaried employee and if there are no rules in this regard then there is no entitlement for enrolment and the appellant's case could not fit in the exception of Rule 49 and the bar contained in the first paragraph of Rule 49 was attracted. It also noted that the

appellant was/is a full time salaried employee and his work was not mainly or exclusively to act or plead in the Court. The decision in *Sushma Suri*[6] was held to be of no help to the case of the appellant. In paragraph 23 (Pgs. 380-381), the Court observed that the work being done by the appellant was different from Prosecutors and Government Pleaders in relation to acting and pleading in court. This is what the Court said :

"23. We find no merit in the ground urged that the appellant was discriminated against the prosecutors and the government pleaders. The duties, nature of work and service conditions of the appellant, details of which are already given above, are substantially different from the duties and nature of work of prosecutors and government pleaders particularly in relation to acting and pleading in court. Thus the appellant stood on a different footing. The High Court in paras 24-26 has dealt with this aspect of the case and rightly rejected the argument based on the ground of discrimination."

54. In *State of U.P. & Another v. Johri Mal*[15], a three-Judge Bench of this Court while dealing with the nature of the office of the District Government Counsel, held in paras 71, 72, 73 and 74 (pgs.744-745) as under:

"71. The District Government Counsel appointed for conducting civil as also criminal cases hold offices of great importance. They are not only officers of the court but also the representatives of the State. The court reposes a great deal of confidence in them. Their opinion in a matter carries great weight. They are supposed to render independent, fearless and non-partisan views before the court irrespective of the result of litigation which may ensue.

72. The Public Prosecutors have greater responsibility. They are required to perform statutory duties independently

15. (2004) 4 SCC 714.

having regard to various provisions contained in the Code of Criminal Procedure and in particular Section 320 thereof.

73. The Public Prosecutors and the Government Counsel play an important role in administration of justice. Efforts are required to be made to improve the management of prosecution in order to increase the certainty of conviction and punishment for most serious offenders and repeaters. The prosecutors should not be overburdened with too many cases of widely varying degrees of seriousness with too few assistants and inadequate financial resources. The prosecutors are required to play a significant role in the administration of justice by prosecuting only those who should be prosecuted and releasing or directing the use of non-punitive methods of treatment of those whose cases would best be processed.

74. The District Government Counsel represent the State. They, thus, represent the interest of the general public before a court of law. The Public Prosecutors while presenting the prosecution case have a duty to see that innocent persons may not be convicted as well as an accused guilty of commission of crime does not go unpunished. Maintenance of law and order in the society and, thus, to some extent maintenance of rule of law which is the basic fibre for upholding the rule of democracy lies in their hands. The Government Counsel, thus, must have character, competence, sufficient experience as also standing at the Bar. The need for employing meritorious and competent persons to keep the standard of the high offices cannot be minimised. The holders of the post have a public duty to perform. Public element is, thus, involved therein."

55. In *Mahesh Chandra Gupta v. Union of India and Others*[16], with reference to the provisions contained in the Legal

16. (2009) 8 SCC 273.

Practitioners Act, 1879, the 1926 Act and the 1961 Act, this Court observed as follows:

> "66. Thus, it becomes clear from the legal history of the 1879 Act, the 1926 Act and the 1961 Act that they all deal with a person's right to practise or entitlement to practise. The 1961 Act only seeks to create a common Bar consisting of one class of members, namely, advocates. Therefore, in our view, the said expression "an advocate of a High Court" as understood, both, pre and post 1961, referred to person(s) right to practise. Therefore, actual practise cannot be read into the qualification provision, namely, Article 217(2)(*b*). The legal implication of the 1961 Act is that any person whose name is enrolled on the State Bar Council would be regarded as "an advocate of the High Court". The substance of Article 217(2)(*b*) is that it prescribes an eligibility criteria based on "right to practise" and not actual practice."

56. The Karnataka High Court in *Mallaraddi H. Itagi and Others v. The High Court of Karnataka, Bangalore and Another*[17] was, inter alia, concerned with the question whether the petitioners, who were working as either Assistant Public Prosecutors or Senior Assistant Public Prosecutors or Public Prosecutors, were eligible to be considered for appointment as District Judges under Article 233(2) of the Constitution and Rule 2 of Karnataka Judicial Services (Recruitment) Rules, 1983 (for short, 'Karnataka Recruitment Rules'). The Division Bench of the High Court considered the relevant provisions and the decisions of this Court in *Sushma Suri*[6] and *Satya Narain Singh*[5]. The High Court held that having regard to the provisions in the Karnataka Recruitment Rules, the petitioners were civil servants in the employment of the State Government and could not be treated as practicing advocates from the date they were appointed to the post of Assistant Public Prosecutors. The High Court took into consideration Rule 49 of the BCI Rules and held as under (Pg. 86-88):

17. 2002 (4) Karnataka Law Journal 76.

"The petitioners 1 to 9 came to be appointed as Assistant Public Prosecutors/Senior Assistant Public Prosecutors/ Public Prosecutors in terms of the Recruitment Rules framed by the State Government. Therefore, in terms of the main provision contained in Rule 49 of the Bar Council of India Rules, the petitioners on their appointment as Assistant Public Prosecutors ceased to be practising Advocates. Further, as noticed by us earlier, when once the petitioners had surrendered their Certificate of Practice and suspended their practice in terms of Rule 5 of the Bar Council of India Rules, it is not possible to take the view that they still continue to be practising Advocates. The rules which prescribe the qualification for appointment to the post of District Judges by direct recruitment provides that an applicant must be practising on the last date fixed for submission of application, as an Advocate and must have so practised for not less than 7 years as on such date. The case of Sushma Suri, supra, does not deal with the situation where the Law Officers had surrendered the Certificate of Practice and suspended their practice. The facts of that case indicates that the Hon'ble Supreme Court proceeded on the basis that the exception provided to Rule 49 of the Rules applies to the Law Officers in that case inasmuch as the Law Officers in those cases were designated by terms of their appointment as Law Officers for the purpose of appearing before the Courts on behalf of their employers. Therefore, facts of those cases are different from the facts of the case of petitioners 1 to 9. The rule similar to the one before us which provides that an Advocate must be a practising Advocate on the date of the submission of the application did not fall for consideration before the Hon'ble Supreme Court. The Delhi Higher Judicial Services Rules, 1970 did not provide that an Advocate should be a practising Advocate on the date of submission of his application. Under these circumstances, in our considered view, the observation made by the Hon'ble Supreme Court in the case of

Sushma Suri, supra, at paragraph 8 of the judgment which is strongly relied upon by the learned Counsel for the petitioners wherein it is stated that "for purposes of the Advocates Act and the Rules framed thereunder the Law Officer (Public Prosecutor or Government Counsel) will continue to be an Advocate. The intention of the relevant rules is that a candidate eligible for appointment to the higher judicial service should be a person who regularly, practices before the Court or Tribunal appearing for a client" has no application to the facts of the present case. As noticed by us, the qualification prescribed for Assistant Public Prosecutor is three years of practice as an Advocate on the date of submission of application. The qualification prescribed for recruitment to the post of Munsiff, i.e., Civil Judge (Junior Division) is that an applicant, on the last date fixed for submission of application, must be a practising Advocate and must have practiced for not less than four years on the date of application; or who is working as an Assistant Public Prosecutor/Senior Assistant Public Prosecutor or as a Public Prosecutor in the Department of Prosecutions and must have so worked for not less than 4 years as on the date of application. Therefore, the Assistant Public Prosecutors/Senior Assistant Public Prosecutor/Assistant Public Prosecutor are made eligible for appointment only to the post of Munsiffs Civil Judge (Junior Division) under the Recruitment Rules. But, they are not made eligible under the Rules for appointment as District Judges. Therefore, when the Rule making Authority itself has not made the Assistant Public Prosecutor/Senior Assistant Public Prosecutor/Public Prosecutor as eligible for appointment to the post of District Judges, it is not permissible to treat the Assistant Public Prosecutor/Senior Assistant Public Prosecutor/Public Prosecutor as practising Advocates by judicial interpretation and by giving extended meaning to make them eligible for appointment to the post of District Judges."

With reference to the decision of this Court in *Satya Narain Singh*[5], the Karnataka High Court held as under (Pg. 88-89) :

"The Hon'ble Supreme Court in the case of *Satya Narain Singh v. High Court of Judicature at Allahabad and Ors.,* 1985 (1) SCC 225, while interpreting Sub-clause (2) of Article 233 of the Constitution of India has taken the view that "a person not already in service of Union or of the State" shall mean only officers in judicial service and the Judicial Officers who are already in service are not eligible for appointment in respect of the post reserved for direct recruitment under Sub-clause (2) of Article 233 of the Constitution of India. Therefore, the Judicial Officers who are in the State services are ineligible for appointment in respect of direct recruitment vacancies. However, if the argument of the learned Counsel for petitioners is accepted as correct, the Assistant Public Prosecutor and Senior Assistant Public Prosecutor who are only made eligible under the Recruitment Rules to the post of Munsiffs which is the lowest cadre in the District Judiciary would be eligible for appointment to the post of District Judges in respect of the posts reserved for direct recruitment vacancies. In our view, the acceptance of such a position would lead to discrimination between the officers of the State who are in judicial services on the one hand and Assistant Public Prosecutors, Senior Assistant Public Prosecutors and Public Prosecutors on the other. While considering the contention of the learned Counsel for the petitioners that the Assistant Public Prosecutor/Senior Assistant Public Prosecutor/Public Prosecutors should be treated as practising Advocates, this Court cannot ignore the consequence of resultant incongruous situation, if such an argument is accepted. We are also unable to accede to the submission of the learned Counsel for the petitioners that so long as the names of the petitioners 1 to 9 are not removed from the Rolls of State Bar Council, the said petitioners would be practising Advocates. In our view,

there is no merit in this submission. No doubt, Section 2(a) of the Advocates Act (hereinafter referred to as the "Act") provides that "an 'Advocate' means an Advocate entered in any roll under the provisions of Advocates Act". That does not mean the Advocate who has surrendered the Certificate of Practice to the State Bar Council and who has suspended his practice also can be treated either as an Advocate or as a practising Advocate. May be that once a Law graduate enrolls himself as an Advocate, his name finds a place in the Rolls of the State Bar Council till it is removed from the Rolls of the State Bar Council in terms of Clause (d) of Sub-section (3) of Section 35 of the Act. But, that does not mean a person who has suspended his practice on securing a full time appointment can still be considered as a practising Advocate. This conclusion of ours gets support from the Sub-section (4) of Section 35 of the Act wherein it is provided that where an Advocate is suspended from practice, during the period of suspension he is debarred from practising in any Court or before any authority or person in India. Therefore, if the object of surrendering Certificate of Practice and suspending the practice is to give up the right to practice before the Court; the petitioners 1 to 9 who were required to surrender the Certificate of Practice and who have so suspended their practice, cannot in our view, be held either as Advocates or as practising Advocates. In our view, during the period of suspension of practice, such a person ceases to be an Advocate; and continuance of his name on the Rolls of Bar Council is of no consequence so far as his right to practice is concerned and such a person cannot designate himself as an Advocate. Therefore, we are of the view that the petitioners 1 to 9 not being practising Advocates on the date of submission of their applications, they are not eligible for appointment as District Judges in terms of the qualification prescribed. Therefore, the Selection Committee has, in our view, rightly rejected the claim of the petitioners 1 to 9 for appointment

as District Judges and they were rightly not called for interview. The petitioners cannot have any grievance on that account."

57. The judgment of the Karnataka High Court in *Mallaraddi H. Itagi*[17] was challenged before this Court. This Court dismissed the appeals on *18.05.2009*[18] and, upholding the judgment of the High Court, observed as follows:

"7. On that basis the Court came to the conclusion that the appellant therein was not liable to be considered as he was holding a regular post. In paragraph 19 it was observed:

> "These orders clearly show that the appellant was required to work in the Legal Cell of the Secretariat of the Board; was given different pay scales; rules of seniority were applicable; promotions were given to him on the basis of the recommendations of the Departmental Promotion Committee; was amenable to disciplinary proceedings, etc.

Further looking to the nature of duties of Legal Cell as stated in the regulation of business of the Board extracted above, the appellant being a full-time salaried employee had/has to attend to so many duties which appear to be substantial and predominant. In short and substance we find that the appellant was/is a full-time salaried employee and his work was not mainly or exclusively to act or plead in court.

Further, there may be various challenges in courts of law assailing or relating to the decisions/actions taken by the appellant himself such as challenge to issue of statutory regulation, notification, the institution/ withdrawal of any prosecution or other legal/quasi-legal proceedings etc. In a given situation the appellant may be amenable to

18. Civil Appeal Nos. 947-956 of 2003, Mallaraddi H. Itagi and ors. v. High Court of Karnataka and Ors.

disciplinary jurisdiction of his employer and/or to the disciplinary jurisdiction of the Bar Council. There could be conflict of duties and interest. In such an event, the appellant would be in an embarrassing position to plead and conduct a case in a court of law.

Moreover, mere occasional appearances in some courts on behalf of the Board even if they be, in our opinion, could not bring the appellant with the meaning of "Law Officer" in terms of para 3 of Rule 49."

and has also taken a view that in a situation like this the decision in Sushma Suri case is not applicable. We have no reason to take any different view, as had already been taken by this court, as the situation is not different. It is already considered before the High Court that the appellants were holding a regular post they were having the regular pay scale, they were considered for promotion, they were employed by the State Government Rules and therefore they were actually the Government servants when they made applications for the posts of District Judges."

58. The decision of the Karnataka High Court in *Mallaraddi H. Itagi*[17] and the judgment of this Court[18] in the appeals from that decision have been heavily relied on by the respondent – successful writ petitioner.

59. Few decisions rendered by some of the High Courts on the point may also be noticed here. In *Sudhakar Govindrao Deshpande*[11], the issue that fell for consideration before the Bombay High Court was whether the petitioner therein who was serving as Deputy Registrar at the Nagpur Bench of the Bombay High Court, was eligible for appointment to the post of the District Judge. The advertisement that was issued by the High Court inviting applications for five posts of District Judges, inter alia, stated, 'candidate must ordinarily be an advocate or pleader who has practised in the High Court, Bombay or Court subordinate thereto for not less than seven years on the 1st October, 1980'. The Single Judge of the Bombay High Court

considered Articles 233, 234 and 309 of the Constitution, relevant Recruitment Rules and noted the judgments of this Court in *Chandra Mohan*[4], *Satya Narain Singh*[5] and *Rameshwar Dayal*[9]. It was observed as follows:

> " . . . . . the phrase "has been an Advocate or a pleader" must be interpreted as a person who has been immediately prior to his appointment a member of the Bar, that is to say either an Advocate or a pleader. In fact, in the above judgment, the Supreme Court has repeatedly referred to the second group of persons eligible for appointment under Article 233 (2) as "members of the Bar". Article 233(2) therefore, when it refers to a person who has been for not less than seven years an Advocate or pleader refers to a member of the Bar who is of not less than seven years' standing."

60. In *Smt. Jyoti Gupta v. Registrar General, High Court of M.P., Jabalpur and Another*[19], Madhya Pradesh High Court was concerned with the question as to whether the Assistant Public Prosecutors were eligible to apply for appointment to the post of District Judges. The Madhya Pradesh High Court held as under :

> ". . . . . A careful reading of the note provided in the exception states that nothing in Rule 49 of the Bar Council of India Rules shall apply to a Law Officer of the Central Government, State Government or a body corporate who is entitled to be enrolled under the rules of the State Bar Council under Section 28(2)(d) read with Section 24(1)(e) of the Advocates Act, 1961 despite his being a full-time salaried employee. Hence, the exception to Rule 49 has been provided because of the provisions in the Rules of State Bar Council made under Section 28(2)(d) read with Section 24(1)(e) of the Advocates Act, 1961 for a Law Officer of the Central Government or the State Government or a body corporate to be admitted into the roll of the State

19. 2008 (2) MPLJ 486.

> Bar Council if he is required by the terms of his appointment to act and/or plead in Courts on behalf of his employer. In other words, if the rules made by the State Bar Council under Section 28(2)(d) read with Section 24(1)(e) of the Advocates Act, 1961 provide for admission as an Advocate, enrolment in the State Bar Council as an Advocate or a Law Officer of the Central Government or the State Government or a body corporate, who, by the terms of his employment, is required to act and/or plead in Courts on behalf of his employer, he can be admitted as an Advocate and enrolled in the State Bar Council by virtue of the provisions of Sections 24(1)(e) and 28(2)(d) of the Advocates Act, 1961 and the rules made thereunder by the State Bar Council and he does not cease to be an Advocate on his becoming such Law Officer of the Central Government, State Government or a body corporate. As we have seen, the State Bar Council of M.P. has provided under Proviso(i) of Rule 143 that a Law Officer of the Central Government or a Government of State or a public corporation or a body constituted by a statute, who by the terms of his appointment, is required to act and/or plead in Courts on behalf of his employer, is qualified to be admitted as an Advocate even though he may be in full or part-time service or employment of such Central Government, State Government, public corporation or a body corporate. The position of law, therefore, has not materially altered after the deletion of the note contained in the exception under Rule 49 of the Bar Council of India Rules by the resolution of the Bar council of India, dated 22nd June, 2001.
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> In the result, we hold that if a person has been enrolled as an Advocate under the Advocates Act, 1961 and has

thereafter been appointed as Public Prosecutor/Assistant Public Prosecutor or Assistant District Public Prosecutor and by the terms of his appointment continues to conduct cases on behalf of the State Government before the Criminal Courts, he does not cease to be an Advocate within the meaning of Article 233(2) of the Constitution and Rule 7(1)(c) of M.P. Uchchatar Nyayik Sewa (Bharti Tatha Sewa Shartein) Niyam, 1994 for the purpose of recruitment to the post of District Judge (Entry Level) in the M.P. Higher Judicial Service."

61. In *K. Appadurai v. The Secretary to Government of Tamil Nadu and Another*[20], one of the questions under consideration before the Madras High Court was whether for appointment to the post of District Judge (Entry Level), the applications could have been invited from the Assistant Public Prosecutor (Grade I & II). The Division Bench of that Court referred to Article 233 of the Constitution, Rule 49 of the BCI Rules and the decisions of this Court in *Satya Narain Singh*[5], *Chandra Mohan*[4], *Sushma Suri*[6], *Johri Mal*[15] and *Satish Kumar Sharma*[7]. The Division Bench held as under:

"22. In the light of the ratio laid down by the Supreme Court in the decisions quoted hereinbefore, it can safely be concluded that the nature of duties of the Assistant Public Prosecutors is to act and plead in Courts of Law on behalf of the State as Advocates. Even after becoming Assistant Public Prosecutors they continue to practice as advocates and plead the cases on behalf of the Government and their names remained in the roll of advocates maintained by the Bar Council. As Public Prosecutors they acquired much experience in dealing criminal cases.

23. It was argued on behalf of the petitioners that the note appended to Rule 49 of the Bar Council of India Rules having been deleted by a resolution dated 22nd June, 2001 of the Bar Council of India, the ratio decided by the

20. 2010-4-L.W. 454.

Supreme Court in *Sushma Suri* Case (supra) will not apply, and therefore, an advocate who is employed as a full time salaried employee of the government, ceases to practice as an advocate so long as he continues in such employment. The submission made by the counsel has no substance.

24. As noticed above, Rule 49 of the Bar Council of India Rules provides an exception where in case of Law Officers of the government and corporate bodies, despite they being employed by the government as Law Officers, they cannot cease to be advocates so long as they are required to plead in the courts. For example, Assistant Public Prosecutors so appointed by the government on payment of salary their only nature of work is to act, plead and defend on behalf of the State as an advocate. Hence, an advocate employed by the government as Law Officer namely, an Assistant Public Prosecutor on terms of payment of salary would not cease to be an advocate in terms of Rule 49 of the Bar Council of India Rules for the purpose of appointment, as such advocate is required to act or plead in courts on behalf of the State. If, in terms of the appointment, an advocate is made a Law Officer on payment of salary to discharge his duties at the Secretariat and handle the legal files, he ceased to be an advocate. In our considered opinion, therefore, the deletion of the note appended to under Rule 49 of the Bar Council of India Rules will not in any way affect the legal proposition of law. We are also of the view that in the light of the relevant clauses of the Advocates Act, 1961 it will not debar the Assistant Public Prosecutors to continue and plead in courts as an advocate."

62. In *Biju Babu*[10], the question before the Kerala High Court was whether the appellant, who was a Public Prosecutor appointed by the Central Government to conduct cases for the C.B.I., was eligible for appointment to the post of District Judge in the Kerala State Higher Judicial Service by direct recruitment.

The High Court answered the question in the negative mainly relying on amended Rule 49 of the BCI Rules and the legal position stated by this Court in *Satish Kumar Sharma*[7].

63. Two more judgments of this Court may be quickly noticed here. In *State of U.P. v. Ramesh Chandra Sharma and others*[21], this Court stated that the appointment of any legal practitioner as a District Government Counsel is only professional engagement. A two-Judge Bench of this Court in *Samarendra Das, Advocate v. State of West Bengal and others*[22] was concerned with the question whether the post of Assistant Public Prosecutor was a civil post under the State of West Bengal in terms of Section 15 of the Administrative Tribunals Act 1985. While answering the above question in the affirmative, this Court held that the post of Assistant Public Prosecutor was a civil post. The Court negated the argument that the Assistant Public Prosecutor was an officer of the Court of Judicial Magistrate.

64. After the arguments were concluded in these matters and the judgment was reserved, Respondent No. 1 (original writ petitioner) has circulated a judgment of the Bombay High Court in *Sunanda Bhimrao Chaware & Ors. v. The High Court of Judicature at Bombay*, delivered on 17.10.2012 by the Full Bench of that Court. We are not inclined to consider this judgment for two reasons. One, the appellants had no occasion to respond to or explain that judgment. Secondly, and equally important, the aggrieved parties by that judgment, who are not before us, may be advised to challenge the judgment. We do not intend to foreclose the rights of the parties one way or the other.

65. Section 24 Cr.P.C. provides that for every High Court the Central Government or the State Government shall appoint a Public Prosecutor. The Central Government or the State Government may also appoint one or more Additional Public Prosecutor for conducting in such court, any prosecution, appeal

21. (1995) 6 SCC 527.

22. (2004) 2 SCC 274.

or other proceedings on their behalf. The Central Government may appoint one or more Public Prosecutors for the purpose of conducting any case or class of cases in any district or local area. Insofar as State Government is concerned it provides that for every district it shall appoint a Public Prosecutor and may also appoint one or more Additional Public Prosecutors for the district. There are two modes of appointment of the Public Prosecutors, one, preparation of a panel of names of persons, who in the opinion of the District Magistrate after consultation with the Sessions Judge, are fit to be appointed as Public Prosecutors or Additional Public Prosecutors for the district. The other, appointment of Public Prosecutor or an Additional Public Prosecutor from amongst the persons in a State where exists regular cadre of prosecuting officers. A person is eligible to be appointed as Public Prosecutor only if he has been in practise as an advocate for not less than seven years. Special Public Prosecutor may also be appointed by the Central or the State Government for the purpose of any case or class of cases but he has to be a person who has been in practise as an advocate for not less than 10 years.

66. Public Prosecutor has a very important role to play in the administration of justice and, particularly, in criminal justice system. Way back on April 15, 1935 in *Harry Berger v. United States of America*[23], Mr. Justice Sutherland, who delivered the opinion of the Supreme Court of United States, said about the United States Attorney that he is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all, and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. The twofold aim of United States Attorney is that guilt shall not escape or innocence suffer. It is as much his duty to refrain from improper methods calculated to produce wrongful conviction as it is to use every legitimate means to bring about a just one.

23. 295 U.S. 78.

67. The Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, adopted guidelines on the role of Prosecutors in 1990. Inter-alia, it states that Prosecutors shall perform their duties fairly, consistently and expeditiously and respect and protect human dignity and uphold human rights. He shall take proper account of the position of the suspect and the victim and pay attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect.

68. As a follow up action to the above guidelines on the role of Prosecutors, the International Association of Prosecutors adopted Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors which, inter-alia, provides that Prosecutors shall strive to be, and to be seen to be, consistent, independent and impartial; Prosecutors shall preserve the requirements of a fair trial and safeguard the rights of the accused in co-operation with the Court.

69. European Guidelines on Ethics and Conduct for Public Prosecutors [The Budapest Guidelines] adopted in the Conference of Prosecutors General of Europe on 31st May, 2005 are on the same lines as above. Under the head "professional conduct in the framework of criminal proceedings". These guidelines state that when acting within the framework of criminal proceedings, Public Prosecutor should at all times carry out their functions fairly, impartially, objectively and, within the framework of the provisions laid down by law, independently; seek to ensure that the criminal justice system operates as expeditiously as possible, being consistent with the interests of justice; respect the principle of the presumption of innocence and have regard to all relevant circumstances of a case including those affecting the suspect irrespective of whether they are to the latter's advantage or disadvantage.

70. In India, role of Public Prosecutor is no different. He has at all times to ensure that an accused is tried fairly. He

should consider the views, legitimate interests and possible concern of witnesses and victims. He is supposed to refuse to use evidence reasonably believed to have been obtained through recourse to unlawful methods. His acts should always serve and protect the public interest. The State being a Prosecutor, the Public Prosecutor carries a primary position. He is not a mouthpiece of the investigating agency. In Chapter II of the BCI Rules, it is stated that an advocate appearing for the prosecution of a criminal trial shall so conduct the prosecution that it does not lead to conviction of the innocent; he should scrupulously avoid suppression of material capable of establishing the innocence of the accused.

71. A two Judge Bench of this Court in *Mukul Dalal*[2], while dealing with a question about the justifiability of the appointment by the State of Special Public Prosecutors and Assistant Public Prosecutors under Sections 24 and 25 Cr.P.C. respectively, observed that in criminal jurisprudence the State was a prosecutor and that is why primary position is assigned to the Public Prosecutor.

72. In *Sidhartha Vashisht alias Manu Sharma* v. *State (NCT of Delhi)*[24], the Court considered role of Public Prosecutor vis-à-vis his duty of disclosure. The Court noted earlier decisions of this Court in *Shiv Kumar v. Hukam Chand and Another*[25] and *Hitendra Vishnu Thakur and Others v. State of Maharashtra and others*[26] and in paragraphs 185 and 186 (Pgs. 73-74) of the Report stated as under :

> "185. A Public Prosecutor is appointed under Section 24 of the Code of Criminal Procedure. Thus, Public Prosecutor is a statutory office of high regard. This Court has observed the role of a Prosecutor in *Shiv Kumar v. Hukam Chand* [(1999) 7 SCC 467] as follows: (SCC p. 472, para 13)

24. (2010) 6 SCC 1.
25. (1999) 7 SCC 467.
26. (1994) 4 SCC 602.

"*13*. From the scheme of the Code the legislative intention is manifestly clear that prosecution in a Sessions Court cannot be conducted by anyone other than the Public Prosecutor. The legislature reminds the State that the policy must strictly conform to fairness in the trial of an accused in a Sessions Court. A Public Prosecutor is not expected to show a thirst to reach the case in the conviction of the accused somehow or the other irrespective of the true facts involved in the case. The expected attitude of the Public Prosecutor while conducting prosecution must be couched in fairness not only to the court and to the investigating agencies but to the accused as well. If an accused is entitled to any legitimate benefit during trial the Public Prosecutor should not scuttle/conceal it. On the contrary, it is the duty of the Public Prosecutor to winch it to the force and make it available to the accused. Even if the defence counsel overlooked it, the Public Prosecutor has the added responsibility to bring it to the notice of the court if it comes to his knowledge. A private counsel, if allowed a free hand to conduct prosecution would focus on bringing the case to conviction even if it is not a fit case to be so convicted. That is the reason why Parliament applied a bridle on him and subjected his role strictly to the instructions given by the Public Prosecutor.

186. This Court has also held that the Prosecutor does not represent the investigating agencies, but the State. This Court in *Hitendra Vishnu Thakur v. State of Maharashtra [(1994) 4 SCC 602]* held: (SCC pp. 630-31, para 23)

"*23*. … A Public Prosecutor is an important officer of the State Government and is appointed by the State under the Criminal Procedure Code. He is not a part of the investigating agency. He is an independent statutory authority. The public prosecutor is expected to independently apply his mind to the request of the

investigating agency before submitting a *report* to the court for extension of time with a view to enable the investigating agency to complete the investigation. He is not merely a post office or a forwarding agency. A Public Prosecutor may or may not agree with the reasons given by the investigating officer for seeking extension of time and may find that the investigation had not progressed in the proper manner or that there has been unnecessary, deliberate or avoidable delay in completing the investigation."

Then in paragraph 187 (Pg. 74) the Court stated as follows :

"187. Therefore, a Public Prosecutor has wider set of duties than to merely ensure that the accused is punished, the duties of ensuring fair play in the proceedings, all relevant facts are brought before the court in order for the determination of truth and justice for all the parties including the victims. It must be noted that these duties do not allow the Prosecutor to be lax in any of his duties as against the accused."

73. In a recent decision in *Centre for Public Interest Litigation and Others v. Union of India and Others*[27], the question before this Court was in respect of the appointment of a Special Public Prosecutor to conduct the prosecution on behalf of CBI and ED in 2G Spectrum case. While dealing with the above question, the Court considered Section 2(u) and Section 24 Cr.P.C. and Section 46 of the Prevention of Money-Laundering Act, 2002 and few earlier decisions of this Court in *Manu Sharma*[24], *Sheonandan Paswan v. State of Bihar and Others*[28] and *Johri Mal*[15] and it was observed that in an appointment of Public Prosecutor, the principle of master-servant does not apply; such an appointment is not an appointment to a civil post.

27. (2012) 3 SCC 117.

74. The mode of appointment of Public Prosecutor (including Additional Public Prosecutor and Special Public Prosecutor) under Section 24 Cr.P.C. and the mode of appointment of Assistant Public Prosecutor under Section 25 Cr.P.C. significantly differ. There is qualitative difference in the role and position of Public Prosecutor and Assistant Public Prosecutor. As a matter of law, Assistant Public Prosecutor is not included in the definition of 'Public Prosecutor' under Section 2(u) Cr.P.C. In *Samarendra Das*[22], this Court held that the post of Assistant Public Prosecutor was a civil post. This position was accepted by a three-Judge Bench of this Court in *Johri Mal*[15]. It was stated in *Johri Mal*[15], "….a distinction is to be borne in mind between appointment of a Public Prosecutor or Additional Public Prosecutor on the one hand and Assistant Public Prosecutor on the other. So far as Assistant Public Prosecutors are concerned, they are employees of the State……" As regards 'Public Prosecutor', this Court has consistently held that though Public Prosecutor is a holder of 'public office' and he holds a 'post' yet he is not in government service as the term is usually understood. Despite these differences, for the purposes of Article 233(2) there is not much difference in a Public Prosecutor and an Assistant Public Prosecutor and both of them are covered by the expression 'advocate'. It is so for more than one reason. In the first place, a Public Prosecutor under Section 24 is appointed by the State Government or the Central Government for conduct of prosecution, appeal or other proceeding on its behalf in the High Court or for a district and Assistant Public Prosecutor is appointed under Section 25 by the State Government or the Central Government to conduct prosecution on its behalf in the courts of Magistrates. So the main function of the Public Prosecutor as well as Assistant Public Prosecutor is to act and/or plead on behalf of the Government in a court; both of them conduct cases on behalf of the government. Secondly and remarkably, for the purposes of counting experience as an

28. (1987) 1 SCC 288.

advocate as prescribed in sub-sections 24(7) and 24(8), the period, during which a person has rendered service as a Public Prosecutor or as Assistant Public Prosecutor, is treated as being in practice as an advocate under Section 24(9) Cr.P.C. In other words, the rendering of service as a Public Prosecutor or as Assistant Public Prosecutor is deemed to be practice as an advocate.

75. The three appellants namely, Deepak Aggarwal, Chandra Shekhar and Desh Raj Chalia, at the time of their application, were admittedly working as Assistant District Attorney. They were appointed under the Haryana State Prosecution Legal Service (Group C) Rules, 1979 (for short, '1979 Rules'). The relevant Rules read as under :

"2. Definitions.—In these rules, unless the context otherwise requires:-

2(a) xxx xxx xxx

2(b) "direct recruitment" means an appointment made otherwise than by promotion or by transfer of an official already in the service of the Government of India or any State Government;

xxx xxx xxx

6. Appointing Authority.—Appointment to the posts in the service shall be made by the Director.

xxx xxx xxx

9. Method of Recruitment.-(1) Recruitment to the Service shall be made:-

(i) by direct recruitment; or

(ii) by promotion; or

xxx xxx xxx

11. Seniority of Members of the service.-The seniority inter se of members of the Service shall be determined by the length of their continuous service on any post in the Service.

Provided that in the case of members appointed by direct recruitment, the order of merit determined by the Commission or any other recruiting authority shall not be disturbed in fixing the seniority:

Provided further that in the case of two or more members appointed on the same date, their seniority shall be determined as follows:

(a) a member appointed by direct recruitment shall be senior to a member appointed by promotion or by transfer;

xxx xxx xxx

12. Liability to serve.-(1) A member of the Service shall be liable to serve at any place whether within or outside the State of Haryana, on being ordered so to do by the appointing authority;

(2) A member of the Service may also be deputed to serve under,-

(i) a company, an association or a body of individuals whether incorporated or not, which is wholly or substantially owned or controlled by the Government, a Municipal Committee or a local authority, within the State of Haryana;

(ii) the Central Government or a company an association or a body of individuals whether incorporated or not, which is wholly or substantially owned or controlled

by the Central Government; or

(iii) any other State Government, an international organisation, an autonomous body not controlled by the Government or a private body;

Provided that no member of the service shall be deputed to the Central or any other State Government or any organisation or body referred to in clause (ii) and clause (iii) except with his consent.

13. Leave, pension or other matters.-xxx xxx

(2) No member of the Service shall have the right of private practice.

14. Discipline, penalties and appeals.—(1) in matters relating to discipline, penalties and appeals, members of the Service shall be governed by the Punjab Civil Services (Punishment and Appeal) Rules, 1952, as amended from time to time:

Provided that the nature of penalties which may be imposed, the authority empowered to impose such penalties and appellate authority shall, subject to the provisions of any law or rules made under Article 309 of the Constitution of India, be such as are specified in Appendix C to these rules.

(2) The authority competent to pass an order under clause (c) or clause (d) of sub-rule (1) of rule 10 of the Punjab Civil Services (Punishment and Appeal) Rules, 1952, as amended from time to time, shall be as specified in Appendix 'D' to these rules."

75.1. Appendix 'B' appended to the 1979 Rules provided for qualification and experience for Assistant District Attorney. It reads as follows :

"APPENDIX B"
(See Rule 7)

Qualifications and Experience

Designation of post .....

	For Promotion/transfer	For direct recruitment
Assistant District Attorney	(i) Degree of Bachelor of Law of a recognised university; and	(i) Degree of Bachelor of Law of recognised university; and
	(ii) who has worked - (a) for a period of not less than five years, as Assistant in any post in the equivalent or higher scale in any Government office; or	(ii) who has practiced at the bar for a period of not less than two years
	(b) for a period of not less than three years on an assignment (not less than that of an Assistant; involving legal work to any Government office."	

76. Of the other appellants, Rajesh Malhotra at the time of making application was Public Prosecutor in the office of CBI. His services were governed by the General Rules and CBI (Legal Advisers and Prosecutors) Recruitment Rules, 2002. It is not necessary to refer to these Rules in detail. Suffice it to say that a Public Prosecutor in CBI is appointed by Union Public Service Commission by direct recruitment or by promotion from in-service Assistant Public Prosecutors or by deputation from in-service government servants. Service conditions which are applicable to any government servant or a member of civil service are applicable to such Public Prosecutor. Insofar as Dinesh Kumar Mittal is concerned, admittedly he was working as Deputy Advocate General in the State of Punjab at the time

of his application. In the impugned judgment, he has been held to be full-time employee of the Punjab Government.

77. We do not think there is any doubt about the meaning of the expression "advocate or pleader" in Article 233(2) of the Constitution. This should bear the meaning it had in law preceding the Constitution and as the expression was generally understood. The expression "advocate or pleader" refers to legal practitioner and, thus, it means a person who has a right to act and/or plead in court on behalf of his client. There is no indication in the context to the contrary. It refers to the members of the Bar practising law. In other words, the expression "advocate or pleader" in Article 233(2) has been used for a member of the Bar who conducts cases in court or, in other words acts and/or pleads in court on behalf of his client. In *Sushma Suri*[6], a three-Judge Bench of this Court construed the expression "members of the Bar" to mean class of persons who were actually practising in courts of law as pleaders or advocates. A Public Prosecutor or a Government Counsel on the rolls of the State Bar Council and entitled to practice under the 1961 Act was held to be covered by the expression 'advocate' under Article 233(2). We respectfully agree.

78. In *U.P. State Law Officers Association*[13], this Court stated that though the lawyers of the Government or a public body on the full-time rolls of the government and the public bodies are described as their law officers, but nevertheless they are professional practitioners. It is for this reason, the Court said that the Bar Council of India in Rule 49 of the BCI Rules (in its original form) in the saving clause waived the prohibition imposed by the said rule against the acceptance by a lawyer of a full-time employment. In *Sushma Suri6*, a three-Judge Bench of this Court while considering the meaning of the expression "advocate" in Article 233(2) of the Constitution and unamended Rule 49 of the BCI Rules held that if a person was on the rolls of any Bar Council and is engaged either by employment or otherwise by the Union or State and practises

before a court as an advocate for and on behalf of such Government, such person does not cease to be an advocate. This Court went on to say that a Public Prosecutor or a Government Counsel on the rolls of the Bar Council is entitled to practice. It was laid down that test was not whether such person is engaged on terms of salary or by payment of remuneration but whether he is engaged to act or plead on its behalf in a court of law as an advocate. The terms of engagement do not matter at all and what matters is as to what such law officer engaged by the Government does – whether he acts or pleads in court on behalf of his employer or otherwise. If he is not acting or pleading on behalf of his employer then he ceases to be an advocate; if the terms of engagement are such that he does not have to act or plead but does other kinds of work then he becomes a mere employee of the Government or the body corporate. The functions which the law officer discharges on his engagement by the Government were held decisive. We are in full agreement with the above view in *Sushma Suri*[6].

79. While referring to unamended Rule 49, this Court in *Sushma Suri*[6] said that Bar Council of India had understood the expression "advocate" as one who is actually practising before courts which expression would include even those who are law officers employed as such by the Government or a body corporate.

80. Have the two subsequent decisions in *Satish Kumar Sharma*[7] and *Mallaraddi H. Itagi*[18] differed from Sushma *Suri*[6]? Is there any conflict or inconsistency in the three decisions? *Satish Kumar Sharma*[7] *and Mallaraddi H. Itagi*[18] are the two decisions on which very heavy reliance has been placed on behalf of the successful writ-petitioners (respondents). In *Satish Kumar Sharma*[7], which has been elaborately noted in the earlier part of the judgment, this Court found from the appointment/promotion orders in respect of the appellant

therein that he was required to work in the legal cell of the Secretariat of the Board. Central to the entire reasoning in *Satish Kumar Sharma*[7] is that being a full-time salaried employee he had/has to attend many duties and his work was not mainly and exclusively to act or plead in court. Mere occasional appearances on behalf of the Board in some courts were not held to be sufficient to bring him within the meaning of expression 'Law Officer'. In the backdrop of nature of the office that the appellant therein held and the duties he was required to perform and in the absence of any rules framed by the State Bar Council with regard to enrolment of a full time salaried Law Officer, he was held to be not entitled for enrolment and the exception set out in paragraphs 2 and 3 of unamended Rule 49 of the BCI Rules was not found to be attracted. In *Satish Kumar Sharma*[7]*,* this Court did apply the test that was enunciated in *Sushma Suri*[6] *viz.,* whether a person is engaged to act and/or plead in a court of law to find out whether he is an advocate. In *Satish Kumar Sharma*[7] when this Court observed with reference to Chapter II of the BCI Rules that an advocate has a duty to the court, duty to the client, duty to the opponent and duty to the colleagues unlike a full time salaried employee whose duties are specific and confined to his employment, the Court had in mind such full-time employment which was inconsistent with practice in law. In para 23 of the judgment in *Satish Kumar Sharma*[7], pertinently this Court observed that the employment of appellant therein as a head of legal cell in the Secretariat of the Board was different from the work of the Prosecutors and Government Pleaders in relation to acting and pleading in Court. On principle of law, thus, it cannot be said that there is any departure in *Satish Kumar Sharma*[7] from *Sushma Suri*[6].

81. In *Mallaraddi H. Itagi*[18]*,* the appellants were actually found to be government servants when they made applications for the post of District Judges. The High Court in its judgment in *Mallaraddi H. Itagi*[17] had noticed that the appellants had surrendered their certificate of practice and suspended their

practice on their appointment as Assistant Public Prosecutors/ Senior Assistant Public Prosecutors/Public Prosecutors in terms of Karnakata Recruitment Rules. It was on this basis that Karnataka High Court held that *Sushma Suri*[6] was not applicable to the case of the appellants. There is consonancy and congruity with the decisions of this Court in *Sushma Suri*[6], *Satish Kumar Sharma*[7] and *Mallaraddi H. Itagi*[18] and, in our opinion, there is no conflict or inconsistency on the principle of law.

82. In none of the other decisions viz., *Mundrika Prasad Sinha*[1], *Mukul Dalal*[2] and *Kumari Shrilekha Vidyarthi*[3], it has been held that a Government Pleader or a Public Prosecutor or a District Government Counsel, on his appointment as a full-time salaried employee subject to the disciplinary control of the Government, ceases to be a legal practitioner. In *Kumari Shrilekha Vidyarthi*[3] while dealing with the office of District Government Counsel/ Additional District Government Counsel, it was held that the Government Counsel in the district were law officers of the State which were holders of an 'office' or 'post' but it was clarified that a District Government Counsel was not to be equated with post under the government in strict sense. In *Ramesh Chandra Sharma*[21], this Court reiterated that the appointment of any legal practitioner as a District Government Counsel is only a professional engagement.

83. However, much emphasis was placed on behalf of the contesting respondents on Rule 49 of the BCI Rules which provides that an advocate shall not be a full time salaried employee of any person, government, firm, corporation or concern so long as he continues to practice, and shall, on taking up any such employment, intimate the fact to the Bar Council on whose roll his name appears, and shall thereupon cease to practice as an advocate so long as he continues in such employment. It was submitted that earlier in Rule 49 an exception was carved out that a 'Law Officer' of the Central

Government or of a State or of a body corporate who is entitled to be enrolled under the rules of State Bar Council shall not be affected by the main provision of Rule 49 despite his being a full time salaried employee but by Resolution dated 22.6.2001 which was published in the Gazette on 13.10.2001, the Bar Council of India has deleted the said provision and hence on and from that date a full time salaried employee, be he Public Prosecutor or Government Pleader, cannot be an advocate under the 1961 Act.

84. Admittedly, by the above resolution of the Bar Council of India, the second and third para of Rule 49 have been deleted but we have to see the effect of such deletion. What Rule 49 of the BCI Rules provides is that an advocate shall not be a full time salaried employee of any person, government, firm, corporation or concern so long as he continues to practice. The 'employment' spoken of in Rule 49 does not cover the employment of an advocate who has been solely or, in any case, predominantly employed to act and/or plead on behalf of his client in courts of law. If a person has been engaged to act and/or plead in court of law as an advocate although by way of employment on terms of salary and other service conditions, such employment is not what is covered by Rule 49 as he continues to practice law but, on the other hand, if he is employed not mainly to act and/or plead in a court of law, but to do other kinds of legal work, the prohibition in Rule 49 immediately comes into play and then he becomes a mere employee and ceases to be an advocate. The bar contained in Rule 49 applies to an employment for work other than conduct of cases in courts as an advocate. In this view of the matter, the deletion of second and third para by the Resolution dated 22.6.2001 has not materially altered the position insofar as advocates who have been employed by the State Government or the Central Government to conduct civil and criminal cases on their behalf in the courts are concerned.

85. What we have said above gets fortified by Rule 43 of

the BCI Rules. Rule 43 provides that an advocate, who has taken a full-time service or part-time service inconsistent with his practising as an advocate, shall send a declaration to that effect to the respective State Bar Council within time specified therein and any default in that regard may entail suspension of the right to practice. In other words, if full-time service or part-time service taken by an advocate is consistent with his practising as an advocate, no such declaration is necessary. The factum of employment is not material but the key aspect is whether such employment is consistent with his practising as an advocate or, in other words, whether pursuant to such employment, he continues to act and/or plead in the courts. If the answer is yes, then despite employment he continues to be an advocate. On the other hand, if the answer is in negative, he ceases to be an advocate.

86. An advocate has a two-fold duty: (1) to protect the interest of his client and pursue the case briefed to him with the best of his ability, and (2) as an officer of the Court. Whether full-time employment creates any conflict of duty or interest for a Public Prosecutor/Assistant Public Prosecutor? We do not think so. As noticed above, and that has been consistently stated by this Court, a Public Prosecutor is not a mouth-piece of the investigating agency. In our opinion, even though Public Prosecutor/Assistant Public Prosecutor is in full-time employ with the government and is subject to disciplinary control of the employer, but once he appears in the court for conduct of a case or prosecution, he is guided by the norms consistent with the interest of justice. His acts always remain to serve and protect the public interest. He has to discharge his functions fairly, objectively and within the framework of the legal provisions. It may, therefore, not be correct to say that an Assistant Public Prosecutor is not an officer of the court. The view in *Samarendra Das*[22] to the extent it holds that an Assistant Public Prosecutor is not an officer of the Court is not a correct view.

87. The Division Bench has in respect of all the five private appellants – Assistant District Attorney, Public Prosecutor and Deputy Advocate General – recorded undisputed factual position that they were appearing on behalf of their respective States primarily in criminal/civil cases and their appointments were basically under the C.P.C. or Cr.P.C. That means their job has been to conduct cases on behalf of the State Government/C.B.I. in courts. Each one of them continued to be enrolled with the respective State Bar Council. In view of this factual position and the legal position that we have discussed above, can it be said that these appellants were ineligible for appointment to the office of Additional District and Sessions Judge? Our answer is in the negative. The Division Bench committed two fundamental errors, first, the Division Bench erred in holding that since these appellants were in full-time employment of the State Government/Central Government, they ceased to be 'advocate' under the 1961 Act and the BCI Rules, and second, that being a member of service, the first essential requirement under Article 233(2) of the Constitution that such person should not be in any service under the Union or the State was attracted. In our view, none of the five private appellants, on their appointment as Assistant District Attorney/Public Prosecutor/Deputy Advocate General, ceased to be 'advocate' and since each one of them continued to be 'advocate', they cannot be considered to be in the service of the Union or the State within the meaning of Article 233(2). The view of the Division Bench is clearly erroneous and cannot be sustained.

88. As regards construction of the expression, "if he has been for not less than seven years an advocate" in Article 233(2) of the Constitution, we think Mr. Prashant Bhushan was right in his submission that this expression means seven years as an advocate immediately preceding the application and not seven years any time in the past. This is clear by use of 'has been'. The present perfect continuous tense is used for a position which began at some time in the past and is still

continuing. Therefore, one of the essential requirements articulated by the above expression in Article 233(2) is that such person must with requisite period be continuing as an advocate on the date of application.

89. Rule 11 of the HSJS Rules provides for qualifications for direct recruits in Haryana Superior Judicial Service. Clause (b) of this rule provides that the applicant must have been duly enrolled as an advocate and has practised for a period not less than seven years. Since we have already held that these five private appellants did not cease to be advocate while working as Assistant District Attorney/Public Prosecutor/Deputy Advocate General, the period during which they have been working as such has to be considered as the period practising law. Seen thus, all of them have been advocates for not less than seven years and were enrolled as advocates and were continuing as advocates on the date of the application.

90. We, accordingly, hold that the five private appellants (Respondent Nos. 9,12,13,15 and 18 in CWP No. 9157/2008 before the High Court) fulfilled the eligibility under Article 233(2) of the Constitution and Rule 11(b) of the HSJS Rules on the date of application. The impugned judgment as regards them is liable to be set aside and is set aside.

91. Appeals are allowed as above with no order as to costs.

R.P. Appeals allowed.

UNION OF INDIA & ORS.

v.

DEBTS RECOVERY TRIBUNAL BAR ASSOCIATION & ANR.

(Civil Appeal Nos.617-618 of 2013)

JANUARY 22, 2013

[D.K. JAIN AND H.L. DATTU, JJ.]

Recovery of Debts Due to Banks and Financial Institutions Act, 1993:

Debt Recovery Tribunal (DRTS) and Debt Recovery Appellate Tribunals (DRATs) – Suggestions made for adequate space and infrastructure, smooth functioning, Information Technology, Computerization, increase in number of DRTs and DRATs, eligibility criteria and appointment of Recovery Officers, vacancies and status of senior officers – Suggestions approved – Directions given to implement the suggestions expeditiously – High Courts shall keep a close watch on the functioning of DRTs and DRATs which fell in their respective jurisdiction and ensure a smooth, efficient and transparent working of the said Tribunals – Constitution of India, 1950 – Art.227.

Constitution of India, 1950:

Art. 227 – Superintendence over DRTs and DRATs – Held: High Courts are empowered to exercise their jurisdiction of superintendence under Art. 227 in order to oversee the functioning of DRTs and DRATs – This power also extends to administrative functioning of courts/tribunals – Recovery of Debts Due to Banking and Financial Institutions Act, 1993 – s.18.

Shalini Shyam Shetty & Anr. Vs. Rajendra Shankar Patil **2010 (8) SCR 836 = 2010 (8) SCC 329 – relied on.**

Case Law Reference:

2010 (8) SCR 836 relied on para 11

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 617-618 of 2013.

From the Judgment & Orders dated 18.09.2008 in CWP No. 11742 of 2007 and dated 21.08.2009 in Review Application No. 161 of 2009 in CWP No. 11742 of 2007 of the High Court of Punjab and Haryana at Chandigarh.

Siddharth Luthra, ASG, Rajeev Mehra, (A.C.), Ashish Virmani, Supriya Juneja, Rashmi Malhotra, Gurmohan Singh Bedi, Sushma Suri (for Shreekant N. Terdal) for the Appearing parties.

The following Order of the Court was delivered

O R D E R

1. Leave granted.

2. These appeals arise out of judgment dated 18th September 2008 in CWP No. 11742 of 2007, and order dated 21st August 2009 in Review Application 161 of 2009, rendered by the High Court of Punjab & Haryana, whereby certain directions relating to provision for adequate space for the smooth functioning of the Debts Recovery Tribunals (for short "the DRTs") at Chandigarh, have been issued. The circumstances that have led to the filing of these appeals are succinctly stated below.

3. A Bench of the DRT was established at Chandigarh by the Union of India (for short "the UOI"), vide notification dated 24th March 2000, in a rented building. Subsequently, a second Bench of the DRT was established, which was supposed to function from another premises. However, both the Benches continued to function from the same premises where the earlier

Bench was functioning. By a communication dated 20th July, 2007, the UOI directed that the second Bench would function from the premises acquired for it. Thereupon, the respondent Bar Association made a representation to the Presiding Officers of both the Benches, requesting them to *inter alia,* continue to function from the premises from where the first DRT was functioning. However, in light of the aforesaid communication issued by the UOI, the request of the Bar Association was not acceded to.

4. Aggrieved, the Bar Association filed a Civil Writ Petition in the High Court of Punjab & Haryana, seeking directions to the UOI, to *inter alia* provide adequate accommodation for the functioning of both the DRTs; and to frame Rules for recruitment/ appointment of the Presiding Officer & the Recovery Officers. In light of the assurance on behalf of the UOI that adequate space would be taken on lease for the smooth functioning of both the Benches at the same place, and that further, land was also being acquired for housing the DRTs, the writ petition was disposed of with a direction that the construction of the building shall be completed within three years from the date of its order. However, the High Court did not examine the other issues referred to above on the ground that they were unrelated to the inadequacy of office space needed by the DRTs.

5. Having failed to get the said order reviewed, the UOI is before us in these appeals. In order to appreciate the issue involved in the matter before us, it would be useful to have a bird's eye view of the constitution of DRTs and their functioning.

6. Prior to the promulgation of the Recovery of Debts Due to Banking and Financial Institutions Act, 1993 (for short "the RDDBFI Act"), all banks and financial institutions were required to file their recovery cases in the form of suits before the civil courts, on the basis of their territorial and pecuniary jurisdictions. Due to delays in the disposal of such suits by civil courts on account of heavy dockets, the recovery of loans and enforcement of securities suffered. Thus, an urgent need was

felt to work out a suitable mechanism through which, the dues of the banks and financial institutions could be realized expeditiously. This led to the establishment of DRTs and the Debts Recovery Appellate Tribunals (for short "DRATs") under the RDDBFI Act for expeditious adjudication and recovery of debts due to banks and financial institutions.

7. As per the information available, there are all in all 33 DRTs established in the entire country out of which Delhi, Mumbai, Chennai, Kolkata, Chandigarh and Ahmedabad have two or more DRTs each. However, there are only five DRATs, established in Allahabad, Chennai, Delhi, Kolkata and Mumbai, each covering multiple DRTs of a particular geographical zone. As a result, DRATs are overburdened and are also facing an acute shortage of infrastructure and staff.

8. Given the poor state of affairs as highlighted by the Bar Association, we were constrained to take cognizance and hence, vide order dated 15th November 2010, directed the learned Addl. Solicitor General to file an affidavit suggesting measures for improving the working of the said Tribunals. Subsequently, on 7th April 2011, this Court appointed Mr. Rajeeve Mehra, Senior Advocate, as a*micus curiae* to assist the Court. Consequently, having considered the views of all DRTs, DRATs as well as the Bar Associations, the learned Addl. Solicitor General and the learned a*micus curiae* have filed their responses, highlighting the core issues and respective suggestions to address the same. In light of the above, the UOI was directed to place on record their response on the issues so raised, in particular, on the criteria being adopted for appointment of the members, Recovery Officers etc. In pursuance thereof, the UOI has filed status reports, indicating the measures agreed upon by the Government to address the aforementioned issues. Before we proceed to list the same, it would be helpful to discuss the core issues in respect of which the suggestions have been made.

9. At present, DRTs and DRATs suffer from severe

infrastructural constraints. Most of the DRTs are being run from rented premises and face acute shortage of space, exorbitant rents, limitations on non-renewal/extension of leases etc. It has been brought to our notice that where the DRTs have been allotted space of about 5000 sq. ft., the actual requirement is not less than 7,500 sq. ft. Similarly, the learned a*micus curiae* brought to the fore several other issues plaguing the smooth functioning of the Tribunals, the most significant being: that there is a need to increase the number of DRATs in the country to reduce the workload of the existing DRATs; that many serving Recovery Officers lack a judicial background or are appointed on deputation from those very banks or financial institutions which are filing recovery cases in DRTs, thereby raising serious questions about their independence, impartiality and fairness; that the time taken in filling up vacancies for the posts of senior officials of DRTs and DRATs is extremely long; and that the presence of modern and technological systems of administration continues to be elusive in the administration of justice in as much as many DRTs and DRATs do not even have websites or computerized systems.

Suggestions made by the learned Addl. Solicitor General and learned a*micus curiae*

S. No	Issue	Suggestions of the learned Addl. Solicitor General	Suggestions of the learned a*micus curiae*
1.	**Premises & Physical Infrastructure**	All DRTs and DRATs should be housed in suitable buildings. Pending construction of these buildings, the Tribunals should be housed in rented premises having an	Concurring

		area of at least 8000 sq.ft. where suitable space for records, etc. and amenities for the officers of the court, staff, litigants and lawyers should be provided.	
2.	**Increase in Number of DRTs/DRATs**	**----**	A DRAT must be established in each state where there is a DRT or multiple DRTs. DRATs may be established in the city where the concerned High Court of a State is located.
3.	**Appointment of Recovery Officers**	Qualifications for Recovery Officers should include at the very least, a basic degree in law. If possible, judicial officers or advocates with five years standing at the Bar may be appointed as Recovery Officers.	Appointment of Recovery Officers by way of deputation from Government Departments/ Ministries, Banks and Financial Institutions should be discontinued. Instead, the person appointed must be a person of a judicial background, preferably a judicial officer of the rank below the designation of Addl. District and Sessions Judge on deputation, and should be given the same facilities and perks he/she enjoys in the parent cadre.
4.	**Vacancies and Status of Senior Officers of DRTs/DRATs**	A select list of candidates should be maintained to fill the vacancies. The selections should be made within a fixed time frame.	a. For posts other than Presiding Officers and Recovery Officers, on-going process of sourcing staff/officers on deputation should be discontinued, and permanent cadres should be established. b. The post of Presiding Officers, Registrars and Recovery Officers should be filled up from the state cadre of Judicial Officers through deputations and rotations so that these posts do not remain vacant. c. Judicial officers must be provided the same facilities and perks as they enjoy in their parent cadres. Further, residential accommodation must be necessarily earmarked for Presiding Officers.

5.	**Information Technology and Computerisation**	a. DRTs and DRATs must have a website. Possibility of publication of notices and auctions on the website should be explored, keeping necessary safeguards in mind. b. The National Informatics Centre should be called upon to prepare appropriate software for computerization of processes in the DRTs, from filing to disposal, so that the time taken for disposal is reduced.	Concurring

10. We are pleased to note the positive and forthcoming response of the UOI to the suggestions of the learned Addl. Solicitor General and the learned a*micus curiae*. Having taken note of the urgent need to address the abject conditions prevailing in the Tribunals, the UOI, has agreed to:

i. Provide adequate infrastructure to DRTs/DRATs on the following basis:

a. If sufficient space as per requirement is available in the Government building, then space from the concerned department will be allotted on a permanent basis.

b. If space is not available in the Government building but sufficient space is available in public sector undertakings' buildings, then the DRTs/DRATs may move to the same on a permanent lease/rental basis.

c. If (a) and (b) are not possible, then suitable land may be purchased for construction of a building, or a suitably constructed building may be purchased from public authorities. This may be completed in a phased manner. In the mean time, DRTs and DRATs may continue at their present locations or hire alternative suitable space as per norms.

d. Further, on the basis of a spot study conducted by the Department of Financial Services on 11th December 2011, the existing space authorization of 5000 sq. ft. for DRTs and 3600 sq. ft. for DRATs was examined. In light of the study and requirements of additional facilities, the same has been increased to 7200 sq. ft. and 4500 sq. ft. respectively. In case more than one DRT is accommodated in one building, space would be saved for common facilities such as bar room, consultation chamber, reception, canteen, washrooms, etc. In such a case, the space requirements for the second and third DRT (if located in the same building) may be around 6000 sq. ft. and 5500 sq. ft. respectively.

e. Preference is to be given to buildings where parking facility is provided either within the building premises or in the vicinity.

ii. Consider the feasibility of establishing more DRTs/ DRATs and redefining the jurisdiction of some DRTs on the basis of data showing pendency of cases and existing workload of all the DRTs and DRATs.

iii. Fill all anticipated vacancies for the posts of senior officers, as and when they arise, with candidates who have already been selected according to the stipulated rules.

iv. Extend the facility of General Pool of Accommodation of the type entitled to Group A officers upto April 2013 to the Presiding Officers. In the meantime, the Ministry of

Finance and Ministry of Urban Development will examine all issues to finalise modalities for either buying or construction of flats/houses for use of the members of the Tribunals. Further, in case this proposal does not materialize, then the possibility of hiring accommodation shall be considered at the appropriate stage.

v. Implement the "e-DRT Project" to automate and improve DRT services by building IT systems as expeditiously as possible.

vi. Carry out the recruitment of Recovery Officers by promotion, failing which, by deputation, in accordance with the eligibility criteria as defined in the recruitment rules of each DRT. Keeping in mind the profile of the post of a Recovery Officer, it may not be possible to appoint judicial officers of a rank below that of an Additional District and Sessions Judge, as suggested by the learned a*micus curiae.* However, the UOI shall give preference to only those candidates who either have legal experience or hold a degree in law. Further, with respect to improving the selection procedure of Recovery Officers, the Departmental Promotion Committee (DPC), provided for in the recruitment rules, shall be expanded to include the Presiding Officer of any DRT as a member of the DPC to take part in the selection of the Recovery Officers. At the same time, the level of representation of the Reserve Bank of India in the DPC will also be raised from the rank of Deputy Legal Advisor to Joint Legal Advisor, RBI.

vii. Hold regular training programmes for Recovery Officers/Assistant Registrars/Registrars to give them minimum working knowledge of the procedures followed in DRTs, the provisions of the RDDBFI Act, the SARFAESI Act, the Rules made thereunder, and the provisions of Schedules II and III of the Income Tax Act, 1961.

11. We are confident that the aforementioned measures

proposed by the UOI, shall go a long way in improving the administration of justice in these Tribunals. We are in agreement with these proposals and hope that they will be implemented efficiently and expeditiously by the concerned authorities. Having said that, it is necessary that the exercise undertaken by this Court must reach its logical end *sans* any delays and glitches or any other hindrances in the implementation of these suggestions. To this effect, we issue the following directions:

i. All the aforementioned proposals and measures agreed upon by the UOI in response to the suggestions made by the learned a*micus curiae* and the Addl. Solicitor General shall be implemented expeditiously within a suitable time frame. In the event that the UOI or the concerned authority fails to comply with the aforesaid assurances, it will be open to the learned a*micus curiae* to bring the same to this Court's notice for appropriate directions.

ii. Further, we believe that the High Courts are empowered to exercise their jurisdiction of superintendence under Article 227 of the Constitution of India in order to oversee the functioning of the DRTs and DRATs. Section 18 of the RDDBFI Act leaves no scope for doubt in this behalf. It reads thus:

> 18. Bar of Jurisdiction.—On and from the appointed day, no court or other authority shall have, or be entitled to exercise, any jurisdiction, powers or authority (except the Supreme Court, and a High Court exercising jurisdiction under articles 226 and 227 of the Constitution) in relation to the matters specified in section 17.

Article 227 of the Constitution stipulates that every High Court shall have superintendence over all courts and tribunals throughout the territories interrelation to which it exercises jurisdiction. This power of superintendence also extends to the administrative functioning of these courts and tribunals [*Shalini*

Shyam Shetty & Anr. Vs. Rajendra Shankar Patil[1]**].** Hence, in light of the above, we expect that all the High Courts shall keep a close watch on the functioning of DRTs and DRAT, which fall within their respective jurisdictions. The High Courts shall ensure a smooth, efficient and transparent working of the said Tribunals. We are confident that through the timely and appropriate superintendence of the High Courts, the Tribunals shall adhere to the rigour of appropriate standards indispensable to the fair and efficient administration of justice.

12. Before parting, we place on record our deep appreciation for the able assistance rendered to us by Mr. Sidharth Luthra, the learned Addl. Solicitor General, Mr. Rajeeve Mehra, the learned a*micus curiae* and Mr. Arjun Kapoor, Law Clerk-cum-Research Assistant.

13. These appeals stand disposed of in the above terms.

R.P. Appeals disposed of.

1. (2010) 8 SCC 329.

SATYA NAND MUNJAL

v.

COMMISSIONER OF GIFT TAX

(Civil Appeal No. 3914 of 2010)

JANUARY 22, 2013

[D.K. JAIN AND MADAN B. LOKUR, JJ.]

GIFT TAX ACT, 1958:

s. 4(1) (c) – Gift to include certain transfers – Revocable gift of equity shares made by assessee in February 1982, finally held to be a valid gift – Bonus shares received by transferee as holder of equity shares – Gift revoked in 1988 within the window period – Re-assessment order seeking to tax the assessee treating bonus shares as gift by assessee – Upheld by High Court – Held: Since High Court has not noticed the provisions of s. 4 (1) (c), matter remanded to it for consideration afresh, keeping in view the provisions of s. 4 (1) (c) as also the assessment order for Assessment year 1982-83.

On 20.02.1982, the assessee executed a deed of revocable transfer of certain fully paid up equity shares in favour of the transferee, with a stipulation that the gift could be revoked on completion of 74 months but before expiry of 82 months from the date of transfer. In September, 1982 and May 1986, the company issued certain bonus shares to the transferee as holder of gifted equity shares. On 15.06.1988, the assessee revoked the gift of equity shares, which came back to the assessee, but the bonus shares continued with the transferee. Ultimately, the revocable gift made by the assessee was held valid by the ITAT and the High Court, and assessee liable to pay gift tax on the value of the gift in terms of r. 11 of the Gift Tax Rules, 1958. However, by reassessment

order dated 24.03.1998, it was held that the assessee had surrendered his right to get back the bonus shares and the same were treated as gift by the assessee to the transferee. The assessee was taxed accordingly. The reassessment order was ultimately upheld by the High Court. Aggrieved, the assessee filed the appeal.

Allowing the appeals, the Court

HELD: 1.1. It is quite clear that the assessee had made a valid revocable gift of 6000 equity shares on 20.02.1982 to the transferee. This is a finding of fact conclusively determined by the High Court in the assessee's own case.* The only event that took place in the previous year relevant to the Assessment Year 1989-90 was the revocation of the gift by the assessee on 15.06.1988. The High Court did not even notice the provision of s.4(1)(c) of the Act. [Para 24-25] [500-D-E-G]

* *Commissioner of Gift-tax v. Satya Nand Munjal*, **[2002] 256 ITR 516 – referred to.**

1.2. In the circumstances, this Court is not inclined to decide the issue finally since the High Court has not recorded its view on the interpretation of s. 4(1)(c) of the Act. Nor has the High Court expressed its view on the applicability or otherwise of the principle laid down in *Mc Dowell & Co.* **Accordingly, the order of the High Court is set aside and the matter is remanded to it for *de novo* consideration, keeping in mind the provisions of s. 4(1)(c) of the Act as well as the orders passed in the case of the assessee for the Assessment Year 1982-83. [Para 26, 28-29] [501-A-B, D-E]**

McDowell & Co. v. Commercial Tax Officer **[1985] 154 ITR 148;** *Escorts Farms (Ramgarh) Ltd. v. Commissioner of Income Tax,* **[1996] 222 ITR 509 – referred to.**

Case Law Reference:

[1985] 154 ITR 148	**referred to**	**para 9**
[2002] 256 ITR 516	**referred to**	**para 10**
[1996] 222 ITR 509	**referred to**	**para 21**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3914 of 2010.

From the Judgment & Order dated 17.12.2008 of the High Court of Punjab and Haryana at Chandigarh in GTA No. 3 of 2001.

WITH

C.A. Appeal No. 3915 of 2010.

S. Ganesh, Satyen Sethi, Arta Trana Panda, Rameshwar Prasad Goyal for the Appellant.

R.P. Bhatt, Arijit Prasad, Rahul Kaushik, Chandra Bhushan Prasad, Gargi Khanna, Reena Singh, Anil Katiyar, P.S. Parvar, Shaheen Parveen, Yatinder Chaudhary (for B.V. Balaram Das) for the Respondent.

The Judgment of the Court was delivered by

MADAN B. LOKUR, J. 1. Civil Appeal No. 3914/2010 (Assessee: Satya Nand Munjal) and Civil Appeal No. 3915/2010 (Assessee: Om Prakash Munjal) arise out of G.T.A. No.3/2001 and G.T.A. No. 2/2001 respectively both decided by the High Court of Punjab & Haryana on 17th December, 2008. The relevant Assessment Year is 1989-90.

2. At the instance of the Revenue, the High Court was called upon to decide the following common substantial question of law:-

"Whether, on the facts and in the circumstances of the

case, the ITAT was right in law in quashing the gift-tax assessment in the assessee's case."

3. The High Court set aside the order of the Income Tax Appellate Tribunal (the Tribunal) and held in favour of the Commissioner of Gift Tax by upholding the assessment order. It is in these circumstances that the assessee is now before us.

4. For convenience, we refer to the facts in the case of Satya Nand Munjal.

The facts:

5. On 20th February 1982 the assessee, being the absolute owner of 6000 fully paid up equity shares of the face value of Rs. 25 each of M/s Hero Cycles (P) Ltd. executed a deed of revocable transfer in favour of M/s Yogesh Chandra and Brothers Associates (the transferee). Under the deed, the assessee could, on completion of 74 months from the date of transfer but before the expiry of 82 months from the said date, exercise the power of revoking the gift. In other words, the assessee left a window of 8 months within which the gift could be revoked.

6. The deed of revocable transfer specifically stated that the gift shall not include any bonus shares or right shares received and/or accruing or coming to the transferee from M/s Hero Cycles (P) Ltd. (the company) by virtue of ownership or by virtue of the shares gifted by the assessee and standing in the name of the transferee. Effectively, therefore, only a gift of 6000 equity shares was made by the assessee to the transferee.

7. On 29th September 1982 the company issued bonus shares and since the transferee was a holder of the gifted equity shares, 4000 bonus shares of the said company were allotted to the transferee. Similarly, on 31st May 1986 another

10,000 bonus shares were allotted to the transferee by the company.

8. Thereafter, during the window of eight months, the assessee revoked the gift on 15th June 1988 with the result that the 6000 shares gifted to the transferee came back to the assessee. However, the 14,000 bonus shares allotted to the transferee while it was the holder of the equity shares of the company continued with the transferee.

Assessment proceedings for AY 1982-83:

9. For the Assessment Year 1982-83, the Gift Tax Officer passed an assessment order on 17th February 1987 in respect of the assessee. He held that the revocable transaction entered into by the assessee was only for the purpose of reducing the tax liability. As such, it could not be accepted as a valid gift. For arriving at this conclusion, the assessing officer relied upon *McDowell & Co. v. Commercial Tax Officer,* [1985] 154 ITR 148. Accordingly, the assessing officer, while holding the gift to be void, made the assessment on a protective basis.

10. Feeling aggrieved by the assessment order, the assessee preferred an appeal before the Commissioner of Gift Tax (Appeals) but found no success. The Commissioner of Gift Tax (Appeals), however, held that since the gift was void, a protective assessment could not be made.

11. The assessee then preferred a further appeal to the Tribunal and by its order dated 23rd August 1991 allowing the appeal; the Tribunal held the revocable gift to be valid. It was noted that the concept of a revocable transfer by way of gift is recognized by Section 6(2) of the Gift Tax Act, 1958 (the Act). The value of the gift in such a case was to be calculated in terms of Rule 11 of the Gift Tax Rules, 1958.

12. Although the decision was rendered by the Tribunal after the gift had been revoked by the assessee, it was held

that if the assessee "does not exercise an option to revoke the gift within the provided for period of 82 months, then at that point of time also, there will be a further valuation of the residuary interest….".

13. Feeling aggrieved by the decision of Tribunal, the Revenue took up the matter in appeal before the Punjab & Haryana High Court. By its judgment and order in *Commissioner of Gift-tax v. Satya Nand Munjal,* [2002] 256 ITR 516 the High Court dismissed the appeal and held:

> "It is a legitimate attempt on the part of the assessee to save money by following a legal method. If on account of a lacuna in the law or otherwise the assessee is able to avoid payment of tax within the letter of law, it cannot be said that the action is void because it is intended to save payment of tax. So long as the law exists in its present form, the taxpayer is entitled to take its advantage. We find no ground to accept the contention that merely because the gift was made with the purpose of saving on payment of wealth-tax, it needs to be ignored."

14. The position as it stood, therefore, was that the revocable gift made by the assessee was held to be a valid gift and the assessee was liable to pay gift tax on the value of the gift as determined under Rule 11 of the Gift Tax Rules, 1958.

Assessment proceedings for AY 1989-90:

15. All of a sudden, on 30th January 1996 the Gift Tax Officer issued a notice to the assessee under Section 16(1) of the Act to the effect that for the Assessment Year 1989-90 the gift made by the assessee was chargeable to gift tax and that it had escaped assessment for that Assessment Year. The assessee responded to the notice by simply stating that there is no gift that had escaped assessment.

16. On 24th March 1998 the assessing officer passed a

reassessment order for the Assessment Year 1989-90. While doing so, he framed two issues for consideration: firstly, whether the transferee becomes the owner of the bonus shares particularly because the shares have been received by it as a result of a revocable transfer; secondly, whether the bonus shares received by the transferee could be described as a benefit derived by the transferee from the transferred shares.

17. The assessing officer held that the transferee does not become the owner of the gifted shares until the transfer is an irrevocable transfer. Proceeding on this basis, it was held that the 14,000 bonus shares allotted to the transferee were a part and parcel of the gifted shares and the assessee only took back 6000 shares from the transferee pursuant to the revocable gift. Consequently, it was held that the assessee had surrendered his right to get back 14,000 bonus shares which were treated as a gift by the assessee to the transferee in view of the provisions of Section 4(1)(c) of the Act. The assessee was taxed accordingly.

18. Feeling aggrieved by the reassessment order, the assessee preferred an appeal to the Commissioner of Gift Tax (Appeals). By his order dated 8th September 1998 the Commissioner held that since there was no regular transfer of the bonus shares, the transferee could not claim any ownership of the shares. In fact he was only a trustee of the assessee in respect of the bonus shares. The Commissioner also referred to *McDowell & Co.* and held that the assessee had carefully planned his affairs in such a manner as to deprive the Revenue of a substantial amount of gift tax. The reassessment order was accordingly upheld.

19. The assessee then took up the matter with the Tribunal which held in its order dated 23rd May 2000 that in view of the assessment to gift tax made in respect of the assessee for the Assessment Year 1982-83, the notice issued under Section 16(1) of the Act was merely a change of opinion and, as such the reassessment proceedings could not have been taken up.

On the merits of the case, it was noted that neither the dividend income on the bonus shares nor their value had been taxed in the hands of the assessee. Consequently, the assessee was liable to succeed on the merits of the case also. The gift tax reassessment was accordingly quashed by the Tribunal.

20. The Revenue then came up in appeal before the High Court with the substantial question of law mentioned above.

21. In the impugned order, the High Court held that the assessee was liable to gift tax on the value of the bonus shares which were a gift made by the assessee to the transferee. It was held that the bonus shares were income from the original shares by relying upon *Escorts Farms (Ramgarh) Ltd. v. Commissioner of Income Tax, [1996] 222 ITR 509*. Accordingly, the order of the Tribunal was set aside and the reassessment order upheld.

Discussion and conclusions:

22. Although learned counsel for the assessee seriously doubted the correctness of the impugned judgment and order on several grounds, we find that it is not necessary for us to go into all the issues raised by him.

23. The fundamental question before the High Court was whether there was in fact a gift of 14,000 bonus shares made by the assess to the transferee. The answer to this question lies in the interpretation of Section 4(1)(c) of the Act which reads as follows :-

"**Gifts to include certain transfers.**

4. (1) For the purposes of this Act,-

(a) xxx

(b) xxx

(c) where there is a release, discharge, surrender, forfeiture or abandonment of any debt, contract or other actionable claim or of any interest in property by any person, the value of the release, discharge, surrender, forfeiture or abandonment to the extent to which it has not been found to the satisfaction of the Assessing Officer to have been *bona fide,* shall be deemed to be a gift made by the person responsible for the release, discharge, surrender, forfeiture or abandonment;

(d) to (e) xxx"

24. A perusal of the impugned judgment and order facially indicates that there has been no consideration of the provisions of Section 4(1)(c) of the Act. From the rather elaborate narration of facts, it is quite clear that the assessee had made a valid revocable gift of 6000 equity shares in the company on 20th February 1982 to the transferee. This is a finding of fact conclusively determined by the High Court in the assessee's own case.

25. The only event that took place in the previous year relevant to the Assessment Year 1989-90 was the revocation of the gift by the assessee on 15th June 1988. Was this event enough for the Gift Tax Officer, in 1996, to re-open the assessment for the year 1989-90, while keeping in mind the fact that bonus shares were allotted to the transferee on 29th September 1982 and 31st May 1986? It is possible, on an interpretation of Section 4(1)(c) of the Act to answer this question either way, but unfortunately the High Court did not even notice this provision of the Act. Of course, the submission of learned counsel for the assessee is that on an interpretation of Section 4(1)(c) of the Act, it cannot be said by any stretch of imagination, that the assessee had made a gift of 14,000

bonus shares to the transferee in the previous year relevant to the Assessment Year 1989-90.

26. However, we are not inclined to decide this issue finally since we do not have the view of the High Court on the interpretation of Section 4(1)(c) of the Act. Nor do we have the view of the High Court on the applicability or otherwise of the principle laid down in *McDowell & Co.*

27. As far as the applicability of *Escorts Farms* is concerned, the question that arose for consideration in that case was the determination of the cost of acquisition of the original shares when bonus shares are subsequently issued. That is the second part of Section 4(1)(c) of the Act and that question would arise (if at all) only after a finding is given by the High Court on the first part of Section 4(1)(c) of the Act. But, as we have noted above, the High Court has not considered the interpretation of Section 4(1)(c) of the Act.

28. Under the circumstances we have no option but remand the matter for *de novo* consideration by the High Court keeping in mind the provisions of Section 4(1)(c) of the Act as well as the orders passed in the case of the assessee for the Assessment Year 1982-83. We do so accordingly.

29. In view of the above, both the Civil Appeals are allowed and the impugned judgment and order of the High Court is set aside but without any order as to costs.

30. We make it clear that the parties are entitled to raise all contentions before the High Court and are at liberty to file additional documents, if necessary.

R.P. Appeals allowed.

SATYA NAND MUNJAL

v.

COMMISSIONER OF GIFT TAX, (CENTRAL), LUDHIANA

(Civil Appeal No. 3917 of 2010 etc.)

JANUARY 22, 2013

[D.K. JAIN AND MADAN B. LOKUR, JJ.]

Gift Tax Act, 1958 – ss. 16B and 16B (3) – Applicability of – Questions whether no interest u/s. 16B was chargeable and whether s. 16B(3) was applicable to the facts of the case – High Court had allowed the appeals relying on its judgment passed in two other appeals whereby it was held that assessee was liable to pay interest on the gift tax levied – On appeal, held: The matter is remitted back to High Court, in view of the fact that the judgment on which the High Court based its decision has been set aside by Supreme Court and that matter was remanded to the High Court for de novo consideration.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3917 of 2010.

From the Judgment & Order dated 17.12.2008 of the High Court of Punjab and Haryana at Chandigarh in GTA No. 1 of 2001.

WITH

C.A. Nos. 3916 & 3918 of 2010.

Rameshwar Prasad Goyal for the Appellant.

Arijit Prasad, Anil Katiyar, B.V. Balram Das for the Respondent.

The Judgment of the Court was delivered by

MADAN B. LOKUR, J. 1. Civil Appeal No. 3917/2010 (Assessee: Mr. Satya Nand Munjal), Civil Appeal No. 3916/

2010 (Assessee: Mr. Brij Mohan Lal Munjal) and Civil Appeal No. 3918/2010 (Assessee: Om Prakash Munjal) arise out of G.T.A. No. 1/2001, G.T.A. No. 4/2001 and G.T.A. No. 5/2001 respectively, all decided by the High Court of Punjab & Haryana on 17th December, 2008. The relevant Assessment Year is 1989-90.

2. The common substantial questions of law referred for consideration by the High Court, at the instance of the Revenue, in all the appeals reads as follows :-

> "1. Whether, in the facts and in the circumstances of the case, the ITAT was right in law in holding that no interest under section 16B was chargeable in this case?
>
> 2.Whether, in the facts and in the circumstances of the case, the ITAT was right in law in holding that the provisions of section 16B(3) were applicable to this case."

3. The High Court allowed the appeals on the basis of the common judgment and order rendered in G.T.A. No. 2/2001 and G.T.A. No. 3/2001 holding, inter alia, that since gift tax was leviable on the revocable transfer of equity shares by the assessee to M/s Yogesh Chandra & Brothers Associates, interest was liable to be paid by the assessee on the gift tax levied.

4. Feeling aggrieved by the judgment and order of the High Court, the assessees have preferred these appeals.

5. We have today set aside the order of the High Court passed in G.T.A. No. 3/2001 and G.T.A. No. 2/2001 and have remanded the matters back to the High Court for de novo consideration.

6. In view thereof, the judgment and order in appeal in these cases is also set aside. The matters are remanded to the High Court for fresh consideration on the merits of the case. The appeals are allowed but there will be no order as to costs.

K.K.T. Appeals allowed.

PRASHANT BHARTI

v.

STATE OF NCT OF DELHI

(Criminal Appeal No. 175 of 2013)

JANUARY 23, 2013

[D.K. JAIN AND JAGDISH SINGH KHEHAR, JJ.]

CODE OF CRIMINAL PROCEDURE, 1973:

s. 482 read with s.401 – Quashing of criminal proceedings – Allegations leveled by prosecutrix against accused for commission offences punishable u/ss 328, 354 and 376 on false promise of marriage – Charge-sheet filed – Charges framed – Held: In the charge sheet, Investigating Officer acknowledged that he could not find any proof to substantiate the charges – Charge-sheet was filed only on the basis of statement of prosecutrix u/s 164 – Further, in view of scientific investigation as revealed by mobile phones of prosecutrix and accused, commission of offence as alleged by prosecutrix cannot be established in trial – Therefore, judicial conscience of High Court ought to have persuaded it, on the basis of the material available before it to quash criminal proceedings initiated against appellant, in exercise of inherent powers vested with it u/s 482 – Accordingly, FIR, consequential charge-sheet as also charges framed by trial court are quashed – Penal Code, 1860 – ss.328, 354 and 376.

On the basis of the statement of the complainant/ prosecutrix, an FIR was registered against the appellant for offences punishable u/ss 328 and 354, IPC. The appellant-accused was arrested on the same day. Five days thereafter the prosecutrix made a supplementary statement alleging that the accused, on the assurance of getting her married, had physical relations with her

several times, the latest being one and half months prior to the date of the FIR. Accordingly, the offence punishable u/s 376 IPC was added to the case. Subsequently, statement of complainant/prosecutrix was recorded u/s 164 CrPC by the Metropolitan Magistrate. The police filed charge-sheet for offences punishable u/ss 328, 354 and 376 IPC. The writ petition filed by the petitioner alleging false implication and seeking to quash the FIR was dismissed by the High Court. Even the writ petition filed by the prosecutrix seeking to quash the FIR filed by her was also dismissed. The order framing the charges having been unsuccessfully challenged by the accused, in revision before the High Court, he filed the instant appeal.

Allowing the appeal, the Court

HELD: 1.1. This Court is satisfied that the assertion made by the complainant/ prosecutrix, that on 23.12.2006, 25.12.2006 and 1.1.2007, she was induced to a physical relationship by the appellant-accused, on the basis of a promise to marry her, stands irrefutably falsified, as during the said period and more than one year and eight months thereafter, she had remained married to one 'LP'. She also affirmed that she was remarried thereafter to one 'M' and produced a "certificate of marriage" dated 30.9.2008. In the absence of any scientific evidence of sexual intercourse between the complainant/prosecutrix and the appellant-accused, it is unlikely, that a factual assertion made by the complainant/prosecutrix, would be acceptable over that of the appellant-accused. Further, a consensual relationship without any assurance obviously will not substantiate the offence punishable u/s 376 IPC alleged against the accused. [para 15-17] [515-F-G; 516-D-E; 517-A-B, D-E; 518-A]

1.2. The assertions made by the prosecutrix in her first complaint dated 16.2.2007 regarding the incident of 15.2.2007, her presence as well as the presence of the appellant-accused at the alleged place of occurrence at the alleged time has been established to be false on the basis of mobile phone call details of the parties concerned, and it must be considered to be conclusive for all intents and purposes. The factual conclusion cannot be altered at the culmination of the trial, since the basis of such determination is scientific evidence. Neither has the said material been contested by the prosecutrix. It is, thus, obvious that the allegation made by the complainant/ prosecutrix against the appellant-accused of having outraged her modesty, was false. What stands established now, will have to be reaffirmed on the basis of the same evidence at the culmination of the trial. Such being the fact situation, it has to be concluded, that the allegations levelled by the prosecutrix against the accused, which culminated in the registration of a first information report on 16.2.2007, as well as her supplementary statement, would never lead to his conviction. [para 18] [518-B, D-E; 519-C-H]

Gajraj vs. State (NCT) of Delhi **2011 (12) SCR 701 = 2011 (10) SCC 675 - relied on**

1.4. Most importantly, as against the allegations, no pleadings whatsoever have been filed by the complainant. As a matter of fact, the prosecutrix had herself approached the High Court, with the prayer that the first information lodged by her, be quashed. It would, therefore, be legitimate to conclude in the facts and circumstances of the case, that the material relied upon by the accused has not been refuted by the complainant/ prosecutrix. Even in the charge sheet dated 28.6.2007, the investigating officer has acknowledged that he could not find any proof to substantiate the charges. The

charge-sheet had been filed only on the basis of the statement of the prosecutrix u/s 164 of the Cr.P.C. [para 21] [525-A-C]

1.5. Therefore, judicial conscience of the High Court ought to have persuaded it, on the basis of the material available before it, while passing the impugned order, to quash the criminal proceedings initiated against the accused-appellant, in exercise of the inherent powers vested with it u/s 482 Cr.P.C. Accordingly, this Court is satisfied, that the first information report registered for offences punishable u/ss. 328, 354 and 376 IPC against the appellant-accused, and the consequential charge-sheet as also the framing of charges by the Additional Sessions Judge deserve to be quashed. Ordered accordingly. [para 22] [525-E-G]

Rajiv Thaper & Ors. vs. Madan Lal Kapoor **[2013] 1 SCR - relied on.**

Case Law Reference:

2011 (12) SCR 701	**relied on**	**para 18**
[2013] 1 SCR	**relied on**	**para 18**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 175 of 2013.

From the Judgment & Order dated 16.01.2009 of the High Court of Delhi at New Delhi in Criminal Revision Petition No. 08 of 2009.

K.T.S. Tulsi, Gaurave Bhargava (for Niraj Gupta) for the Appellant.

R.K. Rathore, Vikas Bansal, D.S. Mahra (for Anil Katiyar) (Priya-Complainant) for the Respondent.

The Judgment of the Court was delivered by

JAGDISH SINGH KHEHAR, J. 1. Leave granted.

2. On 16.2.2007, Priya (hereinafter referred to as, the complainant/prosecuterix), aged 21 years, a resident of Tughlakabad Extension, New Delhi, made a phone call to the Police Control Room (hereinafter referred to as, the PCR). Police personnel immediately reached her residence. She made a statement to the police, leading to the registration of first information report no. 47 of 2007 at Police Station Lodhi Colony, New Delhi, under Sections 328 and 354 of the Indian Penal Code. In her statement to the police, the complainant/prosecuterix alleged, that the appellant herein Prashant Bharti (hereinafter referred to as, the appellant-accused) was known to her for about four months. The appellant-accused was a resident of Lodhi Colony, New Delhi. It was alleged that on the preceding day i.e., on 15.2.2007, the appellant-accused had made a phone call to the complainant/prosecuterix, at about 8.45 pm, and asked her to meet him at Lodhi Colony, New Delhi. When she reached Lodhi Colony, he drove her around in his car. He also offered the complainant/prosecuterix a cold drink (Pepsi) allegedly containing a poisonous/intoxicating substance. According to the complainant/prosecuterix she felt inebriated after taking the cold drink. In her aforesaid state, the appellant-accused started misbehaving with her. He also touched her breasts. Inspite of the complainant/prosecuterix stopping him, it was alleged, that the appellant-accused continued to misbehave with her. The complainant/prosecuterix then got the car stopped, and hired an auto-rickshaw to return to her residence. In her statement, the complainant/prosecuterix requested the police to take legal action against the appellant-accused.

3. Immediately after recording the statement of Priya (the complainant/prosecuterix) on 16.2.2007, the police took her to the All India Institute of Medical Sciences (hereinafter referred to as, the AIIMS), New Delhi. She was medically examined at 1.44 pm. It is sufficient to record herein, that as per the medical

report prepared at the AIIMS, there was no evidence of poisoning.

4. Based on the statement made by the complainant/ prosecuterix, the appellant-accused Prashant Bharti was arrested at 6 pm, on the same day on which the complainant recorded her statement, i.e., on 16.2.2007, a day after the occurrence.

5. After a lapse of five further days, on 21.2.2007, at 8.20 am, the complainant/prosecuterix made a supplementary statement to the police. On this occasion, she alleged, that Prashant Bharti, the appellant-accused, had been having physical relations with her in his house, on the assurance that he would marry her. It was alleged by the complainant/ prosecuterix, that the appellant-accused had subsequently refused to marry her. With reference to the incident of 15.2.2007, she alleged, that she had been administered some intoxicant in a cold drink (Pepsi) by Prashant Bharti, so as to enable him to have a physical relationship with her. But, it was alleged, that she did not succumb to his said desire on 15.2.2007. The complainant/prosecuterix further alleged, that after she returned to her residence on 15.2.2007, she did not feel well and accordingly, had gone to sleep. She therefore explained, why she had made her earlier complaint, on the following day of the incident. In her supplementary statement, she requested the police to take legal action against Prashant Bharti, the appellant-accused, for having physical relations with her (on 23.12.2006, 25.12.2006 and 1.1.2007) at his residence, on the basis of a false promise to marry her.

6. Immediately after recording her supplementary statement, the complainant/prosecuterix was taken to the AIIMS. She was medically examined at the AIIMS at 12 noon, on 21.2.2007. In the medical report prepared at the AIIMS after her examination, it was recorded, that she had no external injuries, and that her hymen was not intact. It was pointed out, that a vaginal smear was not taken, because more than a month

had elapsed from the date of the alleged intercourse(s). Likewise, it was pointed out, that her clothes were not sent for forensic examination, because she had changed the clothes worn by her at the time of the alleged occurrence(s). In other words, the assertions made by the accused could not be tested scientifically, because the complainant was being medically examined, after a substantial delay.

7. Based on the supplementary statement of Priya (the complainant/prosecuterix) recorded on 21.2.2007, the offence under Section 376 was added to the case.

8. On 27.2.2007, the statement of the complainant/ prosecuterix was recorded under Section 164 of the Code of Criminal Procedure by the Metropolitan Magistrate, New Delhi (in first information report no. 47 of 2007). A relevant extract of the aforesaid statement, is being reproduced below:-

> "… then Prashant asked for my number and detail of address. I gave my office telephone number to him. In evening, Mr. Prashant Bharti called me and talked about loan and after some days, Prashant Bharti came to meet in my office and thereafter we became good friends and one day, Prashant Bharti told me that he loves me and wish to marry me and thereafter, we started meeting frequently and I consented for marriage.
>
> One day, when all the family members were gone somewhere, Prashant Bharti called me to his home for party and he told me that he will marry me soon and will inform to his parents about our relationship and he made relation with me. And, whenever his home was vacant, he usually calls me up and when his parents came, I asked him to tell them about our relationship and he did not inform this and on this issue, we have fight with each other and I informed to his parents. Then his parents called Prashant about this and Prashant Bharti denied our relationship to his father and neither he wish to marry me and on that day,

I was sent to my home by his parents.

After two days, Prashant Bharti called me and asked me to meet him, as he wish to tender apology and when I was going to reach my home from office, then I, through auto rickshaw, reached at Central School, Lodhi Colony, where Prashant Bharti was standing near to his Santro Car, and he met me there and he asked me that he has committed mistake and he wish to tender apology and after some time, he took me to his car and thereafter, he told me that he is feeling thirsty and thereafter, he brought Pepsi in car and we both took the Pepsi. And, after drinking the same, I lost my conscious and thereafter, he started misbehaving with me and I asked him that why he was doing so, then he told me that, as I complained to his father, he will take revenge from me, and he forcibly misbehaved with me, and I immediately got down from the car and by Auto, I came to my house and as I was unwell, I could not lodge my complaint with police. On the next day, I called 100 number PCR and there police official, accompanies me and I informed everything to SHO Surinder Jeet and on that basis, he was arrested."

9. By an order dated 12.3.2007, the Additional Sessions Judge, Delhi granted bail to the appellant-accused. In the aforesaid order passed on 12.3.2007, the following factual position was relied upon, to extend the benefit of bail to the appellant-accused. The appellant-accused was in Sector 37, Noida in the State of Uttar Pradesh on 15.2.2007. He was at Noida before 7.55 pm. He, thereafter, remained at different places within Noida and then at Shakarpur, Ghaziabad, Patparganj, Jorbagh etc. From 9.15 pm to 11.30 pm on 15.2.2007, he remained present at a marriage anniversary function celebrated at Rangoli Lawns at Ghaziabad, Uttar Pradesh. An affidavit to the aforesaid effect filed by the appellant-accused was found to be correct by the investigating officer, on the basis of his mobile phone call details.

Verification of the mobile phone call details of the complainant/prosecuterix Priya revealed, that on 15.2.2007, no calls were made by the appellant-accused to the complainant/prosecuterix, and that, it was the complainant/prosecuterix who had made calls to him. The complainant/prosecuterix, on and around the time referred to in the complaint dated 16.2.2007, was at different places of New Delhi i.e., in Defence Colony, Greater Kailash, Andrews Ganj and finally at Tughlakabad Extension, as per the verification of the investigating officer on the basis of her mobile phone call details. Even though the complainant/prosecuterix was married to one Manoj Kumar Soni, S/o Seeta Ram Soni (as indicated in an affidavit appended to the Delhi police format for information of tenants and duly verified by the investigating officer, wherein she had described herself as married), in the complaint made to the police (on 16.2.2007 and 21.2.2007), she had suggested that she was not married. At the time when the complainant/prosecuterix alleged, that the appellant-accused had misbehaved with her and had outraged her modesty on 15.2.2007 (per her complaint dated 16.2.2007), she was actually in conversation with her friends (as per the verification made by the investigating officer on the basis of her mobile phone call details). Even though the complainant/prosecuterix had merely alleged in her complaint dated 16.2.2007, that the accused had outraged her modesty by touching her breasts, she had subsequently through a supplementary statement (on 21.2.2007), levelled further allegations against the accused of having repeatedly raped her (on 23.12.2006, 25.12.2006 and 1.1.2007), on dates preceding the first complaint.

10. On 28.6.2007, the police filed a chargesheet under Sections 328, 354 and 376 of the Indian Penal Code. In the chargesheet, it was clearly mentioned, that the police investigation, from different angles, had not yielded any positive result. However, the chargesheet was based on the statement made by the complainant/prosecuterix before the Metropolitan Magistrate, New Delhi under Section 164 of the Code of

Criminal Procedure, which was found to be sufficient for the charges alleged against the appellant-accused. A relevant extract of the chargesheet depicting the aforesaid factual position, is being reproduced below:-

> "I the Inspector, tried my best from all angles to recover the intoxicating substance/Pepsi/Pepsi glass and undergarments worn at the time of the rape. But nothing could be recovered and for this reason, the blood sample of accused could not be sent to FSL. As from the investigation so far conducted, no proof could be found in support of the crime under Section 328/354 IPC and even the position of accused Prashant Bharti is not available at Lodhi Colony at the date and time as his mobile phone ill. However, prosecuterix Priya Porwal made statement on 21.2.2007 and on 27.2.2007 under Section 164 Cr.P.C. which is sufficient in support of his challan for the offence under Section 376 IPC."
>
> (emphasis is ours)

11. Aggrieved by the first information report (bearing no. 47 of 2007) registered at the Police Station Lodhi Colony, New Delhi, the appellant-accused filed Writ Petition (Crl.) no. 1112 of 2007 before the Delhi High Court for quashing the said first information report on the ground, that the appellant-accused had been falsely implicated. The High Court, dismissed the said writ petition on 27.8.2007, without going into the merits of the controversy, by recording the following observations:-

> "This Court cannot quash the FIR on the ground that FIR was false FIR. In case of a false FIR, it must be brought to its logical conclusion and Investigating Officer must give a report to that effect. In this case, if it is found that the petitioner has been falsely implicated and the complaint was false, it would be obligatory on the part of the Investigating Officer to register a case and book the prosecuterix for falsely implicating the person in an offence

> under Section 376 IPC. It is a very serious matter that a prosecuterix just by making a false statement can book somebody in offence under Section 376 IPC, which is serious in nature and invites a minimum punishment of 07 years. I consider that Investigating Officer shall submit a detailed report and in case, it is that the petitioner was falsely implicated, he would take steps for booking the complainant for falsely implicating the petitioner."

12. Interestingly, even the complainant/prosecuterix filed Writ Petition (Crl.) no. 257 of 2008 before the Delhi High Court seeking quashing of the first information report lodged by the complainant/prosecuterix herself. The High Court noticed the observations recorded in the order dated 27.8.2007 (passed in Writ Petition (Crl.) no. 1112 of 2007) and dismissed the writ petition filed by the complainant/prosecutrix.

13. On 1.12.2008, the Additional Sessions Judge, New Delhi, framed charges against the appellant-accused, by observing as under:-

> "4. Considering the facts and circumstances of the case that prosecuterix has levelled specific allegations against the accused that she was given pepsi to drink and after consuming the same she was intoxicated and accused teased her, moved his hands on her breast and earlier made physical relations with her on the assurance of marriage, I am of the considered opinion that prosecution has brought prima facie sufficient material on record against the accused for charge under Sections 354/328/376 IPC. Let charge be framed accordingly."

14. Dissatisfied with the action of the trial Court in framing charges against him, the appellant-accused filed Criminal Revision Petition no. 08 of 2009, whereby he assailed the order dated 1.12.2008 passed by the Additional Sessions Judge, New Delhi. The Delhi High Court dismissed the revision petition on 16.1.2009, by interalia observing as under:-

"12. Truthfulness or falsity of the allegations, essentially pertains to the realm of evidence and the same cannot be pre-judged at this initial stage. I do not find any illegality or infirmity in the impugned order. Consequently, this Revision Petition is dismissed in limine while making it clear that anything herein shall not be construed as an opinion on merits at trial."

15. Despite notice having been issued to the complainant/prosecuterix by this Court in the present case, she failed to enter personal appearance (or be represented through counsel). To procure her presence, bailable warrants were issued in furtherance of this Court's order dated 12.5.2010 and again on 16.10.2012. Priya, the complainant/prosecuterix entered personal appearance on 8.11.2012. During the course of hearing, consequent upon clarifications sought from her in respect of her marital status (at the time of the alleged occurrences with the appellant-accused), she informed this Court, that even though she was married earlier, she had divorced her previous husband before the dates of occurrence. To verify the factual position pertaining to her marital status as on the dates of occurrence(s), she was asked to produce the judgment and decree of divorce, from her previous husband. She accordingly produced a certified copy of the judgment and decree of the Court of the Civil Judge (Senior Division), Kanpur (Rural) dated 23.9.2008. A photocopy thereof duly attested by Priya, the complainant/prosecuterix, and her counsel, were taken on record. A perusal of the same reveals, that the complainant/prosecuterix was married to Lalji Porwal on 14.6.2003. She was divorced from her said husband by mutual consent under Section 13B of the Hindu Marriage Act, 1955, on 23.9.2008. Priya, the complainant/prosecuterix also affirmed, that she had remarried thereafter. She also produced before us a "certificate of marriage" dated 30.9.2008. A photocopy thereof duly attested by Priya and her counsel, was also taken on record. A perusal of the same reveals, that Priya (date of birth, 17.6.1986), daughter of Anup Kumar was married

to Manoj (date of birth, 8.12.1983), son of Ram Kumar, on 30.9.2008.

16. The factual position narrated above would enable us to draw some positive inferences on the assertion made by the complainant/prosecuterix against the appellant-accused (in the supplementary statement dated 21.2.2007). It is relevant to notice, that she had alleged, that she was induced into a physical relationship by Prashant Bharti, on the assurance that he would marry her. Obviously, an inducement for marriage is understandable if the same is made to an unmarried person. The judgment and decree dated 23.9.2008 reveals, that the complainant/prosecuterix was married to Lalji Porwal on 14.6.2003. It also reveals, that the aforesaid marriage subsisted till 23.9.2008, when the two divorced one another by mutual consent under Section 13B of the Hindu Marriage Act. In her supplementary statement dated 21.2.2007, the complainant/prosecuterix accused Prashant Bhati of having had physical relations with her on 23.12.2006, 25.12.2006 and 1.1.2007 at his residence, on the basis of a false promise to marry her. It is apparent from irrefutable evidence, that during the dates under reference and for a period of more than one year and eight months thereafter, she had remained married to Lalji Porwal. In such a fact situation, the assertion made by the complainant/prosecuterix, that the appellant-accused had physical relations with her, on the assurance that he would marry her, is per se false and as such, unacceptable. She, more than anybody else, was clearly aware of the fact that she had a subsisting valid marriage with Lalji Porwal. Accordingly, there was no question of anyone being in a position to induce her into a physical relationship under an assurance of marriage. If the judgment and decree dated 23.9.2008 produced before us by the complainant/prosecuterix herself is taken into consideration alongwith the factual position depicted in the supplementary statement dated 21.2.2007, it would clearly emerge, that the complainant/prosecuterix was in a relationship of adultery on 23.12.2006, 25.12.2006 and 1.1.2007 with the

appellant-accused, while she was validly married to her previous husband Lalji Porwal. In the aforesaid view of the matter, we are satisfied that the assertion made by the complainant/ prosecuterix, that she was induced to a physical relationship by Prashant Bharti, the appellant-accused, on the basis of a promise to marry her, stands irrefutably falsified.

17. Would it be possible for the prosecution to establish a sexual relationship between Priya, the complainant/ prosecuterix and Prashant Bharti, the appellant-accused, is the next question which we shall attempt to answer. Insofar as the instant aspect of the matter is concerned, medical evidence discussed above reveals, that the complaint made by the complainant/prosecuterix alleging a sexual relationship with her by Prashant Bharti, the appellant-accused, was made more than one month after the alleged occurrences. It was, therefore, that during the course of her medical examination at the AIIMS, a vaginal smear was not taken. Her clothes were also not sent for forensic examination by the AIIMS, because she had allegedly changed the clothes which she had worn at the time of occurrence. In the absence of any such scientific evidence, the proof of sexual intercourse between the complainant/ prosecuterix and the appellant-accused would be based on an assertion made by the complainant/prosecuterix. And an unequivocal denial thereof, by the appellant-accused. One's word against the other. Based on the falsity of the statement made by the complainant/prosecuterix noticed above (and other such like falsities, to be narrated hereafter), it is unlikely, that a factual assertion made by the complainant/prosecuterix, would be acceptable over that of the appellant-accused. For the sake of argument, even if it is assumed, that Prashant Bharti, the appellant-accused and Priya, the complainant/ prosecuterix, actually had a physical relationship, as alleged, the same would necessarily have to be consensual, since it is the case of the complainant/prosecuterix herself, that the said physical relationship was with her consent consequent upon the assurance of marriage. But then, the discussion above, clearly

negates such an assurance. A consensual relationship without any assurance, obviously will not substantiate the offence under Section 376 of the Indian Penal Code, alleged against Prashant Bharti.

18. Insofar as the assertion made by the complainant/ prosecuterix, in her first complaint dated 16.2.2007 is concerned, it is apparent, that on the basis thereof, first information report no. 47 of 2007 was registered at Police Station Lodhi Colony, New Delhi. In her aforesaid complaint, Priya, the complainant/prosecuterix had alleged, that the appellant-accused had called her on her phone at 8.45 pm and asked her to meet him at Lodhi Colony, New Delhi. When she reached there, he drove her around in his car. He also offered her a cold drink (Pepsi) containing a poisonous/intoxicating substance. Having consumed the cold drink, she is stated to have felt inebriated, whereupon, he took advantage of her and started misbehaving with her, and also touched her breasts. Insofar as the instant aspect of the matter is concerned, the presence of the complainant/prosecuterix, as well as the appellant-accused, at the alleged place of occurrence (Lodhi Colony, New Delhi), on the night of 15.2.2007 after 8.45 pm, has been established to be false on the basis of mobile phone call details of the parties concerned. Details in this respect have been summarized in paragraph 8 above. The same are not being repeated for reasons of brevity. The proof of the aforesaid factual matter must be considered to be conclusive for all intents and purposes, specially, in view of the observations made by this Court in *Gajraj Vs. State (NCT) of Delhi* [(2011) 10 SCC 675], wherein it was held as under:-

> "19. In the aforesaid sense of the matter, the discrepancy in the statement of Minakshi PW23, pointed out by the learned counsel for the accused-appellant, as also, the reasoning rendered by the High Court in the impugned judgment becomes insignificant. We are satisfied, that the

process by which the accused-appellant came to be identified during the course of investigation, was legitimate and unassailable. The IEMI number of the handset, on which the accused-appellant was making calls by using a mobile phone (sim) registered in his name, being evidence of a conclusive nature, cannot be overlooked on the basis of such like minor discrepancies . In fact even a serious discrepancy in oral evidence, would have had to yield to the aforesaid authentic digital evidence which is a byproduct of machine operated electronic record having no manual interference. For the reasons recorded hereinabove, we find no merit in the first contention advanced at the hands of the learned counsel for the accused-appellant."

The aforesaid factual conclusion, that the two concerned parties were not present at Lodhi Colony, New Delhi after 8.45 pm on 15.2.2007, as has been established on the basis of the investigation carried out by the police, cannot be altered at the culmination of the trial, since the basis of the aforesaid determination is scientific evidence. Neither has the said material been contested by the complainant/prosecutrix. Once it is concluded, that the complainant/prosecuterix and the appellant-accused were at different places, far away from one another, and certainly not in Lodhi Colony, New Delhi on the night of 15.2.2007, it is obvious that the allegation made by Priya, the complainant/prosecuterix against Prashant Bharti, the appellant-accused of having outraged her modesty, was false. What stands established now, as has been discussed above, will have to be reaffirmed on the basis of the same evidence at the culmination of the trial. Such being the fact situation, we have no other alternative but to conclude, that the allegations levelled by the complainant/prosecuterix, which culminated in the registration of a first information report at Police Station Lodhi Colony, New Delhi on 16.2.2007, as well as her supplementary statement, would never lead to his conviction.

19. The proposition of law, pertaining to quashing of criminal proceedings, initiated against an accused by a High Court under Section 482 of the Code of Criminal Procedure (hereinafter referred to as "the Cr.P.C.") has been dealt with by this Court in *Rajiv Thapar & Ors. vs. Madan Lal Kapoor* (Criminal Appeal No…… of 2013, arising out of SLP (Crl.) no.4883 of 2008, decided on 23.1.2013) wherein this Court inter alia held as under:

> 22. The issue being examined in the instant case is the jurisdiction of the High Court under Section 482 of the Cr.P.C., if it chooses to quash the initiation of the prosecution against an accused, at the stage of issuing process, or at the stage of committal, or even at the stage of framing of charges. These are all stages before the commencement of the actual trial. The same parameters would naturally be available for later stages as well. The power vested in the High Court under Section 482 of the Cr.P.C., at the stages referred to hereinabove, would have far reaching consequences, inasmuch as, it would negate the prosecution's/complainant's case without allowing the prosecution/complainant to lead evidence. Such a determination must always be rendered with caution, care and circumspection. To invoke its inherent jurisdiction under Section 482 of the Cr.P.C. the High Court has to be fully satisfied, that the material produced by the accused is such, that would lead to the conclusion, that his/their defence is based on sound, reasonable, and indubitable facts; the material produced is such, as would rule out and displace the assertions contained in the charges levelled against the accused; and the material produced is such, as would clearly reject and overrule the veracity of the allegations contained in the accusations levelled by the prosecution/complainant. It should be sufficient to rule out, reject and discard the accusations levelled by the prosecution/complainant, without the necessity of recording any evidence. For this the material relied upon

by the defence should not have been refuted, or alternatively, cannot be justifiably refuted, being material of sterling and impeccable quality. The material relied upon by the accused should be such, as would persuade a reasonable person to dismiss and condemn the actual basis of the accusations as false. In such a situation, the judicial conscience of the High Court would persuade it to exercise its power under Section 482 of the Cr.P.C. to quash such criminal proceedings, for that would prevent abuse of process of the court, and secure the ends of justice.

23. Based on the factors canvassed in the foregoing paragraphs, we would delineate the following steps to determine the veracity of a prayer for quashing, raised by an accused by invoking the power vested in the High Court under Section 482 of the Cr.P.C.:-

(i) Step one, whether the material relied upon by the accused is sound, reasonable, and indubitable, i.e., the material is of sterling and impeccable quality?

(ii) Step two, whether the material relied upon by the accused, would rule out the assertions contained in the charges levelled against the accused, i.e., the material is sufficient to reject and overrule the factual assertions contained in the complaint, i.e., the material is such, as would persuade a reasonable person to dismiss and condemn the factual basis of the accusations as false.

(iii) Step three, whether the material relied upon by the accused, has not been refuted by the prosecution/ complainant; and/or the material is such, that it cannot be justifiably refuted by the prosecution/ complainant?

(iv) Step four, whether proceeding with the trial would

result in an abuse of process of the court, and would not serve the ends of justice?

If the answer to all the steps is in the affirmative, judicial conscience of the High Court should persuade it to quash such criminal proceedings, in exercise of power vested in it under Section 482 of the Cr.P.C. Such exercise of power, besides doing justice to the accused, would save precious court time, which would otherwise be wasted in holding such a trial (as well as, proceedings arising therefrom) specially when, it is clear that the same would not conclude in the conviction of the accused."

20. The details in respect of each aspect of the matter, arising out of the complaints made by Priya on 16.2.2007 and 21.2.2007 have been examined in extensive detail in the foregoing paragraphs. We shall now determine whether the steps noticed by this Court in the judgment extracted hereinabove can be stated to have been satisfied. In so far as the instant aspect of the matter is concerned, the factual details referred to in the foregoing paragraphs are being summarized hereafter. Firstly, the appellant-accused was in Sector 37, Noida in the State of Uttar Pradesh on 15.2.2007. He was at Noida before 7.55 pm. He, thereafter, remained at different places within Noida and then at Shakarpur, Ghaziabad, Patparganj, Jorbagh etc. From 9.15 pm to 11.30 pm on 15.2.2007, he remained present at a marriage anniversary function celebrated at Rangoli Lawns at Ghaziabad, Uttar Pradesh. An affidavit to the aforesaid effect filed by the appellant-accused was found to be correct by the investigating officer on the basis of his mobile phone call details. The accused was therefore not at the place of occurrence, as alleged in the complaint dated 16.2.2007. Secondly, verification of the mobile phone call details of the complainant/ prosecuterix Priya revealed, that on 15.2.2007, no calls were made by the appellant-accused to the complainant/ prosecuterix, and that, it was the complainant/prosecuterix who

had made calls to him. Thirdly, the complainant/prosecuterix, on and around the time referred to in the complaint dated 16.2.2007, was at different places of New Delhi i.e., in Defence Colony, Greater Kailash, Andrews Ganj and finally at Tughlakabad Extension, as per the verification of the investigating officer on the basis of her mobile phone call details. The complainant was also not at the place of occurrence, as she herself alleged in the complaint dated 16.2.2007. Fourthly, at the time when the complainant/ prosecuterix alleged, that the appellant-accused had misbehaved with her and had outraged her modesty on 15.2.2007 (as per her complaint dated 16.2.2007), she was actually in conversation with her friends (as per the verification made by the investigating officer on the basis of her mobile phone call details). Fifthly, even though the complainant/ prosecuterix had merely alleged in her complaint dated 16.2.2007, that the accused had outraged her modesty by touching her breasts, she had subsequently through a supplementary statement (on 21.2.2007), levelled allegations against the accused for offence of rape. Sixthly, even though the complainant/prosecuterix was married to one Manoj Kumar Soni, s/o Seeta Ram Soni (as indicated in an affidavit appended to the Delhi police format for information of tenants and duly verified by the investigating officer, wherein she had described herself as married), in the complaint made to the police (on 16.2.2007 and 21.2.2007), she had suggested that she was unmarried. Seventhly, as per the judgment and decree of the Civil Judge (Senior Division), Kanpur (Rural) dated 23.9.2008, the complainant was married to Lalji Porva on 14.6.2003. The aforesaid marriage subsisted till 23.9.2008. The allegations made by the complainant dated 16.2.2007 and 21.2.2007 pertain to occurrences of 23.12.2006, 25.12.2006, 1.1.2007 and 15.2.2007, i.e., positively during the subsistence of her marriage with Lalji Porwal. Thereafter, the complainant Priya married another man Manoj on 30.9.2008. This is evidenced by a "certificate of marriage" dated 30.9.2008. In view of the aforesaid, it is apparent that the complainant could

not have been induced into a physical relationship, based on an assurance of marriage. Eighthly, the physical relationship between the complainant and the accused was admittedly consensual. In her complaints Priya had however asserted, that her consent was based on a false assurance of marriage by the accused. Since the aspect of assurance stands falsified, the acknowledged consensual physical relationship between the parties would not constitute an offence under Section 376 IPC. Especially because the complainant was a major on the date of occurrences, which fact emerges from the "certificate of marriage" dated 30.9.2008, indicating her date of birth as 17.7.1986. Ninthly, as per the medical report recorded by the AIIMS dated 16.2.2007, the examination of the complainant did not evidence her having been poisoned. The instant allegation made by the complainant cannot now be established because even in the medical report dated 16.2.2007 it was observed that blood samples could not be sent for examination because of the intervening delay. For the same reason even the allegations levelled by the accused of having been administered some intoxicant in a cold drink (Pepsi) cannot now be established by cogent evidence. Tenthly, The factual position indicated in the charge-sheet dated 28.6.2007, that despite best efforts made by the investigating officer, the police could not recover the container of the cold drink (Pepsi) or the glass from which the complainant had consumed the same. The allegations made by the complainant could not be verified even by the police from any direct or scientific evidence, is apparent from a perusal of the charge-sheet dated 28.6.2007. Eleventhly, as per the medical report recorded by the AIIMS dated 21.2.2007 the assertions made by the complainant that the accused had physical relations with her on 23.12.2006, 25.12.2006 and 1.1.2007, cannot likewise be verified as opined in the medical report, on account of delay between the dates of occurrences and her eventual medical examination on 21.2.2007. It was for this reason, that neither the vaginal smear was taken, nor her clothes were sent for forensic examination.

21. Most importantly, as against the aforesaid allegations, no pleadings whatsoever have been filed by the complainant. Even during the course of hearing, the material relied upon by the accused was not refuted. As a matter of fact, the complainant/prosecutrix had herself approached the High Court, with the prayer that the first information lodged by her, be quashed. It would therefore be legitimate to conclude, in the facts and circumstances of this case, that the material relied upon by the accused has not been refuted by the complainant/ prosecutrix. Even in the charge sheet dated 28.6.2007, (extracted above) the investigating officer has acknowledged, that he could not find any proof to substantiate the charges. The charge-sheet had been filed only on the basis of the statement of the complainant/prosecutrix under Section 164 of the Cr.P.C.

22. Based on the holistic consideration of the facts and circumstances summarized in the foregoing two paragraphs; we are satisfied, that all the steps delineated by this Court in *Rajiv Thapar's* case (supra) stand satisfied. All the steps can only be answered in the affirmative. We therefore have no hesitation whatsoever in concluding, that judicial conscience of the High Court ought to have persuaded it, on the basis of the material available before it, while passing the impugned order, to quash the criminal proceedings initiated against the accused-appellant, in exercise of the inherent powers vested with it under Section 482 of the Cr.P.C. Accordingly, based on the conclusions drawn hereinabove, we are satisfied, that the first information report registered under Sections 328, 354 and 376 of the Indian Penal Code against the appellant-accused, and the consequential chargesheet dated 28.6.2007, as also the framing of charges by the Additional Sessions Judge, New Delhi on 1.12.2008, deserves to be quashed. The same are accordingly quashed.

Disposed of in the aforesaid terms.

R.P. Appeal disposed of.

M/S OSWAL AGRO MILLS LTD.
v
PUNJAB STATE ELECTRICITY BOARD AND OTHERS.
(Civil Appeal Nos. 662-663 of 2013)

JANUARY 23, 2013

**[A.K. PATNAIK AND
SUDHANSU JYOTI MUKHOPADHAYA, JJ.]**

Electricity Act, 1910:

ss. 30 and 58 read with PSEB Circular No. CC23/90 and Clause 8-b of Tariff Schedule – Levy of load surcharge at additional rate – Held: Was only meant for a load which was unauthorized or not sanctioned and if a particular load of a consumer is sanctioned or authorized, load surcharge at additional rate could not be levied under Clause 8-b of the Schedule of Tariff – In the instant case, the load of the TG Set detected was a sanctioned load and was not an unauthorized load – Therefore, appellant could not be held liable for load surcharge under Clause 8-b, even if by the aid of bus coupler, inter-transferability of load could be effected between the TG Set of appellant and the energy supplied by respondent-Board – Demand raised against appellant quashed – Punjab State Electricity Board Circular No. CC 23/ 90.

The appellant-owner of a sugar mill, installed a TG set of 3187.500 KW capacity and applied for its approval to respondent no. 1 State Electricity Board. The Chief Engineer, Commercial of respondent no. 1-Board, by memo dated 8.12.1992, granted permission to the appellant for installation of two TG sets subject to some conditions. The instant appeals arose out of the demand notices issued to the appellant by the Sub-Divisional Officer of respondent no. 1 stating that as the TG Set and

stand by load had not been sanctioned by respondent no. 1, the appellant was liable for excess unauthorized TG set load of 3187.500 KW and standby load of 2226.330 KW at the additional rate of Rs.1000/- per KW.

Allowing the appeals, the Court

HELD: 1.1. It is apparent from the demand notice dated 01.06.1993 that the unauthorized load comprised the TG Set load 3187.500 KW and the standby load of 2226.330 KW. So far as the standby load of 2226.330 KW is concerned, the demand for unauthorized load has been set aside by the Single Judge by the order dated 01.04.2009 in CWP No.7299 of 1993 and the order has not been challenged by respondents either before the Division Bench of the High Court or before this Court. In fact, the appellant has been issued a fresh demand notice dated 12.06.2009 pursuant to the order dated 01.04.2009 of the Single Judge in CWP No.7299 of 1993 restricting the demand of Rs.26,77,797/- for the unauthorized load on account of the TG Set. [para 10] [537-B-E]

1.2. From the demand notice dated 01.06.1993, it is evident that the reason for the demand for unauthorized load for the TG Set was non-compliance by the sugar mill of Circular No.CC23/90 issued by respondent No.1-Board. However, pursuant to the said Circular, the appellant applied for and was permitted regularization of load of two TG Sets by memo dated 08.12.1992 subject to certain conditions. Thus, on 09.12.1992 when the Flying Squad of respondent no.1 visited the sugar mill of the appellant, it had already been permitted installation of TG sets. It is pertinent to note that neither the first demand notice dated 10.12.1992 nor does the second demand notice dated 01.06.1993 state that the demand for unauthorized load for the TG Set was being made because the appellant has not fulfilled the conditions mentioned in the memo dated 08.12.1992. In fact, in the

two demand notices dated 10.12.1992 and 01.06.1993 no reference at all has been made to the memo dated 08.12.1992. [para 11 and 14] [537-F; 538-B-C; 540-G; 541-A; 543-G-H; 544-A]

1.3. It is evident from the demand notice dated 01.06.1993 that for the unauthorized load, a demand has been made at the rate of Rs.1,000/- per KW in accordance with Clause 8-b of the Schedule of Tariff applicable to the sugar mill of the appellant as notified in the Commercial Circular No.12/89. It will be clear from Clause 8-b of the Schedule of Tariff that if the connected load of a consumer exceeds the sanctioned connected load, the excess load shall be unauthorized load chargeable at additional rate of Rs.1000/- per KW for each subsequent default. As on 08.12.1992, the Chief Engineer, Commercial, has sanctioned or permitted or regularized the installation of two TG Sets, the load of 3187.500 KW of the TG Set detected on 19.12.1992 was a sanctioned load and was not an unauthorized load. Therefore, the appellant could not be held liable for load surcharge under clause 8-b of the Schedule of Tariff for the load of the TG Set, even if by the aid of bus coupler, inter-transferability of load could be effected between the TG Set of the appellant and the energy supplied by respondent no.1-Board. [para 12-13] [541-C-D, G-H; 542-A-D]

1.4. What the Single Judge and Division Bench of the High Court failed to appreciate is that the appellant was separately liable for energy charges and demand charges to respondent no.1 for consumption of energy and demand of energy respectively under the Schedule of Tariff; and the levy of load surcharge at the additional rate of Rs.1000/- per KW was only meant for a load of the consumer which was unauthori zed or not sanctioned and if a particular load of a consumer is sanctioned or authorized, load surcharge at additional rate of Rs.1000/

- per KW could not be levied under Clause 8-b of the Schedule of Tariff. [para 13] [542-E-H]

1.5. The impugned orders of the Single Judge and the Division Bench of the High Court are set aside and the demand raised against the appellant in the demand notice dated 01.06.1993 and the demand notice dated 12.06.2009 for unauthorized load of the TG Set is quashed. [para 15] [544-A-B]

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 662-663 of 2013.

From the Judgment & Order dated 1.05.2009 of the High Court of Punjab & Haryana at Chandigarh in Letters Patent Appeal No. 304 of 2009 and Judgment & Order dated 31.7.2009 in Review Application No. 6 of 2009 & C.W.P.No. 7299 of 1993.

Rohit Sharma, Abhijat P. Medh for the Appellant.

Dr. Prabhat Kumar, Ajay Amritraj, Prerna Kumari, Dharmendra Kumar Sinha for the Respondent.

The Judgment of the Court was delivered by

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

2. The facts very briefly are that the appellant owns a sugar mill situated at Phagwara, and the respondent no.1-Board is supplying electricity to the sugar mill. In 1989, the appellant installed a TG Set of 3187.500 KW capacity to meet some of its electricity demand and applied for approval of its TG Set to the respondent no.1. By memo dated 08.12.1992, the Chief Engineer, Commercial of the respondent no.1 granted permission to the appellant for installation of 2 No. TG Sets subject to some conditions. On 09.12.1992, however, the Flying Squad, Jalandhar of the respondent no.1 visited the sugar

mill of the appellant and checked the electricity connection at the sugar mill. Pursuant to the report submitted by the Flying Squad, the Sub-Divisional Officer (Suburban), Phagwara of the respondent no.1 issued a demand notice dated 10.12.1992 to the appellant stating *inter alia* that the TG Set and stand-by load had not been sanctioned by the respondent no.1 and the appellant was liable for an excess unsanctioned load of 4904.127 KW for load surcharge at the rate of Rs.1,000/- per KW, which worked out to Rs.49,04,127/-.

3. The appellant made a representation to the Sub-Divisional Officer (Suburban), Phagwara, and to the Chief Engineer, Commercial of respondent no.1 against the demand of load surcharge of Rs.49,04,127/-. When there was no response from the aforesaid two authorities of the respondent no.1, the appellant filed a Writ Petition CWP No.370 of 1993 before the High Court of Punjab and Haryana at Chandigarh challenging the demand of load surcharge of Rs.49,04,127/-. The Division Bench of the High Court held in its order dated 30.03.1993 that the respondent no.1 could charge for the excess load which was to be the sum of the rated capacities of all the energy consuming apparatus in the consumer's installation, but from the order impugned by the High Court or from the documents filed by the respondent no.1 before the High Court along with its written reply, there is nothing to show that the TG Set having the capacity of 3187.5 KW was an energy consuming apparatus. The Division Bench further held in its order dated 30.03.1993 that for the purpose of charging for the excess load, the load of the stand-by machinery was to be excluded and, therefore, the load to the extent of 2226.330 KW of the stand-by apparatus in the order impugned before the High Court could not be included. For the aforesaid reasons, the Division Bench quashed the demand of load surcharge of Rs.49,04,127/- leaving it to the respondent no.1 to pass afresh appropriate order, if so advised, with liberty to the appellant to challenge the same, if required.

4. Thereafter, by a fresh demand notice dated 01.06.1993, the Sub-Divisional Officer (Distribution), Suburban Sub-Division, Phagwara, raised the very same demand of Rs.49,04,127/- for the unauthorized TG Set load of 3187.500 KW and stand-by load of 2226.330 KW totalling to 6520.155 KW at the rate of Rs.1,000/- per KW. The appellant filed a second Writ Petition CWP No.7299 of 1993 challenging the aforesaid demand. The learned Single Judge, who heard and disposed of the writ petition, held in his order dated 01.04.2009 that the finding of the Division Bench of the High Court in earlier Writ Petition CWP No.370 of 1993 that the stand-by load of 2226.330 KW could not be included in the demand for excess load was binding on the respondent no.1 and hence the demand of excess load on account of the stand-by load could not be raised again by the respondent no.1. Regarding the connected load of the TG Set, the learned Single Judge of the High Court referred to the earlier order dated 21.08.2008 of the learned Single Judge in which it was recorded that the learned counsel for the appellant had very fairly stated that he would accept the decision of the Dispute Settlement Committee of the respondent no.1 and as the Dispute Settlement Committee had decided the matter against the appellant, the addition on account of the load connected on the TG Set could not be faulted with. Aggrieved, the appellant filed Letters Patent Appeal No.304 of 2009 before the Division Bench of the High Court, but by the impugned order dated 01.05.2009 the Division Bench dismissed the appeal after holding that there was no infirmity in the findings returned by the learned Single Judge on the basis of the statement made by the counsel for the appellant and the report submitted by the Dispute Settlement Committee. The appellant filed a Review Application RA No.6 of 2009 before the Division Bench, but by the impugned order dated 31.07.2009 the Division Bench dismissed the Review Application. Aggrieved, the appellant has filed this appeal by way of special leave under Article 136 of the Constitution challenging the orders of the Division Bench of the High Court

in the Letters Patent Appeal and the Review Application.

5. Learned counsel for the appellant submitted that the only ground on which the learned Single Judge in CWP No.7299 of 1993 declined to quash the demand for the excess connected load of the TG Set was that the learned counsel for the appellant had agreed before the learned Single Judge on 21.08.2008 that he would accept the decision of the Dispute Settlement Committee of the respondent no.1 on this aspect of the matter. He submitted that a reading of the order dated 21.08.2008 of the learned Single Judge would show that the learned counsel for the appellant had only agreed to accept the decision of the Dispute Settlement Committee of the respondent no.1 on the question whether with the aid of a device called a bus coupler, inter-transferability of load could be effected between the TG Set of the appellant and the energy supplied by the respondent no.1. He submitted that the learned counsel for the appellant, therefore, had not agreed before the learned Single Judge on 21.08.2008 to accept the decision of the Dispute Settlement Committee of the respondent no.1 with regard to the legality of the demand for the excess load on account of the TG Set. He further submitted that it will be clear from the memo dated 08.12.1992 issued by the Chief Engineer, Commercial, that the respondent no.1 had permitted installation of the two TG Sets subject to certain conditions and, therefore, the load of the TG Set had been permitted/sanctioned by the competent authority of the respondent no.1-Board and the appellant could not be charged any load surcharge at the additional rate of Rs.1,000/- per KW for 3187.500 KW connected load of the TG Set under the Commercial Circular No.12 of 1989.

6. Learned counsel appearing for the respondents, on the other hand, submitted that the memo dated 08.12.1992 of the Chief Engineer, Commercial of the respondent no.1 would show that the appellant was permitted installation of 2 No. TG Sets

subject to certain conditions which were to be complied with by the appellant and if the conditions were to be complied with, the appellant was liable for prosecution under Section 58 read with Section 43 of the Indian Electricity Act, 1910 and the unauthorized TG Sets were to be disconnected after giving 24 hours notice and were not allowed to be run till its sanction is obtained from the competent authority of the respondent no.1. He submitted that the permission was only given for installation of TG Set and not for the bus coupler and yet on 09.12.1992 when the Flying Squad of the respondent no.1 entered the sugar mill of the appellant, they found that the TG Turbo Bus and the supply of the respondent no.1 were electrically connected through LT Bus Coupler and there was inter-transferability of load. He submitted that, therefore, the TG Set of the appellant was found as unauthorized load for which the appellant was liable for load surcharge at the additional rate of Rs.1,000/- per KW. He submitted that the learned Single Judge and the Division Bench of the High Court were, therefore, right in rejecting the challenge of the appellant to the demand of Rs.26,77,797/- towards load surcharge for the TG Set at the rate of Rs.1,000/- per KW.

7. The first question that we have to decide is whether on 21.08.2008 the learned counsel for the appellant had agreed before the learned Single Judge to accept the decision of the Dispute Settlement Committee of the respondent no.1 on the legality of the demand of the unauthorized load of the TG Set and, therefore, the learned Single Judge and the Division Bench of the High Court were right in taking a view that the appellant was not entitled to challenge the demand of load surcharge for the authorized load in respect of the TG Set. The order dated 21.08.2008 of the learned Single Judge in CWP No.7299 of 1993, which records the submission of the learned counsel of the appellant, is extracted hereinbelow:

"Present: Mr. Rahul Sharma, Advocate

For the petitioner.
Mr. H.S. Riar, Advocate
with Mr. DPS Kahlon, Advocate for the Respondents.
Arguments in part heard.

The dispute in this petition primarily relates to the question, whether with the aid of a device called a bus coupler, inter-transferability of load could be effected between the captive generation apparatus of the petitioner and the energy supplied by the respondent-board. This is a disputed question of fact.

At this stage learned counsel for the petitioner has very fairly stated that he would accept the decision of the Dispute Settlement Committee of the respondent-board on this aspect of the matter. Let the Dispute Settlement Committee of the respondent-board, after hearing both the parties, give an opinion on the question whether the bus coupler installed by the petitioner would permit inter-transferability of the load between the Turbo Generator Set of the petitioner and the PSEB. Let representatives of both the parties appear before the Dispute Settlement Committee in this regard on 28.08.2008.

The matter is adjourned for two weeks i.e. 8.9.2008. Copy of this order be given to both the learned counsel under the signatures of the Reader of this Court.

Sd/-
Ajay Tewari
Judge
August 21, 2008."

8. It will be clear from the aforesaid order dated 21.08.2008 that the learned Single Judge was of the opinion that the dispute between the parties was on the question whether with the aid of a device called a bus coupler, inter-transferability of load could be effected between the captive generation apparatus

of the appellant and the energy supplied by the respondent no.1 and he was also of the opinion that this dispute was on a question of fact and accordingly learned counsel for the appellant had stated very fairly that he would accept the decision of the Dispute Settlement Committee of the respondent no.1 on this aspect of the matter. Hence, learned counsel for the appellant had not agreed before the learned Single Judge of the High Court that he would accept the decision of the Dispute Settlement Committee of the respondent no.1 on the legality of the demand for the extra load on account of the TG Set. In fact, we find from the proceedings of the Dispute Settlement Committee that the Dispute Settlement Committee has also not decided on the legality of the demand for the extra load on account of the TG Set, but has only decided that with the aid of a device called a bus coupler, inter-transferability of load could be effected between the captive generation apparatus of the appellant and the energy supplied by the respondent no.1. In our considered opinion, therefore, the legality of the demand for the extra load on account of the TG Set should have been decided by the learned Single Judge or the Division Bench after taking into account the finding of the Dispute Settlement Committee that with the aid of a device called a bus coupler, inter-transferability of load can be effected between the TG Set of the appellant and the energy supplied by the respondent no.1.

9. The next question that we have to decide is whether the appellant is liable for the demand of load surcharge for the unauthorized load in the notice dated 01.06.1993 issued by the Sub-Divisional Officer of the respondent no.1 keeping in view the finding of the Dispute Settlement Committee of the respondent No.1 that with the aid of bus coupler, inter-transferability of load can be effected between the captive generation apparatus of the appellant and the energy supplied by the respondent no.1 board. The justification of the demand made by the respondent no.1 is given in the demand notice dated 01.06.1993 of the Sub-Divisional Officer of the

respondent no.1 in which demand for load surcharge has been raised. Relevant extract from the demand notice dated 01.06.1993 containing the justification of the demand is extracted hereinbelow:

> "1. Total load running on PSEB System as checked by enforcement staff on 9.12.92: 1106.325 KW.
>
> 2. As agreed by your representative Sh. Ramesh Chand who was present at the time of spot checking, the TG Set load which also includes the running stand bye load which was taken on the basis of details of load given to the Board as per A/A form along with test reports submitted earlier and not on the basis of R.C. Set Capacity: 3187.500 KW
>
> Stand by Load on T.G. Set: 2226.330 KW
>
> Total: 6520.155 KW
>
> In addition to above, as per checking of enforcement staff on 9.2.92 and your representative Sh. Ramesh Chander Sharma present at the time of checking the total load was accepted so this load is unauthorized. It is also made clear that under PSEB Circular No.12/89 General Condition 14 and as per 8.. of Tariff Schedule, the standby load until sanctioned by the Board is unauthorized. Your attention is invited to your registered letter No.2922 dt. 26.8.89 addressed to Member Commercial, PSEB, Patiala in which you had mentioned that new schedule of tariff for Sugar Mills would tend to increase difficulties and also admitted that keeping this in view approximately Rs.35/40 lacs required to be deposited for running the 4434 KW on T.G. Set, expenses of which are not bearable. Keeping this in view the Board has issued Special instruction to the sugar mills vide Circular No.CC23/90 along with some condition, the compliance of which is not fulfilled by you.

As a result of this a load of 4904.127 KW was declared unauthorized after checking by the XEN Enforcement on 9.12.92. Keeping in view the unauthorized load you are requested to deposit Rs.49,04,127/- as per Board Circular No. CC 12/89 clause No.2 C 23/90 @ Rs.1000/- per KW. Since it is your 2nd default you have already deposited Rs.33,347/- on 23.5.91 towards first default."

10. It is apparent from what has been extracted from the demand notice dated 01.06.1993 of the Sub-Divisional Officer of the respondent no.1 that the unauthorized load comprised the TG Set load 3187.500 KW and the standby load of 2226.330 KW. So far as the standby load of 2226.330 KW is concerned, the demand for unauthorized load has been set aside by the learned Single Judge by the order dated 01.04.2009 in CWP No.7299 of 1993 and the order dated 01.04.2009 has not been challenged by the respondents either before the Division Bench of the High Court or before this Court. In fact, we find that the Sub-Divisional Officer of the respondent no.1 has issued a fresh demand notice dated 12.06.2009 to the appellant pursuant to the order dated 01.04.2009 of the learned Single Judge in CWP No.7299 of 1993 restricting the demand of Rs.26,77,797/- for the unauthorized load on account of the TG Set. Hence, we are to examine whether the reasons given in the demand notice dated 01.06.1993 of the Sub-Divisional Officer of the respondent no.1 for the unauthorized load of the TG Set are legal.

11. From the aforesaid extract of the demand notice dated 01.06.1993 of the Sub-Divisional Officer of the respondent no.1, we find that the reason for the demand for unauthorized load for the TG Set is that respondent No.1- Board has issued special instruction to sugar mills vide Circular No.CC23/90 along with some conditions, compliance of which have not been fulfilled by the appellant and as a result the load on account of TG Set was declared unauthorized after checking by XEN Enforcement on 09.12.1992. We have examined the Circular

No.CC 23/90 and we find that by the said Circular issued by the Chief Engineer, Commercial of the respondent No.1, all concerned were informed that respondent no.1 has decided to regularize the load of the sugar mills fed from TG Sets after recovering ACD worked out according to the capacity of TG Sets. In para 3 of the Circular, the working details for regularizing load of sugar mills from the supply of respondent no.1-Board and TG Sets have been given and at the end of the Circular it is mentioned that necessary action for regularizing total load of the sugar mills may be taken accordingly. Pursuant to the said Circular, the appellant applied for regularization of load of two TG Sets and by memo dated 08.12.1992 issued by the Chief Engineer, Commercial of the respondent no.1, the appellant was permitted to install two TG Sets subject to certain conditions. The memo dated 08.12.1992 issued by the Chief Engineer, Commercial of the respondent no.1 is extracted hereinbelow:

"PUNJAB STATE ELECTRICTY BOARD

From

The Chief Engineer / Commercial,
Tariff & Billing Directorate, PSEB,
The Mall, Patiala 147001

To,

M/s Oswal Agro Mills Ltd.
Sugar Divn. G.T. Road,
Phagwara (Pb.)
Memo No.64192/Com/54/Indl./Jall.
Dated 8.12.92

Sub: Permission for installation of 2 no. TG Sets of 3730 KVA & 500 KVA capacity.

Reference your letter regarding permission for installation of 2 No. TG Sets.

You are hereby permitted to install 2 No. TG sets of 3750 KVA Capacity of make Jyoti Vadodars, 420 Volts of 1500 RPM KVA Tg Set of Crompton make 400 volts & 375 RPM, subject to the following conditions:-

i. All relevant provisions of the I.E. Rules, 1956 shall be complied with by you and test report of the installation shall be furnished.

ii. That the Generating set will be operated whenever called upon to do so by the Pb. State Elecy. Board for meeting your demand or for giving suitable relief to the Board's system by meeting the demand of the other consumers also, depending upon the prevailing situation.

iii. Full proof arrangements to be approved by SE/DS concerned shall be provided to avoid mixing of Board's supply with that to be generated by the generating sets. It shall be ensured that the nature of the PSEB supply is isolated ruing change over to TG sets supply.

iv. That after obtaining receipts of this permission you will give notice not less than 7 (seven) days to the concerned District Magistrate in terms of Section 30 of the Indian Elecy. Act, 1910 intimating the nature and purpose of supply.

v. That the separate notice of not less than 7 (days) shall also be given to Chief Electrical Inspector to Govt. Punjab as laid down in Section 30 of the Indian Electricity Act, 1910. Notice shall also be accompanied by the following documents:-

a. Particulars of the Electrical installation and plan thereof.

b. A copy of the notice sent to the District Magistrate.

c. An attested copy of the consent received from the Punjab State Electy. Board.

d. Original Challan of the prescribed inspection fee under the following Head of Account;

-043 – Taxes and Duties on Electricity fee under the Indian Electricity Rules."

e. Test report from Licensed Wiring Contractor in token of his having carried out the job and tested the installation for safety.

f. A single line key diagram indicating the arrangement of connecting the generator installation to the existing electrical installation.

vi. That suitable energy meter shall be installed to comply with the requirement of Rule-6 of Punjab Electricity Duty Rules 1958. The meter shall be got tested from the nearest PSEB laboratory.

vii. That in case you fail to comply with the above provision you shall make yourself liable for prosecution under Section 58 read with Section 43 of Indian Electricity Act, 1910. The unauthorized T.G. Sets shall be disconnected after giving 24 hours notice and shall not be allowed to run till its sanction is obtained from the competent authority. In case you do not disconnect the TG Sets or apply for regularization of TG Sets your connection shall be disconnected after giving 24 hours notice in writing for contravening the provisions of the said Act and Clause 19 of the PSEB, abridged conditions of supply. Supply in such cases shall not be restored unless you disconnect the TG Sets and furnish test report for sanction electric installation or comply with the above provisions."

Thus, on 09.12.1992 when the Flying Squad, Jalandhar, of respondent no.1 visited the sugar mill of the appellant, the

Chief Engineer, Commercial of respondent no.1 had already permitted installation of TG Sets in the sugar mill of the appellant. If the appellant had refused to comply with the conditions mentioned in the Circular No.CC 23/90 for regularization of the load of the sugar mill fed from the TG Sets, the Chief Engineer, Commercial, would not have granted such permission in the memo dated 08.12.1992. Alternatively, even if the appellant had refused to comply with some conditions in the Circular No.CC 23/90, the Chief Engineer, Commercial did not consider such refusal to disentitle the appellant for regularization of the installation of the TG Set and permitted the installation of the TG Sets by the memo dated 08.12.1992.

12. We further find from the aforesaid extract from the demand notice dated 01.06.1993 that for the unauthorized load, a demand has been made at the rate of Rs.1,000/- per KW in accordance with Clause 8-b of the Schedule of Tariff applicable to the sugar mill of the appellant as notified in the Commercial Circular No.12/89. Clause 8-b of the Schedule of Tariff as notified in the Commercial Circular no.12/89 is extracted hereinbelow:

"SCHEDULE OF TARIFF:

i. Schedule L.S. – Large Industrial Power Supply 1 to 7.

8. ……..

'8-b. If the connected load of a consumer exceeds the sanctioned connected load, the excess load shall be unauthorized load. Such excess of the connected load shall be charged load surcharge at an additional rate of Rs.1000/- per KW for each subsequent default."

It will be clear from Clause 8-b of the Schedule of Tariff that if the connected load of a consumer exceeds the sanctioned connected load, the excess load shall be unauthorized load and such excess connected load shall be charged at additional rate of Rs.1000/- per KW for each subsequent default. If, therefore,

any load is sanctioned by the appropriate authority of respondent no.1-Board, such load cannot be held to be unauthorized load or excess load liable to surcharge at the rate of Rs.1000/- per KW. As we have already found, on 08.12.1992, the Chief Engineer, Commercial, has sanctioned or permitted or regularized the installation of two TG Sets and hence the load of 3187.500 KW of the TG Set detected on 19.12.1992 was a sanctioned load and was not an unauthorized load for which the appellant can be charged load surcharge at the rate of Rs.1000/- per KW under Clause 8-b of the Schedule of Tariff.

13. Once we hold that the load of the TG Sets was sanctioned and authorized, the appellant could not be held liable for load surcharge under clause 8-b of the Schedule of Tariff for the load of the TG Set, even if by the aid of bus coupler, inter-transferability of load could be effected between the TG Set of the appellant and the energy supplied by the respondent no.1-Board. For the consumption of energy from the supply of the respondent no.1, the appellant was liable for every unit of energy consumed to the respondent no.1. For demand of energy, the appellant being a sugar mill was also liable for demand charges with minimum contract demand of not less than the capacity of the distribution transformer(s) installed by the appellant and not 60% of the connected load as stated in the Commercial Circular Nos.12/89 and 23/90. What the learned Single Judge and Division Bench of the High Court failed to appreciate is that the appellant was separately liable for energy charges and demand charges to the respondent no.1 for consumption of energy and demand of energy respectively under the Schedule of Tariff and the levy of load surcharge at the additional rate of Rs.1000/- per KW was only meant for a load of the consumer which was unauthorized or not sanctioned and if a particular load of a consumer is sanctioned or authorized, load surcharge at additional rate of Rs.1000/- per KW could not be levied under Clause 8-b of the Schedule of Tariff.

14. Learned counsel for the respondents vehemently submitted that the permission to install the TG Sets granted by the memo dated 08.12.1992 by the Chief Engineer, Commercial of the respondent no.1 was subject to various conditions mentioned in the memo dated 08.12.1992 and these conditions have not been fulfilled by the appellant. Learned counsel for the respondents is right that since the permission to install the TG Sets was granted by the memo dated 08.12.1992 subject to various conditions, the load of the TG Sets installed could not be said to be sanctioned or authorized if the conditions in the memo dated 08.12.1992 were not fulfilled. It was, therefore, open to the respondents to treat the load of the TG Set as unauthorized on the ground that the conditions in the memo dated 08.12.1992 permitting the installation of the TG Sets were not fulfilled. But neither in the first demand notice dated 10.12.1992 nor in the second demand notice dated 01.06.1993 of the Sub-Divisional Officer of the respondent no.1 raising the demand for unauthorized load for the TG Set, there is any mention that the demand for unauthorized load was being raised because the appellant had not fulfilled the conditions mentioned in the memo dated 08.12.1992 of the Chief Engineer, Commercial of the respondent no.1. In the demand notice dated 10.12.1992 of the Sub-Divisional Officer of the respondent no.1, the only reason given for raising the demand for unauthorized load was that the TG Set load "has not yet been sanctioned by the Board". After the High Court quashed the first demand notice dated 10.12.1992 in CWP No.370 of 1993, leaving it to the respondent no.1 to pass afresh an appropriate order, the Sub-Divisional Officer issued the second demand notice dated 01.06.1993, but in this lengthy second demand notice also it has not been stated that the demand for unauthorized load for the TG Set was being made because the appellant has not fulfilled the conditions mentioned in the memo dated 08.12.1992 of the Chief Engineer, Commercial of the respondent no.1. In fact, in the two demand notices dated 10.12.1992 and 01.06.1993 no reference at all has been made

to the memo dated 08.12.1992 of the Chief Engineer, Commercial of the respondent no.1.

15. In the result, these appeals are allowed. The impugned orders of the learned Single Judge and the Division Bench of the High Court are set aside and the demand raised against the appellant in the demand notice dated 01.06.1993 and the demand notice dated 12.06.2009 for unauthorized load of the TG Set is quashed. The parties shall bear their own costs.

R.P. Appeals allowed.

C.P. SUBHASH
v.
INSPECTOR OF POLICE CHENNAI & ORS.
(Criminal Appeal No. 176 of 2013)

JANUARY 23, 2013

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

Code of Criminal Procedure, 1973 – s.482 – Pending criminal proceedings including FIRs under investigation – Exercise of powers u/s.482 CrPC or u/Article 226 of the Constitution by the High Court – Scope – Private respondents filed suit for declaration of title over landed property by placing reliance upon two sale deeds/documents – Appellant filed complaint alleging commission of offences punishable u/ ss.468 and 471 IPC – High Court quashed the complaint/FIR – On appeal, held: In cases where the complaint, whether lodged before a Court or before the jurisdictional police station, makes out the commission of an offence, High Court would not in the ordinary course invoke its powers to quash such proceedings except in rare and compelling circumstances enumerated in the Supreme Court decision in Bhajan Lal's case – In the case at hand, it cannot be said that the allegations made in the complaint did not constitute any offence or that the same did not prima facie allege the complicity of the accused – Complaint filed by the appellant stated the relevant facts and alleged that documents had been forged and fabricated only to be used as genuine to make a fraudulent and illegal claim over the land owned by the appellant – It was wrong for the High Court to hold that the respondents concerned were not the makers of the documents or that the filing of a civil suit based on the same did not constitute an offence – Whether or not the respondents concerned had forged the documents and if so what offence was committed by them was a matter for investigation which

could not be prejudged or quashed by the High Court in exercise of its powers u/s.482 CrPC or u/Article 226 of the Constitution – High Court was thus wrong in quashing the FIR – Constitution of India, 1950 – Article 226 – Penal Code, 1860 – ss.468 and 471.

Code of Criminal Procedure, 1973 – s.195(1)(b)(ii) – Applicability of – Held: s.195(1)(b)(ii) CrPC is attracted only when offences enumerated in the said provision have been committed with respect to a document after it has been produced or given in evidence in any court and during the time the same was in custodia legis – Bar contained in s.195 against taking of cognizance not attracted to the case at hand as the sale deeds relied upon for claiming title to the property in question had not been forged while they were in custodia legis –Penal Code, 1860 – ss.468 and 471.

The appellant was the General Manager of SNP Ventures Pvt. Ltd. while respondents 2, 3 and 4 were working with M/s Gorden Woodroff Limited ('GWL') as legal advisers/Senior Managers. GWL filed suit for declaration of title *qua* 11.75 acres of land placing reliance upon two sale deeds, dated 10th March, 1922 and 27th June, 1922 respectively. SNP Ventures Pvt. Ltd. claiming to be in actual physical possession of the said property approached the Sub-Registrar's office to verify the genuineness of the two sale deeds relied upon by GWL. Verification revealed that both the sale deeds in question pertained to transactions between some private parties and had no connection whatsoever with GWL. The Sub-Registrar also informed the appellant that there was no transaction during the year 1922 in respect of the subject lands. The appellant filed complaint against respondent nos.2, 3 and 4 alleging commission of offences punishable under Sections 468 and 471 IPC and FIR was accordingly registered.

Aggrieved, respondents 2, 3 and 4 filed petition for quashing of the FIR as also investigation in connection therewith. The petition was allowed by the High Court which quashed registration of the case as also the proceedings based on the same. The High Court called in aid two precise reasons for doing so - *firstly,* that the allegations made in the complaint even if accepted in their entirety did not *prima facie* constitute an offence or make out a case against the respondents and s*econdly*, that no Court could, in view of the bar contained in Section 195 CrPC, take cognizance of offences in question except on a complaint in writing made by the court or the public servant concerned. Hence the present appeal.

Allowing the appeal, the Court

HELD: 1.1. The legal position regarding the exercise of powers under Section 482 Cr.P.C. or under Article 226 of the Constitution of India by the High Court in relation to pending criminal proceedings including FIRs under investigation is fairly well settled by a long line of decisions of this Court. In cases where the complaint lodged by the complainant whether before a Court or before the jurisdictional police station makes out the commission of an offence, the High Court would not in the ordinary course invoke its powers to quash such proceedings except in rare and compelling circumstances enumerated in the decision of this Court in *Bhajan Lal's* **case. [Para 7] [552-D-F]**

1.2. In the case at hand, it cannot be said that the allegations made in the complaint do not constitute any offence or that the same do not *prima facie* allege the complicity of the persons accused of committing the same. The complaint filed by the appellant sets out the relevant facts and alleges that the documents have been forged and fabricated only to be used as genuine to make a fraudulent and illegal claim over the land owned by

complainant. [Para 10] [554-B-D]

State of Haryana and Ors. v. Ch. Bhajan Lal and Others **1992 Supp (1) SCC 335;** *Rajesh Bajaj v. State, NCT of Delhi* **(1999) 3 SCC 259;** *State of Madhya Pradesh v. Awadh Kishore Gupta* **(2004) 1 SCC 691;** *V.Y. Jose and Anr. v. State of Gujarat and Anr.* **(2009) 3 SCC 78** *Harshendra Kumar D. v. Rebatilata Koley etc.* **(2011) 3 SCC 351 – relied on.**

State of Karnataka and Anr. v. Pastor P.Raju **(2006) 6 SCC 728 – cited.**

2. Equally untenable is the view taken by the High Court that the bar contained in Section 195(1)(b)(ii) CrPC could be attracted to the case at hand. Section 195(1)(b)(ii) CrPC is attracted only when the offences enumerated in the said provision have been committed with respect to a document after it has been produced or given in evidence in any court and during the time the same was in *custodia legis*. Therefore, the bar contained in Section 195 against taking of cognizance was not attracted to the case at hand as the sale deeds relied upon by GWL for claiming title to the property in question had not been forged while they were in *custodia legis*. [Paras 11, 12] [555-E-G; 556-C]

Iqbal Singh Marwah and Anr. v. Meenakshi Marwah and Anr. **(2005) 4 SCC 370 and** *Sachida Nand Singh & Anr. v. State of Bihar & Anr.* **(1998) 2 SCC 493 – relied on.**

3. The High Court was thus wrong in quashing the FIR on the ground that the allegations did not constitute an offence even when the same were taken to be true in their entirety. It was also wrong for the High Court to hold that the respondents were not the makers of the documents or that the filing of a civil suit based on the same would not constitute an offence. Whether or not the respondents had forged the documents and if so what

offence was committed by the respondents was a matter for investigation which could not be prejudged or quashed by the High Court in exercise of its powers under Section 482 of Cr.P.C. or under Article 226 of the Constitution. The judgment passed by the High Court is set aside and criminal petition filed by the said respondents 2, 3 and 4 is dismissed. [Paras 13, 14] [556-D-G]

Case Law Reference:

(2006) 6 SCC 728	**cited**	**Para 5**
(2005) 4 SCC 370	**relied on**	**Para 5**
1992 Supp (1) SCC 335	**relied on**	**Para 7**
(1999) 3 SCC 259	**relied on**	**Para 7**
(2004) 1 SCC 691	**relied on**	**Para 8**
(2009) 3 SCC 78	**relied on**	**Para 9**
(2011) 3 SCC 351	**relied on**	**Para 9**
(1998) 2 SCC 493	**relied on**	**Para 11**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 176 of 2013.

From the Judgment & Order dated 15.2.2011 of the High Court of Judicature at Madras in Crl. O.P. No. 15917 of 2010.

K.K. Venugopal, D. Ramkrishna Reddy, D. Bharathi Reddy, Ankur Talwar for the Appellant

Jayant Bhushan, U.A. Rana, Mrinal Majumdar, Himanshu Mehta, Gagrat & Co., Praveen Jain, T.S. Sidhu, Tanu Pirya, M.V. Kini & Associaties, B. Balaji, Guru Krishna Kumar, Yogesh Kanna, Prasanna Venkat for the Respondents.

The Judgment of the Court was delivered by

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

2. This appeal arises out of a judgment and order dated 15th February, 2011 passed by the High Court of Madras whereby Criminal O.P. No.15917 of 2010 filed by respondents 2, 3 and 4 has been allowed, FIR No.41/10 dated 25th March, 2010 registered in Police Station Tambaram for offences punishable under Sections 468 and 471 of the Indian Penal Code, 1860 and the ongoing investigation into the said FIR quashed.

3. The complainant-appellant in this appeal is the General Manager of SNP Ventures Pvt. Ltd. while respondents 2, 3 and 4 were during the relevant period working with M/s Gorden Woodroff Limited (for short 'GWL') as legal advisers/Senior Managers. GWL has, it appears, filed O.S. No.169 of 2008 before the District Court, Chengalpattu seeking a decree for declaration of its title *qua* 11.75 acres of land situated at Jameen Pallavaram Village, Tambaram in the State of Tamil Nadu. In support of its claim of ownership over the suit property GWL appears to be placing reliance upon two sale deeds one dated 10th March, 1922 (document No.1551 of 1922) and the other dated 27th June, 1922 (document No.1575 of 1922). SNP Ventures Pvt. Ltd. who claims to be in actual physical possession of the suit property in the meantime appears to have approached the Sub-Registrar's office at Saidapet to verify the genuineness of the two sale deeds relied upon by GWL. Verification revealed that both the sale deeds in question pertained to transactions between some private parties and had no connection whatsoever with GWL. The Sub-Registrar also informed the complainant that there was no transaction during the year 1922 in respect of the subject lands at Jameen Pallavaram.

4. It was on the basis of the above information that the complainant filed a complaint against the respondents alleging commission of offences punishable under Sections 468 and 471 of the IPC. Crime No.41/10 was accordingly registered in the Central Crime Branch, Chennai Suburban, St. Thomas Mount for the said offences against respondents 2, 3 and 4.

Aggrieved, the respondents filed Criminal O.P. No.15917 of 2010 for quashing of the FIR as also investigation in connection therewith which petition was heard and allowed by a Single Judge of the High Court of Madras by an order dated 15th February, 2011 quashing registration of the case as also the proceedings based on the same. The High Court called in aid two precise reasons for doing so. *Firstly*, the High Court held that the allegations made in the complaint even if accepted in their entirety did not *prima facie* constitute an offence or make out a case against the respondents herein. *Secondly*, the High Court held that no Court could, in view of the bar contained in Section 195 Cr.P.C., take cognizance of offences in question except on a complaint in writing made by the court or the public servant concerned. The present appeal assails the correctness of the said order passed, as already noticed above.

5. Appearing for the appellant, Mr. K.K. Venugopal, learned senior counsel, argued that the High Court had fallen in a palpable error in interfering with the ongoing investigation. The complaint filed by the appellant, argued the learned counsel, made specific allegations against the respondents which could not be brushed aside without a proper verification of the correctness thereof in the course of investigation. In support of his submission he placed reliance upon the decision of this Court in *State of Karnataka and Anr. v. Pastor P. Raju* (2006) 6 SCC 728. He urged that the High Court could not interfere with an ongoing investigation except under compelling circumstances or where the complaint did not make out any case even if the allegations made therein were taken at their face value. He further contended that the High Court was in error in relying upon Section 195 of Cr.P.C. while quashing the investigation. Section 195, argued Mr. Venugopal, was applicable to cases in which the alleged fabrication of the document had taken place while the same was in the custody of the court. That was not the position in the case at hand. Reliance in support of that contention was placed by Mr. Venugopal upon a Constitution Bench decision of this Court in

the case of *Iqbal Singh Marwah and Anr. v. Meenakshi Marwah and Anr. (2005) 4 SCC 370*.

6. *Per contra*, Mr. Jayant Bhushan, learned senior counsel appearing for the respondents 2, 3 and 4 argued that while the complaint and the registration of the case was not hit by the provisions of Section 195 of the Cr.P.C. in the light of the decision of the Constitution Bench of this Court referred to above, yet keeping in view the fact that the question of validity and genuineness of the sale deeds relied upon by GWL was the subject matter of a pending civil suit it would be an unnecessary and avoidable harassment for the respondents if the investigation is allowed to proceed even before the Civil Court records a finding regarding the genuineness of the sale deeds.

7. The legal position regarding the exercise of powers under Section 482 Cr.P.C. or under Article 226 of the Constitution of India by the High Court in relation to pending criminal proceedings including FIRs under investigation is fairly well settled by a long line of decisions of this Court. Suffice it to say that in cases where the complaint lodged by the complainant whether before a Court or before the jurisdictional police station makes out the commission of an offence, the High Court would not in the ordinary course invoke its powers to quash such proceedings except in rare and compelling circumstances enumerated in the decision of this Court in *State of Haryana and Ors. v. Ch. Bhajan Lal and Others* 1992 Supp (1) SCC 335. Reference may also be made to the decision of this Court in *Rajesh Bajaj v. State, NCT of Delhi* (1999) 3 SCC 259 where this Court observed:

> *"...If factual foundation for the offence has been laid down in the complaint the Court should not hasten to quash criminal proceedings during investigation stage merely on the premise that one or two ingredients have not been stated with details. For quashing an FIR (a step which is permitted only in extremely rare cases) the information*

in the complaint must be so bereft of even the basic facts which are absolutely necessary for making out the offence."

8. To the same effect is the decision of this Court in *State of Madhya Pradesh v. Awadh Kishore Gupta* (2004) 1 SCC 691 where this Court said:

"...The powers possessed by the High Court under Section 482 of the Code are very wide and the very plenitude of the power requires great caution in its exercise. Court must be careful to see that its decision in exercise of this power is based on sound principles. The inherent power should not be exercised to stifle a legitimate prosecution. High Court being the highest Court of a State should normally refrain from giving a prima facie decision in a case where the entire facts are incomplete and hazy, more so when the evidence has not been collected and produced before the Court and the issues involved, whether factual or legal, are of magnitude and cannot be seen in their true perspective without sufficient material. Of course, no hard and fast rule can be laid down in regard to cases in which the High Court will exercise its extraordinary jurisdiction of quashing the proceeding at any stage. It would not be proper for the High Court to analyse the case of the complainant in the light of all probabilities in order to determine whether a conviction would be sustainable and on such premises, arrive at a conclusion that the proceedings are to be quashed. It would be erroneous to assess the material before it and conclude that the complaint cannot be proceeded with. In proceeding instituted on complaint, exercise of the inherent powers to quash the proceedings is called for only in a case where the complaint does not disclose any offence or is frivolous, vexatious or oppressive. If the allegations set out in the complaint do not constitute the offence of which cognizance has been taken by the Magistrate, it is open

to the High Court to quash the same in exercise of the inherent powers under Section 482 of the Code..."

9. Decisions of this Court in *V.Y. Jose and Anr. v. State of Gujarat and Anr.* (2009) 3 SCC 78 and *Harshendra Kumar D. v. Rebatilata Koley etc.* (2011) 3 SCC 351 reiterate the above legal position.

10. Coming to the case at hand it cannot be said that the allegations made in the complaint do not constitute any offence or that the same do not *prima facie* allege the complicity of the persons accused of committing the same. The complaint filed by the appellant sets out the relevant facts and alleges that the documents have been forged and fabricated only to be used as genuine to make a fraudulent and illegal claim over the land owned by complainant. The following passage from the complaint is relevant in this regard:

".....Thus evidently these two sale deeds being produced by GWL i.e. 1551/1922 dated: 10th March 1922 and 1575/1922 dated 27th June 1922 are forged and fabricated and after making the false documents they were used as genuine to make fraudulent and illegal claim over our lands and go grab them. The representatives of GWL Properties with dishonest motive of grabbing our lands having indulged in committing forgery and fabrication of documents and with the aid of the forged documents are constantly attempting to criminally trespass into our lawful possessed lands and have been threatening and intimidating the staffs of our company in an illegal manner endangering life and damaging the land. The representatives of GWL properties also have been making false statements to the Government Revenue Authorities by producing these forged and fabricated documents with dishonest intention to enter their name in the Government Records. The present Director-in-charge and responsible for the affairs of the GWL Properties Limited is Mrs. V.M. Chhabria

and all the above mentioned acts and commission of offences have been committed with the knowledge of the Directors of GWL Properties Ltd., and connivance for which they are liable. Mr. A.V.L. Ramprasad Varma representing M/s GWL Properties Limited has registered a civil suit in the District Court, Chengalpet using the forged documents. Mr. Satish, Manager (Legal), Mr. Shanmuga Sundram, Senior Manager, (Administration), have assisted in fabricating the forged documents and used the same to get patta from Tahsildar, Tambaram, thus cheating the Govt. Officials. Hence we request you to register the complaint and to investigate and take action in accordance with law as against the said company M/s GWL Property Limited represented by Mr. Satish, Manager (Legal) Mr. Shanmudga Sundaram, Senior Manager (Administration), A.V.L. Ramprasad Varma, Directors, and their accomplice who have connived and indulged in fabricating and forging documents for the purpose of illegally grabbing our lands and for all other offences committed by them."

11. Equally untenable is the view taken by the High Court that the bar contained in Section 195(1)(b)(ii) could be attracted to the case at hand. In *Iqbal Singh Marwah's* case (supra) a Constitution Bench of this Court had authoritatively declared that Section 195(1)(b)(ii) Cr.P.C. was attracted only when the offences enumerated in the said provision have been committed with respect to a document after it has been produced or given in evidence in any court and during the time the same was in custodia legis. This Court while taking that view approved the ratio of an earlier decision in *Sachida Nand Singh & Anr. v. State of Bihar & Anr.* (1998) 2 SCC 493 where this Court held:

"12. It would be a strained thinking that any offence involving forgery of a document if committed far outside the precincts of the Court and long before its production in the Court, could also be treated as one affecting

administration of justice merely because that document later reached the court records.

xx xx xx xx

23. The sequitur of the above discussion is that the bar contained in Section 195(1)(b)(ii) of the Code is not applicable to a case where forgery of the document was committed before the document was produced in a court."

12. Mr. Venugopal was, therefore, correct in contending that the bar contained in Section 195 against taking of cognizance was not attracted to the case at hand as the sale deeds relied upon by GWL for claiming title to the property in question had not been forged while they were in *custodia legis*.

13. In the light of the above, the High Court was wrong in quashing the FIR on the ground that the allegations did not constitute an offence even when the same were taken to be true in their entirety. It was also, in our view, wrong for the High Court to hold that the respondents were not the makers of the documents or that the filing of a civil suit based on the same would not constitute an offence. Whether or not the respondents had forged the documents and if so what offence was committed by the respondents was a matter for investigation which could not be prejudged or quashed by the High Court in exercise of its powers under Section 482 of Cr.P.C. or under Article 226 of the Constitution of India.

14. In the result this appeal succeeds and is hereby allowed. The judgment and order dated 15th February, 2011 passed by the High Court is set aside and Criminal O.P. No.15917 of 2010 filed by the respondents dismissed. We make it clear that neither the investigating agency nor the Court before whom the matter may eventually come up for trial and hearing upon conclusion of the investigation shall be influenced by any observation made by this Court regarding the merit of the case.

B.B.B. Appeal allowed.

RAJESH GUPTA

v.

STATE OF JAMMU AND KASHMIR AND OTHERS

(Civil Appeal No. 952 of 2013)

JANUARY 23, 2013

[SURINDER SINGH NIJJAR AND ANIL R. DAVE, JJ.]

Service Law – Retirement – Premature retirement – Jammu and Kashmir Public Service Commission – Appellant, an Executive Engineer in the Rural Engineering Wing ('REW') – Allegation that he possessed assets disproportionate to his known sources of income and that he had issued back dated technical sanctions to some departmental works and passed bills and estimates in respect thereof – High Powered Review Committee constituted by State Government to consider cases of officers/officials for premature retirement in terms of Articles 226(2) and 226(3) of the Jammu and Kashmir Civil Services Regulations – Based upon the recommendations made by the said Committee, order passed by respondent-State Government prematurely retiring the appellant from service – Writ petition filed by appellant – Dismissed by Single Judge of High Court – Division Bench affirmed the order – On appeal, held: Recommendation made by the High Powered Review Committee was indubitably arbitrary – There was no material before the Committee to conclude that appellant possessed assets beyond his known source of income – In regard to allegation with regard to issuance of back dated technical sanctions, at best the appellant acted in a casual and haphazard manner in the maintenance of records – Such negligence on the part of appellant cannot per se lead to the conclusion that the appellant was acting in such a manner with an ulterior motive – Conclusions reached by High Powered Committee also did not co-relate to the assessment of work

and integrity of the appellant in the annual performance report – In all annual performance reports, the appellant was rated 'very good', 'excellent' and even 'outstanding' – Order passed by the State Government suffered from vice of arbitrariness – Impugned order of premature retirement of the appellant quashed and set aside – Since appellant still not reached the age of superannuation, direction given for his reinstatement – However, as appellant had not challenged the order of premature retirement on the ground that the action taken by the Government was malafide, it would not be appropriate in this case, to follow the normal rule of grant of full backwages on reinstatement – Direction given that the appellant shall be paid 30% of the backwages from the date of order of premature retirement till reinstatement – He shall not be entitled to any interest on the backwages – Upon reinstatement, it shall be open to the Government to post the appellant on a non- sensitive post in view of the background of the case – Jammu and Kashmir Civil Services Regulations, 1956 – Article 226(2) and 226(3).

Baikuntha Nath Das & Anr. vs. Chief District Medical Officer, Baripada & Anr. **(1992) 2 SCC 299: 1992 (1) SCR 836;** *Nand Kumar Verma v. State of Jharkhand and others* **2012 (3) SCC 580;** *State of Gujarat v. Umedbhai M. Patel* **2001 (3) SCC 314: 2001 (2) SCR 170** and *Jugal Chandra Saikia vs. State of Assam & Anr.* **(2003) 4 SCC 59: 2003 (2) SCR 615** and *Allahabad Bank Officers' Association & Anr. vs. Allahabad Bank & Ors.* **(1996) 4 SCC 504: 1996 (2) Suppl. SCR 172– referred to.**

Case Law Reference:

2012 (3) SCC 580	**referred to**	**Paras 15, 20**
2001 (2) SCR 170	**referred to**	**Paras 15, 21**
2003 (2) SCR 615	**referred to**	**Paras 17, 22**
1996 (2) Suppl. SCR 172	**referred to**	**Paras 18, 24**

1992 (1) SCR 836 referred to Paras 18, 20

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 952 of 2013.

From the Judgment & Order dated 28.02.2011 of the High Court of Jammu and Kashmir at Jammu in LPA (SW) No. 20 of 2008.

Dinesh Kumar Garg, B.S. Billowaria, Dr. Bheem Pratap Singh, Jyoty for the Appellant.

Sunil Fernandes, Vernika Tomar, Rahul Sharma, Astha Sharma, Insha Mir for the Respondent.

The following order of the Court was delivered

O R D E R

1. Leave granted.

2. We have heard learned counsel for the parties.

3. This appeal is directed against the judgment and order of the Division Bench dated 28th February, 2011 passed by the High Court of Jammu and Kashmir at Jammu in L.P.A.(SW) No. 20 of 2008 whereby the Division Bench confirmed the judgment and order passed by the learned Single Judge dismissing the Writ Petition(S) No. 622 of 2005 by judgment and order dated 29th January, 2008, wherein the appellant had challenged the order passed by the respondent-State dated 26th April, 2005 prematurely retiring the appellant from service.

4. We may briefly notice the relevant facts leading to the filing of the writ petition in the High Court.

5. Upon being selected by the Jammu and Kashmir Public Service Commission, the appellant was appointed as Soil Conservation Assistant in the Department of Agriculture Production in March, 1981. On 20th April, 1985 he was posted

as Assistant Engineer in Rural Engineering Wing (hereinafter referred to as 'REW'), Ramban, District Doda, Jammu and Kashmir. He was promoted on the post of Assistant Executive Engineer in REW in September, 1988. While he was posted as such, three separate criminal cases were registered against him on the basis of (i) F.I.R. No. 49 of 1991, (ii) F.I.R. No. 63 of 1994 and (iii) F.I.R. No. 11 of 1995. It is not disputed before us that upon investigation in all the matters, the allegations made in all the three FIRs were found to be 'Not Proved'. In F.I.R. No. 11 of 1995, there was, however, a recommendation to initiate departmental action against the appellant and some other officers. It is also not disputed before us, that no departmental action was ever taken against the appellant. Record also does not show that any departmental action was taken against him. After completion of the investigation in F.I.R. No. 11 of 1995, the appellant was, in fact, promoted to the post of Executive Engineer on 15.12.1996. In spite of having been promoted, the order of promotion was not given effect to. Therefore, the appellant challenged the action of the Deputy Commissioner, Udhampur who had refused to give effect to the order of promotion by filing a writ petition in the High Court. The writ petition was allowed and thereafter the appellant was permitted to join as Executive Engineer on 6th February, 2003. He worked as Executive Engineer at Jammu till 8th May, 2003. During this period, in the performance of his official duty, the appellant was required to recommend the sanctioning of technical approval to the construction works of various projects.

6. On 5th March, 2003, the Government of Jammu and Kashmir, General Administration Department by Government Order No. 306-GAD of 2003 dated 5th March, 2003 constituted a Committee to consider the cases of officers/officials for premature retirement in terms of Article 226(2) and 226(3) of the Jammu and Kashmir Civil Services Regulations, 1956. On 1st April, 2003, further directions were issued by the Government indicating the circumstances which would be relevant for making a recommendation for premature retirement

of a public servant. On 9th May, 2003 the appellant was directed to be attached to the office of the Director, Rural Development, Jammu pending an enquiry into some allegations on the appellant. On 22nd July, 2003, an enquiry report was submitted into the suspected irregularities in the execution of "Rural Development Works" in the eleven Blocks of Jammu and Kashmir. Clause 1 of the terms of reference of the enquiry related to the execution of works during 2002-2003 particularly during the month of March, 2003. It was as under:-

> "Whether any irregularity has been committed in any blocks of District Jammu in the execution of works during the year 2002-2003 particularly during the month of March, 2003 in the matter of observing the coral formalities viz. issuing of technical sanction, approval of estimates and allotment of works to mates, test checks etc."

7. As noticed earlier, the appellant was working as the Executive Engineer at Jammu at the relevant time. Therefore, during the performance of his official duty, he was required to issue technical sanctions, approve estimates and allot work to mates as well as conducting test checks of the works allotted by the Block Development Officer. The conclusion recorded by the inquiry officer is as under:-

> "The Executive Engineer, Rural Engineering Wing, Jammu has also confessed having accorded such sanctions on spot. All this clearly indicates that no proper records have been maintained by that office and some sanctions have been issued out of record. No record/ register of bills/test checks has been maintained.
>
> Regarding accord of back dated technical sanctions and delays, it could not be established with evidence that their existed some back dated technical sanctions or there were delays in accord of technical sanctions and clearance of bills. However, the casual and haphazard manner of maintenance of records could be a probable pointer towards the direction."

8. The Inquiry Officer further records that Block Development Officers have taken up number of works without technical sanctions which was contrary to the standing rules governing execution of work. The Inquiry Officer further observed that the Executive Engineer, REW, Jammu, i.e. the appellant, has not maintained the proper record of technical sanctions and test checks. Non-maintenance of the important records has resulted in mismanagement owing to the issue of technical sanctions not adopting a proper procedure for the execution of works and test checks etc. It is a matter of record that even though this report was submitted on 22nd July, 2003, no action was taken on the basis thereof.

9. We may also notice at this stage that the appellant had a spotless service record throughout 24 years of service. In the annual performance report for the period 1.4.1997 till 31.3.1998, his work has been assessed as 'Good'. The reviewing authority has graded the appellant as a 'Very Good Officer'. Against the column of integrity, the remark is 'Excellent'. Similarly, for the year 1998-1999, he was assessed as 'Good officer' and having 'excellent' integrity. In the annual performance report for the year 1999-2000 again his integrity is said to be 'Excellent'. He has been assessed as a very capable and efficient officer. The overall assessment given by the reviewing authority is 'A very good officer'. For the year 2000-2001, the annual performance report again records that the appellant is 'A good officer' with good integrity. A separate assessment was given on 12th March, 2005 for the period 27th October, 2001 to 29th July, 2002 and thereafter from 23rd October, 2002 till 23rd December, 2002. This annual performance report was recorded by the Deputy Commissioner, Jammu for the period of 11 months. In the aforesaid two tenures, the work and conduct of the appellant was found to be good. It is also recorded that no complaint was

brought to the notice of the reporting officer. For the year 2003-2004 against the column integrity, it is mentioned that 'nothing against came in notice'. The reporting officer has said 'he is a very good field officer'. The reviewing officer assessed the appellant as 'An outstanding officer'.

10. In spite of having a blemish-free record of service as noticed above, the appellant was directed to be prematurely retired by order dated 26th April, 2005 on the basis of the recommendations made by the High Powered Review Committee. The conclusion on the basis of which the recommendations for retirement of the appellant has been made are as under:-

> "5. As per inputs provided by the Additional DG CID the officer has amassed property disproportionate to his known sources of income which include a palatial house at Krishna Colony Kathua built over about 3 kanals of land; two shops in Kathua market; six kanals of land in Kathua town, one kanal of land at Trikuta Nagar Jammu (Sector No.3), two kanals of land at Trikuta Nagar extension, three kanals of land at Greater Kailash Colony, Jammu; 10 marla plot at Bhatiandi and bank account and lockers in United Commercial Bank, R.N. Bazar and Vijay Bank, Purani, Mandi, Jammu."

11. As per information provided by the Rural Development Department, the officer was attached vide Government Order No. 112-RD of 2004 dated 9.5.2003 for issuing back dated sanctions relating to the execution of departmental works, passing of bills and estimates in Jammu District and other matters related thereto. A departmental enquiry has been ordered vide Government Order No. 125-RD of 2004 dated 22.5.2003. The Officer is a professional litigant who has created problems for the department. Besides, the reputation of the officer is very bad."

12. On the basis of these recommendations the

Government issued the order of retirement which was impugned by the appellant in the writ petition.

13. The learned Single Judge dismissed the writ petition with the observations that "there is sufficient material on the record which clearly speaks of the doubtful integrity of the petitioner." The Division Bench also concluded that the decision of the High Powered Committee to recommend the appellant's premature retirement was based on the inputs received from the Additional DG, CID regarding assets of appellant which were disproportionate to his known sources of income and the information received from the Rural Development Department that the appellant had issued back dated sanctions to some departmental works and passed bills and estimates in respect thereof.

14. The Division Bench concluded that the Vigilance Organization has found part of the assets allegedly disproportionate to the known source of income of the appellant though not purchased in the appellant's own name. The Division Bench notices that the assets at S. Nos. 6 and 7 were shown to have been purchased in the name of the father-in-law of the appellant. The Vigilance Organization had also indicated that there was unaccounted money in the sum of Rs.6,66,103/- in the bank account. It was also stated that in other bank accounts of the appellant, there were transactions of Rs.24 lacs since 23rd February, 2008. Therefore, the Division Bench concluded that there was sufficient material before the Committee constituted to consider the case of the appellant to recommend his premature retirement.

15. Mr. D.K. Garg, learned counsel appearing for the appellant submitted that the conclusion recorded by the High Powered Committee are based on no material and therefore, the recommendations for premature retirement of the appellant was without any basis. He submits that the decision taken by the State Government on the basis of the recommendations of the High Powered Committee is unreasonable and arbitrary

and therefore, liable to be quashed. He relies on the unblemished record of the appellant for the past 24 years in support of the submissions that the impugned order has been passed without application of mind and therefore, deserves to be quashed and set aside. He further submitted that even subjective satisfaction of the Government had to be formulated on the basis of relevant material which was wholly missing. Learned counsel further submitted that on the basis of the service record of the appellant it was not possible for the Government to come to the conclusion that the appellant had become deadwood. Furthermore, according to Mr. Garg, there is no justification for the conclusion reached by the learned Single Judge as well as by the Division Bench that the Committee had recorded a finding of doubtful integrity with regard to the appellant. He submitted that on the basis of some allegations an enquiry was conducted and the conclusion could at best indicate that the appellant had been negligent in performance of his duties. In support of his submissions, learned counsel has relied on judgments of this Court titled *Nand Kumar Verma versus State of Jharkhand and others* reported in 2012 (3) SCC 580 and *State of Gujarat versus Umedbhai M. Patel* reported in 2001 (3) SCC 314.

16. On the other hand, Mr. Sunil Fernandes, learned counsel appearing for the respondent-State relying particularly, on the conclusions recorded by the Additional DG, CID submits that the material provided by the Additional DG, CID in his report dated 19th October, 2004 clearly indicate that the properties mentioned therein belong to the appellant as also there was no denial that the bank accounts mentioned at S.No. 9 also belong to the appellant. Learned counsel submitted that since the order of premature retirement is not by way of punishment nor is it stigmatic, it was not open to challenge any of the grounds taken by the appellant. He submitted that the plea put forth by the appellant that the properties at S.Nos. 6 and 7 have been gifted to his wife by the father-in-law are without any basis. The appellant has failed to place on record

any material to show that the properties were in fact, gifted by the father-in-law.

17. Learned counsel was at pains to emphasise that the order of compulsory retirement is based on the recommendation of the Screening Committee. It was open to the court to interfere, unless such order is based on no evidence or is totally perverse. In the present case, the High Powered Committee had made the recommendation on the basis of relevant material. Therefore, according to the learned counsel, the High Court had rightly declined to interfere with the order. In support of his submission, learned counsel relied on *Jugal Chandra Saikia vs. State of Assam & Anr.* (2003) 4 SCC 59.

18. Mr.Fernandes also submitted that the object of compulsory retirement is to weed out the dead wood and also to dispense with the services of those whose integrity is doubtful. The order of compulsory retirement does not per se cast any stigma on the government servant. Therefore, the scope for interference by the court is minimal. In support of this, he relied on *Allahabad Bank Officers' Association & Anr. vs. Allahabad Bank & Ors.* (1996) 4 SCC 504. In support of this submission, he relied on *Baikuntha Nath Das & Anr. vs. Chief District Medical Officer, Baripada & Anr.* (1992) 2 SCC 299.

19. We have considered the submissions made by the learned counsel for the parties.

20. The principles on which a government servant can be ordered to be compulsorily retired were authoritatively laid down by this Court in the case of *Baikuntha Nath Das* (supra). In Paragraph 34, the principles have been summed up as follows:

"34. The following principles emerge from the above discussion:

(*i*) An order of compulsory retirement is not a punishment.

It implies no stigma nor any suggestion of misbehaviour.

(*ii*) The order has to be passed by the government on forming the opinion that it is in the public interest to retire a government servant compulsorily. The order is passed on the subjective satisfaction of the government.

(*iii*) Principles of natural justice have no place in the context of an order of compulsory retirement. This does not mean that judicial scrutiny is excluded altogether. While the High Court or this Court would not examine the matter as an appellate court, they may interfere if they are satisfied that the order is passed (*a*) mala fide or (*b*) that it is based on no evidence or (*c*) that it is arbitrary — in the sense that no reasonable person would form the requisite opinion on the given material; in short, if it is found to be a perverse order.

(*iv*) The government (or the Review Committee, as the case may be) shall have to consider the entire record of service before taking a decision in the matter — of course attaching more importance to record of and performance during the later years. The record to be so considered would naturally include the entries in the confidential records/character rolls, both favourable and adverse. If a government servant is promoted to a higher post notwithstanding the adverse remarks, such remarks lose their sting, more so, if the promotion is based upon merit (selection) and not upon seniority.

(*v*) An order of compulsory retirement is not liable to be quashed by a Court merely on the showing that while passing it uncommunicated adverse remarks were also taken into consideration. That circumstance by itself cannot be a basis for interference.

Interference is permissible only on the grounds mentioned

in (*iii*) above. This aspect has been discussed in paras 30 to 32 above.

The aforesaid principles have been re-examined and reiterated by this Court in the case of *Nand Kumar Verma* (supra). The principles have been restated as follows :-

> 34. It is also well settled that the formation of opinion for compulsory retirement is based on the subjective satisfaction of the authority concerned but such satisfaction must be based on a valid material. It is permissible for the courts to ascertain whether a valid material exists or otherwise, on which the subjective satisfaction of the administrative authority is based. In the present matter, what we see is that the High Court, while holding that the track record and service record of the appellant was unsatisfactory, has selectively taken into consideration the service record for certain years only while making extracts of those contents of the ACRs. There appears to be some discrepancy. We say so for the reason that the appellant has produced the copies of the ACRs which were obtained by him from the High Court under the Right to Information Act, 2005 and a comparison of these two would positively indicate that the High Court has not faithfully extracted the contents of the ACRs.
>
> 36. The material on which the decision of the compulsory retirement was based, as extracted by the High Court in the impugned judgment, and material furnished by the appellant would reflect that totality of relevant materials were not considered or completely ignored by the High Court. This leads to only one conclusion that the subjective satisfaction of the High Court was not based on the sufficient or relevant material. In this view of the matter, we cannot say that the service record of the appellant was unsatisfactory which would warrant premature retirement from service. Therefore, there was

no justification to retire the appellant compulsorily from service.

21. In the case of *State of Gujarat vs. Umedbhai M.Patel* (supra), the same principles were reiterated in the following words :-

"11. The law relating to compulsory retirement has now crystallised into definite principles, which could be broadly summarised thus:

(*i*) Whenever the services of a public servant are no longer useful to the general administration, the officer can be compulsorily retired for the sake of public interest.

(*ii*) Ordinarily, the order of compulsory retirement is not to be treated as a punishment coming under Article 311 of the Constitution.

(*iii*) For better administration, it is necessary to chop off dead wood, but the order of compulsory retirement can be passed after having due regard to the entire service record of the officer.

(*iv*) Any adverse entries made in the confidential record shall be taken note of and be given due weightage in passing such order.

(*v*) Even uncommunicated entries in the confidential record can also be taken into consideration.

(*vi*) The order of compulsory retirement shall not be passed as a short cut to avoid departmental enquiry when such course is more desirable.

(*vii*) If the officer was given a promotion despite adverse entries made in the confidential record, that is a fact in favour of the officer.

(*viii*) Compulsory retirement shall not be imposed as a punitive measure."

22. The judgments cited by Mr.Fernandes have only reiterated the principles earlier enunciated. In *Jugal Chandra Saikia* (supra), this Court reiterated the principles in the following words:-

"6.……..……It cannot be disputed that the passing of an order of compulsory retirement depends on the subjective satisfaction of the competent authority, of course on objective consideration. Unless it is shown that the order of compulsory retirement was passed arbitrarily and without application of mind or that such formation of opinion to retire compulsorily was based on no evidence or that the order of compulsory retirement was totally perverse, the court cannot interfere."

23. Examining the record of the appellant therein and the material that was placed before the Screening Committee, the High Court as well as this Court came to the conclusion that on an objective consideration of the material on the record it was not possible to accept the argument that the Screening Committee had acted only on the basis of the report of the Rao Committee. It was found that the recommendations of the Screening Committee were based on relevant material.

24. In *Allahabad Bank Officers' Association* case (supra), this Court examined whether the order of compulsory retirement, passed in that case, cast a stigma on appellant No.2. The impugned order therein had recited that there was "want of application to Bank's work and lack of potential" and "he has also been found not dependable". It was the case of the appellant NO.2 that the aforesaid expressions were stigmatic as they cast aspersions on his conduct, character and integrity. The High Court rejected the plea of appellant No.2 on the ground that the recitals do not cast any stigma but only

assesses the work of appellant No.2 for determining the issue of his compulsory retirement. In these circumstances, it was observed that the object of compulsory retirement is to weed out the dead wood in order to maintain efficiency in the service and also to dispense with the services of those whose integrity is doubtful, so as to preserve purity in the administration. The order of compulsory retirement was distinguished from the order of dismissal and removal, as it does not inflict any punishment on the government servant. It only deprives the government servant of the opportunity to remain in service till the age of superannuation. Therefore, the order of compulsory retirement differs from an order of dismissal or removal both in its nature and consequence. However, in case it is found that the order is stigmatic it would be treated as an order of punishment, which cannot be passed without complying with the provisions of Article 311 (2) and the rules of natural justice. Upon examination of a large body of case law, it was observed that the order of compulsory retirement does not cast a stigma on the Government servant. But if the order contains a statement casting aspersion on his conduct or character, then the court will treat the order as an order of punishment, attracting the provisions of Article 311(2) of the Constitution. In the facts of that case, it was concluded that the two recitals contained in the order of premature retirement had been made in relation to the work of appellant No.2 and not for any other purpose. Therefore, the court declined to interfere with the order of the High Court.

25. Examining the fact situation in this case on the basis of the aforesaid principles, it becomes evident that recommendation made by the High Powered Committee was indubitably arbitrary.

26. The report submitted by the Additional DGP CID is as follows:

"Sub: Disproportionate assets of Shri Rajesh Gupta, Executive Engineer, Rural Engineering Wing, Kathua.

The officer originally hails from Kathua and has amassed property and assets worth crores of rupees. He has accumulated unaccounted wealth in the shape of movable/immovable properties both at Kathua and Jammu by misusing his official position for pecuniary gains. As per reliable sources he is in possession of the following assets which are in no way commensurate with all known sources of his income:-

(i) He owns a palatial house at Krishna Colony, Kathua built over at least 3 kanals of land with all modern fittings, fixtures, electronics gadgets and costly household articles. In the same building he has set up a shoe making unit and goods are being sold by his brother in the market on shops owned by him. The estimated cost of this building alongwith other infrastructure is not less than Rs.30 lacs.

(ii) He owns a shop below State Bank of India Branch at Kathua which is a busy market. The minimum value assessed is Rs.10 lacs.

(iii) Another shop situated opposite DC Office Kathua which is also a prime location valued at more than Rs.10 lacs.

(iv) He is also in possession of about 6 kanals of land near DPL Kathua which is also a costly chunk of land valued at not less than Rs.30 lacs.

(v) Recently the said officer has purchased plot No.158 measuring one kanal at Trikuta Nagar, Jammu in Sector 3 behind Gurdwara Saheb for Rs.24 lacs. On this piece of land, the officer has spent more than RS.30 lacs for the construction of a house. Previously, he was putting up in a rented house at 48/4 Nanak Nagar, Jammu.

(vi) He is also in possession of 2 kanals of land at Trikuta Nagar Ext. Khoo Wali Gali which is also a valuable site

and values about Rs.15 lacs.

(vii) 3 kanals of land at Greater Kailash Colony, Jammu whose market value is about Rs.25 lacs.

(viii) 10 Marla plot at Bathindi valuing Rs.3 lacs.

(ix) He has bank accounts and lockers in United Commercial Bank, R.N.Ba....and Vijay Bank, Purani Mandi Jammu.

2. Besides, he may be in possession of other assets in the shape o jewellery/valuables/securities etc. which can be unearthed only after proper probe. He also having lockers/bank accounts in the name of his wife namely Smt. Poonam Gupta, Rahil (son), Balkrishen (father) and Rakesh (brother) at Jammu as well as Kathua. It is worthwhile to mention here that he comes from a family of model means. His father is a retired Sr. Assistant. He has developed connections manipulate lucrative postings to mint money.

Sd/-

Addl. DGP CID J & K

Chief Secretary, J&K

No.NGO/EMP©/2698-99
Dated Oct.19, 2004"

27. During the course of the submissions before us, learned counsel for the State of Jammu & Kashmir accepted that there was no material with regard to properties at Sl.No.1 to 5. Therefore, we shall say no more about the same. With regard to the properties at Sl.No.6 and 7, Mr.Garg learned counsel for the appellant pointed out that during the pendency of the Letters Patent Appeal in the High Court, the respondents were directed to place on record the findings recorded by the

Special Investigation Team which was constituted for carrying detailed investigation into the question as to whether the petitioner was in possession of the assets mentioned in the report of the Additional DGP dated 19th October, 2004. The report dated 1.7.2010 submitted by the Joint Director (Prosecution) was placed on record of the High Court alongwith an affidavit. The report with regard to the aforesaid two properties is as under:-

"03. Two kanals of land at Trikuta Nagar Extn. Jammu :-

The land/plots were found purchased by Shri Devi Dutt Mal Gupta, (Father-in-law of the subject officer), who subsequently gifted it to his grandson Rahul Gupta, who happens to be the son of Rajesh Gupta (subject officer) in the year 2003.

04. Three kanals of land at Greater Kailash, Jammu:-

This piece of land alongwith 1 kanal and 6 Marlas have been purchased by one Shri Vijay Kumar from actual owners and stand mutated since in the name of purchaser. This asset as per revenue records was found not attributable to the subject officer."

28. The report also does not indicate that there is any irregularity in the bank accounts maintained by the appellant. The affidavit filed on behalf of the State of Jammu and Kashmir clearly shows that according to the Vigilance Organization, three First Information Reports bearing Nos. 49/91, 11/95 and 63/94 were registered by the State Vigilance Organization against the appellant when he was posted as Executive Engineer (REW, Kathua). Upon investigation, all the FIRs were found to be "Not Proved". However, recommendation was made to initiate departmental action against the officer. Inspite of the aforesaid recommendation, it has not been disputed before us, that no departmental action was ever initiated against the

appellant. In fact, after the completion of the investigation into the FIRs, the appellant was promoted to the post of Executive Engineer on 15.12.1996. Therefore, it can be safely concluded that there were no material before the High Powered Committee to conclude that the officer possessed assets beyond his known source of income.

29. This now takes us to the other material on the basis of which the recommendation has been made by the High Powered Committee. It has been noticed by us earlier that the appellant was required, in the performance of his official duties, to recommend the sanctioning of technical approval to the construction of works of various projects. The allegation with regard to issuing back dated technical sanctions was duly inquired into. The conclusion ultimately reached by inquiry officer noticed in the earlier part of the order indicates that at best the appellant acted in a casual and haphazard manner in the maintenance of records. Such negligence on the part of the appellant cannot per se lead to the conclusion that the appellant was acting in such a manner with an ulterior motive. The conclusions reached by the High Powered Committee also do not co-relate to the assessment of work and integrity of the appellant in the annual performance report. As noticed earlier, in all the annual performance reports, the officer has been rated 'very good', 'excellent' and even 'outstanding'.

30. In view of the aforesaid, the conclusion is inescapable, that the order passed by the State Government suffers from vice of arbitrariness. The High Court erred in arriving at conclusions which were not borne out by the record produced before the High court. In view of the settled law, it is not possible for us to uphold the judgments of the Single Judge as also of the Division Bench.

31. Consequently, the appeal is allowed, the impugned order of the premature retirement of the appellant dated 26th April, 2005 is quashed and set aside. It is brought to our notice that the appellant has still not reached the age of

superannuation. He is, therefore, directed to be reinstated in service. In view of the fact that the appellant has not challenged the order of premature retirement on the ground that the action taken by the Government was malafide, it would not be appropriate in this case, to follow the normal rule of grant of full backwages on reinstatement. We, however, direct that the appellant shall be paid 30% of the backwages from the date of order of premature retirement till reinstatement. He shall not be entitled to any interest on the backwages.

32. We may further observe that upon reinstatement, it shall be open to the Government to post the appellant on a non sensitive post in view of the background of the case.

33. Let the order be implemented within a period of four weeks.

34. There shall be no order as to costs.

B.B.B. Appeal allowed.

LALA RAM (D) BY L.R. & ORS.
v.
UNION OF INDIA & ANR.
(Civil Appeal Nos. 243-247 of 2003)

JANUARY 24, 2013

[DR. B.S. CHAUHAN AND V. GOPALA GOWDA, JJ.]

Fee – Licence fee – Shops situated in a busy market of Old Delhi – Notice dated 7-8-1980 issued by the Railways Authorities enhancing licence fee in respect of the said shops from Rs.21 per sq yards to Rs.270 per sq yards per annum – Representations thereagainst by the shop licencees (appellants) – Railway Administration, after considering the case of the appellants, passed order dated 25-5-1987 enhancing the license fee @ Rs.270 per sq. yards with retrospective effect from 1-11-1980 – Writ petitions filed by the appellants – Dismissed by the High Court – On appeal, held: The enhanced license fee being 13 times, seems excessive, and though such observation was also made by the Railway Minister, but the enhanced license fee would be illusory when compared with the prevailing license fee in the said market as applicable to private shops – A State instrumentality must serve the society as a whole, and must not grant unwarranted favour(s) to a particular class of people without any justification, at the cost of others – Merely because the appellants (shop licencees) have been occupying the shops in question for a prolonged period of time, they cannot claim any special privilege – The enhanced license fee cannot be held to be unreasonable or arbitrary, and as warranting any interference by a court of equity – However, finding of the High Court that the notice dated 7-8-1980 remained unchallenged and therefore, application of order dated 25-5-1987 with retrospective effect was justified, not factually correct inasmuch as after receipt of notice dated 7-8-1980, appellants had made representations before the respondents-authorities

raising all their grievances and certain interim relief was also granted pursuant to certain observations made by the Railway Minister – Thus, order dated 25-5-1987 should not be applied retrospectively – Enhanced license fee may be recovered from the appellants from the said date in accordance with law – Interim order passed earlier vacated.

Constitution of India, 1950 – Articles 38 and 39 – Welfare state – Meaning, features and obligations of – Discussed – Maxims – "Salus Populi Suprema lex".

The appellants were licensee of shops situated in a busy market of Old Delhi which were in their occupation since pre-independence. They were regularly paying license fee to the Railways. In 1977, the said licence fee was increased to Rs.21 per sq. yards per annum. The appellants received a notice dated 7.8.1980 from the respondents-Railways Authorities, about increase in the licence fee from Rs.21 per sq. yards to Rs.270 per sq. yards per annum. Representations made by the appellants' association were considered by the Railway Minister who observed that the auction of the said shops was not reasonable and also stated that the revision in license fee was excessive and expressed his opinion with respect to reconsidering the whole case and increasing the license fee by 5% to 10%. The Railway Administration, after considering the case of the appellants, passed order dated 25.5.1987 to enhance the license fee @ Rs.270 per sq. yards with retrospective effect from 1.11.1980. Aggrieved with the notice dated 25.5.1987 and also the letter dated 29.7.1987, terminating licences to operate the shops in question and to vacate the premises for failing to deposit outstanding dues on account of non-payment of licence fee, the appellants filed writ petitions before the High Court. The High Court dismissed the writ petitions and therefore the instant appeals.

The appellants submitted that once the enhanced license fee had been disapproved by the Railway Minister and the matter was reconsidered in light of the observation made by the said Minister stating that the said enhancement was excessive and that the license fee could be enhanced by 5% to 10%, the notice impugned was unreasonable and arbitrary. It was further submitted that being a welfare state, it is the duty of the State to provide shops at nominal license fee.

Disposing of the appeals, the Court

HELD: 1. In the case at hand, the enhanced license fee cannot be held to be unreasonable or arbitrary, and as warranting any interference by a court of equity. Undoubtedly, the enhanced license fee being 13 times, seems excessive, and such an observation was also made by the Hon'ble Railway Minister in order dated 11.4.1981, but the enhanced license fee would be illusory if the same is compared with the prevailing license fee in the said market as applicable to private shops. [Para 7, 8] [585-E-G]

2.1. A welfare state denotes a concept of government, in which the State plays a key role in the protection and promotion of the economic and social well-being of all of its citizens, which may include equitable distribution of wealth and equal opportunities and public responsibilities for all those, who are unable to avail for themselves, minimal provisions for a decent life. It refers to "Greatest good of greatest number and the benefit of all and the happiness of all". It is important that public weal be the commitment of the State, where the state is a welfare state. A welfare state is under an obligation to prepare plans and devise beneficial schemes for the good of the common people. Thus, the fundamental feature of a Welfare state is social insurance. Anti-poverty

programmes and a system of personal taxation are examples of certain aspects of a Welfare state. A Welfare state provides State sponsored aid for individuals from the cradle to the grave. However, a welfare state faces basic problems as regards what should be the desirable level of provision of such welfare services by the state, for the reason that equitable provision of resources to finance services over and above the contributions of direct beneficiaries would cause difficulties. A welfare state is one, which seeks to ensure maximum happiness of maximum number of people living within its territory. A welfare state must attempt to provide all facilities for decent living, particularly to the poor, the weak, the old and the disabled i.e. to all those, who admittedly belong to the weaker sections of society. Articles 38 and 39 of the Constitution of India provide that the State must strive to promote the welfare of the people of the State by protecting all their economic, social and political rights.These rights may cover, means of livelihood, health and the general well-being of all sections of people in society, specially those of the young, the old, the women and the relatively weaker sections of the society. These groups generally require special protection measures in almost every set up. The happiness of the people is the ultimate aim of a welfare state, and a welfare state would not qualify as one, unless it strives to achieve the same. [Para 9] [586-C-H; 587-A-B]

2.2. A welfare state must serve larger public interest. ***"Salus Populi Suprema lex",*** **means that the welfare of the people is the supreme law. A State instrumentality must serve the society as a whole, and must not grant unwarranted favour(s) to a particular class of people without any justification, at the cost of others. However, in order to serve larger public interest, the State instrumentality must be able to generate its own resources, as it cannot serve such higher purpose while**

in deficit. Merely because the appellants have been occupying the suit premises for a prolonged period of time, they cannot claim any special privilege. In the absence of any proof of violation of their rights, such concession cannot be granted to them. [Para 8] [585-G-H; 586-A-B]

Dantuluri Ram Raja & Ors. v. State of Andhra Pradesh & Anr. **AIR 1972 SC 828: 1972 (2) SCR 900;** *N. Nagendra Rao & Company v. State of Andhra Pradesh* **AIR 1994 SC 2663: 1994 (3) Suppl. SCR 144 and** *N.D. Jayal & Anr. Union of India & Ors.* **AIR 2004 SC 867: 2003 (3) Suppl. SCR 152 – relied on.**

3. The High Court observed that the letter/notice dated 7.8.1980, enhancing the rate of license fee remains unchallenged, and therefore, the application of notice dated 25.5.1987, with retrospective effect is justified. This finding is not factually correct. Notice dated 7.8.1980, enhancing the license fee was received by the appellants, and representations were filed by them through their Association, raising all their grievances to the effect that during a period of 30 years, the license fee paid by them had been enhanced about 15 to 20 times, without any justification and hence, they demanded justice. The same were considered by the then Railway Minister, and orders dated 26.9.1980 and 11.4.1981 were passed by him, observing that the license fee may be revised after every 5 years on the basis of justice and equity. Certain interim relief was also granted. Thus, the aforesaid demands should not have been made to apply with retrospective effect from the year 7-8-1980. The notice dated 25.5.1987 must not be applied retrospectively, i.e., w.e.f. 7-8-1980. However, the enhanced license fee may be recovered from the appellants from the said date in accordance with law. The interim order passed earlier stands vacated. [Para 10] [587-D-H; 588-A]

Case Law Reference:

1972 (2) SCR 900	**relied on**	**Para 9**
1994 (3) Suppl. SCR 144	**relied on**	**Para 9**
2003 (3) Suppl. SCR 152	**relied on**	**Para 9**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 243-247 of 2003.

From the Judgment & Order dated 13.08.2001 of the High Court of Delhi at New Delhi in Civil Writ Petition No. 349, 2812-2814 and 2822 of 1989.

WITH

C.A. Nos. 268-279, 263-266 & 248-262 of 2003.

Altaf Ahmad, P.H. Parekh, Anil Makhija, Lalit Chauhan Pallavi Sharma, Faisal Sherwani (for Parekh & Co.) for the Appellants.

Chandra Bhusan Prasad, Vikas Bansal, Shreekant N. Terdal, Anil Katiyar for the Respondents.

The Judgment of the Court was delivered by

DR. B. S. CHAUHAN, J. 1. These appeals have been preferred against the impugned judgment and order dated 13.8.2001, passed by the High Court of Delhi at New Delhi in Writ Petition Nos.349, 2812-2814 and 2822 of 1989 by way of which, the High Court dismissed the said writ petitions challenging the notice dated 25.5.1987, issued by the Divisional Railway Manager, Northern Railway, calling upon the appellants to pay the licence fee for the railway property in their use, at the enhanced rate, and also letter dated 29.7.1987, terminating licences to operate the shops in question and to vacate the premises for failing to deposit outstanding dues on account of non-payment of licence fee.

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

Each of the appellants is a licensee of the shops in dispute admeasuring 4.22 sq. yards upto 100 sq. yards situated at Qutub Road, Sadar Bazar, Delhi which have been in their occupation since pre-independence. As per the appellants, there has been previous litigation in respect of this very land and the same became evacuee property under the Administration of Evacuee Property Act, 1950 and was taken over by the Custodian. The appellants, being licensees of the shops, have regularly been paying the license fee to the Railways, at rates which were mutually agreed upon and have also been increased in the past. In 1977, the said licence fee was increased to Rs.21 per sq. yards per annum, while earlier, it was fixed at only Rs.18 per sq. yards per annum. The appellants received a notice dated 7.8.1980 from the respondents-Railways Authorities, about increase in the licence fee from Rs.21 per sq. yards to Rs.270 per sq. yards per annum. Representations made by the appellants' association were considered by the Hon'ble Railway Minister and order dated 26.9.1980 was passed, staying the auction thereof, with a further direction to examine their grievances. The Hon'ble Railway Minister further considered the representation of the appellants' Association and observed that the auction of the said shops was not reasonable. He also stated that the revision in license fee was excessive and expressed his opinion with respect to reconsidering the whole case and increasing the license fee by 5% to 10%. The Railway Administration, after considering the case of the appellants, again passed an order dated 25.5.1987 to enhance the license fee @ Rs.270 per sq. yards with retrospective effect from 1.11.1980. The appellants' Association had been making representations since receiving the aforementioned notice for enhancement dated 25.5.1987, and ultimately filed writ petitions before the High Court which have been dismissed. Hence, these appeals.

3. Shri Altaf Ahmed, learned Senior counsel appearing for the appellants has submitted that once the enhanced license fee had been disapproved by the Hon'ble Railway Minister and the matter was reconsidered in light of the observation made by the Hon'ble Minister stating that the said enhancement was excessive and that the license fee could be enhanced by 5% to 10%, the notice impugned was unreasonable and arbitrary.

The Ministry of Urban Development issued guidelines dated 14.1.1992 as how the license fee could periodically be revised. Therein, it was provided that the standard license fee should be determined as per the provisions of the Rent Control Act applicable to a State. In the instant case, the Delhi Rent Control Act is applicable, and therefore, the standard license fee as provided therein ought to have been calculated. The Delhi Rent Control Act was amended in 1963, making it applicable to the premises belonging to the Government as well.

The respondents have filed an affidavit before this Court on 5.9.2002, giving a particular mode of calculation and even if the same is applied, the enhanced license fee would not be enhanced to this extent, and the High Court has erred in not deciding any issue raised by the appellants and in dismissing the writ petitions in a cursory manner. Thus, the said appeals deserve to be allowed. Being a welfare state, it is the duty of the State to provide shops at nominal license fee.

4. Per contra, Shri Chandra Bhushan Prasad, learned counsel appearing for the respondents, has submitted that the appellants have been enjoying the said property at nominal license fee. The property is situated in a very busy market of old Delhi. The area of the shops varies from 4.22 sq. yards to 100 sq. yards. Therefore, considering the geographical situation of the shops, alongwith the other facilities provided to the appellants, such enhanced license fee is, in fact, nominal. The High Court has rightly dismissed their writ petitions and no interference is called for.

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

6. The High Court has taken judicial notice of the facts and surrounding circumstances, considered the geographical situation of the suit properties and held as under:

> "For a similarly situated shop if it was owned by a private persons, the rental/licence fee would have been much more. The mere fact that the Railway is a State Enterprise does not mean that …… on the premises in occupation of the petitioner and other persons. State enterprise must not look elsewhere for funds. It must generate funds through the activities which are undertaken by it for providing services to the public at large. It cannot be expected to run in deficit…… Since the action of the first respondent is reasonable, we decline to interfere with the aforesaid enhancement."

7. We are of the considered opinion that no fault can be found with the aforesaid observations and no interference is required. The enhanced license fee cannot be held to be unreasonable or arbitrary, and as warranting any interference by a court of equity.

8. Undoubtedly, the enhanced license fee being 13 times, the earlier license fee amount seems excessive, and such an observation was also made by the Hon'ble Railway Minister in order dated 11.4.1981, but the enhanced license fee would be illusory if the same is compared with the prevailing license fee in the said market as applicable to private shops. A welfare state must serve larger public interest. *"Salus Populi Suprema lex",* means that the welfare of the people is the supreme law. A state instrumentality must serve the society as a whole, and must not grant unwarranted favour(s) to a particular class of people without any justification, at the cost of others. However, in order to serve larger public interest, the State instrumentality must be able to generate its own resources, as it cannot serve

such higher purpose while in deficit. Merely because the appellants have been occupying the suit premises for a prolonged period of time, they cannot claim any special privilege. In the absence of any proof of violation of their rights, such concession cannot be granted to them.

Welfare State means:

9. A welfare state denotes a concept of government, in which the State plays a key role in the protection and promotion of the economic and social well-being of all of its citizens, which may include equitable distribution of wealth and equal opportunities and public responsibilities for all those, who are unable to avail for themselves, minimal provisions for a decent life. It refers to "Greatest good of greatest number and the benefit of all and the happiness of all". It is important that public weal be the commitment of the State, where the state is a welfare state. A welfare state is under an obligation to prepare plans and devise beneficial schemes for the good of the common people. Thus, the fundamental feature of a Welfare state is social insurance. Anti-poverty programmes and a system of personal taxation are examples of certain aspects of a Welfare state. A Welfare state provides State sponsored aid for individuals from the cradle to the grave. However, a welfare state faces basic problems as regards what should be the desirable level of provision of such welfare services by the state, for the reason that equitable provision of resources to finance services over and above the contributions of direct beneficiaries would cause difficulties. A welfare state is one, which seeks to ensure maximum happiness of maximum number of people living within its territory. A welfare state must attempt to provide all facilities for decent living, particularly to the poor, the weak, the old and the disabled i.e. to all those, who admittedly belong to the weaker sections of society. Articles 38 and 39 of the Constitution of India provide that the State must strive to promote the welfare of the people of the state by protecting all their economic, social and political rights.

These rights may cover, means of livelihood, health and the general well-being of all sections of people in society, specially those of the young, the old, the women and the relatively weaker sections of the society. These groups generally require special protection measures in almost every set up. The happiness of the people is the ultimate aim of a welfare state, and a welfare state would not qualify as one, unless it strives to achieve the same. (See also: *Dantuluri Ram Raja & Ors. v. State of Andhra Pradesh & Anr.,* AIR 1972 SC 828; *N. Nagendra Rao & Company v. State of Andhra Pradesh,* AIR 1994 SC 2663; and *N.D. Jayal & Anr. Union of India & Ors.,* AIR 2004 SC 867).

10. The High Court has observed that the letter/notice dated 7.8.1980, enhancing the rate of license fee remains unchallenged, and therefore, the application of notice dated 25.5.1987, with retrospective effect is justified. This finding is not factually correct.

Notice dated 7.8.1980, enhancing the license fee was received by the appellants, and representations were filed by them through their Association, raising all their grievances to the effect that during a period of 30 years, the license fee paid by them had been enhanced about 15 to 20 times, without any justification and hence, they demanded justice. The same were considered by the then Railway Minister, and orders dated 26.9.1980 and 11.4.1981 were passed by him, observing that the license fee may be revised after every 5 years on the basis of justice and equity. Certain interim relief was also granted. Thus, in view of the above, we are of the opinion that the aforesaid demands should not have been made to apply with retrospective effect from the year 7-8-1980.

In view of the above, the appeals succeed and are allowed partly, to the extent that notice dated 25.5.1987 must not be applied retrospectively, i.e., w.e.f. 7-8-1980. However, the enhanced license fee may be recovered from the appellants from the said date in accordance with law.

With these observations, the appeals stand disposed of. Interim order passed earlier stands vacated.

CA Nos.268-279, 263-266 & 248-262 of 2003

The abovesaid Civil Appeals stand disposed of in terms of the judgment passed in Civil Appeal Nos.243-247 of 2003.

B.B.B. Appeals disposed of.