BOARD OF TRUSTEES OF PORT OF KANDLA
v.
HARGOVIND JASRAJ & ANR.
(Civil Appeal No. 153 of 2013)

JANUARY 09, 2013

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

LEASE:

Termination of lease – Vesting of title in lessor – Lease of subject land terminated and possession thereof taken over as per Panchnama – Suit by transferee of lessee for declaration and injunction – Held: With the termination of lease, title to suit property vested in lessor, ipso jure – That being so, possession of a vacant property would follow title and also vest in the lessor – Panchnama drawn up at site recorded the factum of actual takeover of possession from lessee, whereafter possession too legally vested in lessor – Besides, there could be no better evidence to prove dispossession of lessee from plot in question than her own admission contained in her communication addressed to the Senior Estate Manager of the appellant-Trust, genuineness whereof was not disputed – It is, therefore, held that dispossession of lessee had taken place pursuant to termination of lease in terms of the Panchnama.

LIMITATION ACT, 1963:

Suit for declaration – Limitation – Held: A suit for declaration not covered by Article 57 of the Schedule to the Act must be filed within 3 years from the date when the right to sue first arises – A suit for declaration that the termination of the lease was invalid and, therefore, ineffective could have been instituted by lessee as and when the right first accrued and for that purpose, dispossession of lessee was not

necessary as dispossession is different from termination of lease – However, dispossession having taken place, lessee ought to have filed suit within three years of date of dispossession – Suit having been instituted after nearly eighteen years was clearly barred by limitation – Courts below fell in error in holding the suit as within time.

The subject-land admeasuring 1891.64 square metres was leased to respondent no. 2 by the appellant Port-Trust. However, as the lesse committed default in payment of the outstanding amount and interest, the lease was terminated by order dated 08-08-1977 w.e.f. 13.12.1978. Possession of the subject land was taken under the Panchnama dated 14.12.1978, a copy whereof was sent to the lessee on 20-12-1978 with a certificate that the possession had been taken. Respondent no. 1 filed suit Suit No. 77 of 1996 for a declaration and permanent injunction, questioning the termination of the lease by the appellant Port-Trust. The plaintiff-respondent no. 1 claimed that he had purchased the suit land from respondent no. 2 in the year 1991, and on that basis had asked the Port-Trust in the year 1994 to transfer the lease rights in his favour. The trial court decreed the suit. The first appellate court held that the lease had not been validly terminated and the same continued to be subsisting. However, it set aside the part of the judgment of the trail court whereby it has directed to transfer the lease rights in favour of plaintiff-respondent no. 1. The second appeal of the Port-Trust having been dismissed, it filed the instant appeal.

Allowing the appeal, the Court

HELD: 1.1. It is manifest that there is no clear finding of fact regarding possession of the suit property having continued with the lessee, no matter the lease stood terminated and a panchnama evidencing takeover of the

possession drawn and even communicated to her. The question whether the possession of the suit plot was taken over did not engage the attention of the first appellate court or the High Court although the latter proceeded on the basis that the findings of fact recorded by the courts below were concurrent, without pointing out as to what those findings were and how the same put the issue regarding takeover of possession from the lessee beyond the pale of any challenge. [Para 14-15] [599-D-E; 600-E-G]

1.2. Suffice it to say that the respondents are not correct in urging that the dispossession of the lessee pursuant to the termination of the lease was not proved as a fact. It is significant to note that with the termination of the lease, the title to the suit property vested in the lessor, *ipso jure*. That being so, possession of a vacant property would follow title and also vest in the lessor. Even so, the Panchnama drawn up at site recorded the factum of actual takeover of the possession from the lessee, whereafter the possession too legally vested in the lessor, growth of wild bushes and grass notwithstanding. This court is of the view that there could be no better evidence to prove that the lessee had been dispossessed from the plot in question than her own unequivocal and unconditional admission contained in her communication dated 22-2-1979 addressed to the Senior Estate Manager of the appellant-Trust. The genuineness of the said document was not disputed by the respondents. This Court, therefore, holds that dispossession of the lessee had taken place pursuant to the termination of the lease deed in terms of panchnama dated 14-12-1978. [Para 15 and 16] [600-G; 601-C-E; 603-A]

2.1. A suit for declaration not covered by Article 57 of the Schedule to the Limitation Act, 1963 must be filed within 3 years from the date when the right to sue first

arises. The right to sue in the instant case first accrued to the lessee on 13-12-1978 when in terms of order dated 8.8.1977 the lease in favour of the lessee was terminated. A suit for declaration that the termination of the lease was invalid and, therefore, ineffective for any reason including the reason that the person on whose orders the same was terminated had no authority to do so, could have been instituted by the lessee on 14-12-1978. For any such suit it was not necessary that the lessee was dispossessed from the leased property as dispossession was different from termination of the lease. However, such a dispossession having taken place on 14-12-1978, the lessee ought to have filed the suit within three years of 15-12-1978 so as to be within the time stipulated under Article 58. The suit in the instant case was, however, instituted in the year 1996 i.e. after nearly eighteen years and was, therefore, clearly barred by limitation. The Courts below fell in error in holding that the suit was within time and decreeing the same in whole or in part. [Para 17 and 21] [603-B-C; 605-G-H; 606-A-D]

State of Punjab & Ors. V. Gurdev Singh **1991 (3) SCR 663 = (1991) 4 SCC 1;** *Daya Singh & Anr. V. Gurdev Singh (dead) by LRs. & Ors.* **2010 (1) SCR 194 = (2010) 2 SCC 194;** *Khatri Hotels Pvt. Ltd. & Anr. vs. Union of India & Anr.* **2011 (15) SCR 299 = 2011 (9) SCC 126;** *Krishnadevi Malchand Kamathia & Ors. v. Bombay Environmental Action Group and Ors.* **2011 (3) SCR 291 = (2011) 3 SCC 363; and** *Pune Municipal Corporation v. State of Maharashtra and Ors.* **2007 (3) SCR 277 = (2007) 5 SCC 211;** *R. Thiruvirkolam v. Presiding Officer and Anr.* **1996 (8) Suppl. SCR 687 = (1997) 1 SCC 9;** *State of Kerala v. M.K. Kunhikannan Nambiar Manjeri Manikoth, Naduvil (dead) and Ors.* **1995 (6) Suppl. SCR 139 = (1996) 1 SCC 435; and** *Tayabbhai M. Bagasarwalla & Anr. v. Hind Rubber Industries Pvt. Ltd. etc.* **1997 (2) SCR 152 = (1997) 3 SCC 443 – referred to.**

Smith v. East Elloe Rural District Council **(1956) 1 All ER 855- referred to.**

2.2. The impugned judgments and decrees passed by the courts below are set aside and the suit filed by the respondents is dismissed. [Para 28] [610-D]

Case Law Reference:

1991 (3) SCR 663	**referred to**	**para 18**
2010 (1) SCR 194	**referred to**	**para 19**
2011 (15) SCR 299	**referred to**	**para 19**
(1956) 1 All ER 855	**referred to**	**para 22**
2011 (3) SCR 291	**referred to**	**para 23**
2007 (3) SCR 277	**referred to**	**para 24**
1996 (8) Suppl. SCR 687	**referred to**	**para 25**
1995 (6) Suppl. SCR 139	**referred to**	**para 25**
1997 (2) SCR 152	**referred to**	**para 25**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 153 of 2013.

From the Judgment & Order dated 26.12.2007 of the High Court of Gujarat at Ahmedabad in Second Appeal No. 17 of 2007 with Civil Application No. 1791 of 2007.

Pravin H. Parekh, Nitin Thakral, Rajat Nair, Ritika Sethi, Vishal Prasad (for Parekh & Co.) for the Appellant.

Huzefa Ahmadi, Ejaz Maqbool, Mrigank Prabhakar, Anas Tanwir, Aishwarya Bhati, Dr. Prikhshayat Singh, Sanjoli Mittal, Karmendra Singh 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 26th December, 2007 passed by the High Court of Gujarat at Ahmedabad whereby Civil Second Appeal No.17 of 2007 filed by the appellant has been dismissed and the judgment and decree passed by the Courts below affirmed. The facts giving rise to the filing of this appeal may be summarised as under:

3. A parcel of land admeasuring 1891.64 square meters situated in Sector 30, Gandhidham in the State of Gujarat was granted in favour of Smt. Pushpa Pramod Shah-respondent No.2 in this appeal on a long-term lease basis. A formal lease-deed was also executed and registered in favour of the lessee stipulating the terms and conditions on which the lessee was to hold the land demised in her favour. The respondent-lessee it appears committed default in the payment of the lease rent stipulated in the lease-deed with the result that the appellant-lessor issued notices dated 12th December, 1975 and 17th July, 1976 calling upon the lessee to pay the outstanding amount with interest and stating that the lease of the plot in question shall stand determined under Clause 4 thereof and possession of the demised premises taken over by the appellant-Port Trust in case the needful is not done.

4. In response to the notices aforementioned the lessee by communication dated 18th November, 1976 requested the appellant-Port Trust to permit her to resell the plots for a symbolic consideration and to obtain the refund of the instalment amount already paid to the Port Trust. The letter sought to justify the default in the payment of arrears on the ground of an untimely demise of her husband, resulting in cancellation of expansion programme including any further acquisition of land by the lessee.

5. Failure of the lessee to remit the outstanding instalment amount culminated in the termination of the lease by the appellant-Port Trust in terms of an order dated 8th August, 1977

w.e.f. 13th December, 1978. A panchnama prepared on 14th December, 1978 evidenced the takeover of possession of the plot in question by the appellant-Port Trust, copy whereof was forwarded even to the lessee along with a certificate that the possession had been taken over by the Assistant Estate Manager of the appellant-Port Trust under his letter dated 20th December, 1978.

6. On receipt of the letter aforementioned the lessee by her letter dated 22nd February, 1979 requested the appellant-Port Trust to refund the amount and in case a refund could not be made, to return the possession of the plot to her. One year and four months after the issue of the said letter the lessee-respondent No.2 herein filed Civil Suit No.152 of 1980 in the Court of Civil Judge, Gandhidham, in which she prayed for a decree for permanent injunction restraining the defendants, its officers and servants from interfering with her peaceful possession over the plot in question. The immediate provocation for the filing of the said suit was provided by the appellant-Port Trust proposing to re-auction the plot in question. The plaintiff's case in the suit was that she was in actual physical possession of the plot which rendered the proposed auction thereof unreasonable. An interim application was also filed in the said suit in which the Court granted an ex-parte order of injunction that was subsequently vacated by a detailed order passed on 5th September, 1980 holding that the plaintiff was not entitled to the relief of injunction. It is common ground that suit No.152 of 1980 was eventually dismissed on 18th January, 1985 for non-prosecution.

7. Almost six years after the dismissal of the first suit, another Suit No.126 of 1991 was filed, this time by respondent No.1-Hargovind Jasraj against respondent No.2-Smt. Pushpa Pramod Shah for a permanent prohibitory injunction restraining defendant No.2-lessee of the plot, her agents, servants and representatives from interfering with the plaintiff's possession over the plot in dispute. According to averments made in the said suit the lessee had not been carrying on any business

activities in Gandhidham nor was she using the plot in question and that she was finding it difficult to look after and administer the plot after the death of her husband. She had, therefore, sold the plot to the plaintiff-respondent No.1 in this appeal in terms of a registered document. It was further alleged that the cause of action to file the suit accrued a few days before the filing of the suit when defendant-lessee had through her representative asked the plaintiff to vacate the suit plot which demand was in breach of the sale agreement between the parties. Apprehending dispossession from the plot in question plaintiff-respondent No.1 sought a decree for injunction against respondent No.2. The appellant-Port Trust, it is noteworthy, was not impleaded as a party to the suit which too was dismissed for non-prosecution on 15th March, 2002.

8. Five years later and pending disposal of the second suit mentioned above, a third suit being Suit No.77 of 1996 was filed by respondent No.1 this time asking for a declaration and permanent injunction in which the plaintiff for the first time questioned the termination of the lease by the appellant-Port Trust. A declaration that the said lease was still subsisting with an injunction restraining the defendant-appellant in this appeal and its employees from acting in any manner injurious to the title and the possession of the plaintiff over the disputed land was prayed for. Plaintiff's case in this suit was that he had purchased the plot in question from Smt. Pushpa Pramod Shah in the year 1991 in terms of a transfer deed registered with the concerned Sub-Registrar at Gandhidham and that he had based on the said transfer asked for transfer of the lease rights which request had been declined by the appellant-Port Trust in the year 1994. It was further alleged that he had come to know about the purported cancellation of the lease in favour of Smt. Pushpa Pramod Shah and the purported takeover of the possession of the plot from her which was according to him both fraudulent and invalid in the eyes of law.

9. The suit was contested by the appellant-Port Trust on

several grounds giving rise to as many as seven issues framed by the trial Court for determination. The suit was eventually decreed by the said Court, aggrieved whereof the appellant-Port Trust filed an appeal before the First Appellate Court who partly allowed the said appeal by its judgment and order dated 16th November, 2006. The Appellate Court affirmed the decree passed by the Courts below in so far as the trial Court had declared that the lease-deed in question had not been validly terminated by the lessor and the same continued to be subsisting but allowed the appeal setting aside that part of the judgment passed by the trial Court whereby the trial Court had directed the appellant-Port Trust to transfer the lease rights in favour of the plaintiff-respondent No.1 in this appeal.

10. The appellant-Port Trust appealed to the High Court against the above judgment and decree which has been dismissed by the High Court in terms of the order impugned before us holding that no substantial question of law arose in the light of the concurrent findings of fact recorded by the courts below. The High Court found that since the earlier suits had not been decided on merits, no final adjudication had taken place in the same so as to attract the doctrine of res judicata to the issues raised in the third suit out of which the present proceedings arise.

11. Appearing for the appellant Mr. Pravin H. Parekh, learned senior counsel, strenuously argued that the courts below had fallen in serious error in holding that the termination of the lease by the appellant-Port Trust was invalid or that the lease continued to be valid and subsisting. The question whether the Senior Estate Manager was competent to terminate the lease and enter upon the suit property was not, argued Mr. Parekh, joined as an issue by the courts below and could not be made a basis for holding the termination to be unauthorised or invalid. Alternatively, he submitted that the termination order had been passed as early as in the year 1977 whereas the suit in question was filed in the year 1996

after a lapse of nearly 18 years. The possession of the plot was also taken over on 14th December, 1978 which fact was acknowledged unequivocally by the lessee in her letter dated 22nd February, 1979. That being so, any suit aimed at challenging the validity of the termination or assailing validity of the process by which the possession was taken over from the lessee should have been filed within a period of six months from the date the cause of action accrued to the lessee in terms of Section 120 of the Major Port Trust Act. At any rate, such a suit could be filed, at best within three years from the date the cause of action accrued to the lessee. Neither the lessee nor her transferee who came on the scene long after the termination order had been passed and the possession taken over could question the validity of the termination of the lease or demand protection of their possession in the light of a clear and unequivocal admission made by the lessee in her letter dated 22nd February, 1979 that the possession of the plot in question stood taken over from her. The courts below have, in that view, committed a mistake in holding that the suit was within time.

12. Mr. Ahmadi, counsel appearing for the respondent, on the other hand, submitted that the courts below had recorded a concurrent finding of fact that the lessee continued to be in possession of the suit property even after the termination of the lease which finding of fact could not be assailed nor was there any legal impediment for the plaintiff transferee or the original lessee who too was joined as a plaintiff in the year 1999 to seek protection of their possession. It was further argued by Mr. Ahmadi that the admission made by the lessee in her letter dated 22nd February, 1979 was not unequivocal and stood explained by the attendant circumstances including the demise of her husband and resultant inability of the lessee to go ahead with the expansion programme or to pay remainder of the lease amount.

13. The Trial Court has, while dealing with the question of dispossession of the lessee from the disputed plot, recorded

a rather ambivalent finding. This is evident from the following observations made by it in its judgment:

> *".....Further Panchnama submitted alongwith Ex.49 cannot be said to be panchnama of taking physical possession of the plot because the plot is open. Even at present it is open and there are bushes of the Babool Trees and as such it is difficult to hold anything about possession that of Pushpaben or K.P.T. IT cannot be believed that by mere preparing panchnama the possession has been taken from the person who is in possession of the plot. The K.P.T. has not taken the possession vide Ex. 49 in the presence of Pushpaben. Under the said circumstances the plot is open and it is as it is....."*
>
> (emphasis supplied)

14. It is manifest that there is no clear finding of fact regarding possession of the suit property having continued with the lessee, no matter the lease stood terminated and a panchnama evidencing takeover of the possession drawn and even communicated to her. The first Appellate Court in appeal filed against the above judgment and decree also did not record a specific finding that the possession of the plot had not been taken over by the Port Trust no matter the documents relied upon by it evidenced such take over. The first Appellate Court instead held that the termination of the lease was not valid inasmuch as no notice regarding termination in terms of Sections 106 and 111(g) of the Transfer of Property Act, 1882 had been proved and served upon the lessee nor was it proved that the person who signed notice Exhibit 47 and who took over possession in terms of panchnama enclosed with Exhibit 49 had been authorised by the Kandla Port Trust, the lessor, to do so. The conclusions drawn by the first Appellate Court were summarised in paragraph 59 of its judgment in the following words:

> *"59. In view of what is stated in foregoing paras of this judgment this Court come to the following conclusions: -*
>
> *1. The appellant/original defendant has failed to prove the service of notice terminating the lease as required under Section 111(g) and 106 of the Transfer of Property Act upon the lessee i.e. the Respondent No. 2/original plaintiff No. 2.*
>
> *2. The defendant/the present appellant failed to prove that the person who signed the notice Ex. 47 and the person who is alleged to have made re-entry on the suit plot and signed Ex.49 and panchnama produced along with Ex. 49 were specifically authorised by Kandla Port Trust i.e. the lessor and the Chairman of Kandla Port Trust.*
>
> *3. The lease dated 14/12/1966 is not legally and validly determined by the lessor hence, it is subsisting till date and alive, and the lessee Smt. Pushapaben Shah i.e. the respondent No. 2 is entitled to hold and enjoy the suit plot No. 30 sector No. 8."*

15. In the second appeal filed by the appellant, the High Court was of the view that the matter was concluded by concurrent findings of fact regarding the validity of the termination of the lease and the authority of those who purported to have brought about such a termination. The question whether the possession of the suit plot was taken over did not engage the attention of the first Appellate Court or the High Court although the latter proceeded on the basis that the findings of fact recorded by the Courts below were concurrent, without pointing out as to what those findings were and how the same put the issue regarding takeover of the possession from the lessee beyond the pale of any challenge. Suffice it to say that the respondents are not correct in urging that the dispossession of the lessee pursuant to the termination of the lease was not proved as a fact. None of the Courts below has recorded a clear finding on this aspect even though the trial Court has in

its judgment briefly touched that issue but declined to record an affirmative finding in the matter. That apart a careful reading of the passage extracted above from the order passed by the trial Court shows that the trial Court was labouring under the impression as though possession of the vacant piece of land cannot be taken over by the lessor unless some overt act of actual occupation of the plot is established. The fact that wild bushes were growing on the plot was, in our opinion, no reason to hold that the panchnama prepared by the Port Trust authorities evidencing the takeover of the plot was inconsequential or insufficient to establish that the process of dispossession of the lessee had been accomplished. We need to remember that with the termination of the lease, the title to the suit property vested in the lessor, ipso jure. That being so, possession of a vacant property would follow title and also vest in the lessor. Even so, the Panchnama drawn up at site recorded the factum of actual takeover of the possession from the lessee, whereafter the possession too legally vested in the lessor, growth of wild bushes and grass notwithstanding. We need not delve any further on this aspect for we are of the view that there could be no better evidence to prove that the lessee had been dispossessed from the plot in question than her own admission contained in her communication dated 22nd February, 1979 addressed to the Senior Estate Manager of the appellant-Trust. The letter may at this stage be extracted in extenso:

"Dear Sir,

I am in receipt of your letter No. ES/LL/723/63/9180 dated 20th December 1978 informing that the Assistant Estate Manager has taken over the plot No. 30 Sector 8. Please note, you have not informed me to be present on 4 PM on 14.12.1978 at the site of the aforesaid plot and your letter No. ES/LL/723/63/6248 dated 8th August 1977 said to have been sent to me has not yet been received and hence you do not have the authority to re-enter the plot.

As you have taken the possession of the plot, you are now requested to kindly refund all the amounts forthwith otherwise you may return back the possession of plot to me. If I do not hear anything from you within seven days from the date of receipt of this letter, appropriate legal proceedings will be adopted against you, holding you entirely responsible for the cost of consequences thereof.

Yours faithfully,
Sd/- P.P. Shah
(Smt. Pushpa P. Shah)"

(emphasis supplied)

16. The genuineness of the above document was not disputed by learned counsel for the respondents. All that was argued was that the admission regarding the dispossession of the lessee had been made in circumstances that (a) cannot constitute an admission and (b) absolve the lessee, the maker, of its binding effect. The husband of the lessee having passed away, the letter in question was written in a state of shock and distress and any admission made therein could not argued Mr. Ahmadi and Ms. Bhati be treated as an admission in the true sense. We regret our inability to accept that submission. The question is whether possession had indeed been taken over from the lessee pursuant to the termination of the lease. The answer to that question is squarely provided by the letter in which the lessee makes an unequivocal and unconditional admission that possession had indeed been taken over by the appellant-Port Trust. What is significant is that the lessee had asked for refund of the amount paid by her towards instalments and in case such a refund was not possible to return the plot to her. We do not think that such an unequivocal admission as is contained in the letter can be wished away or ignored in a suit where the question is whether the lessee had indeed been dispossessed pursuant to the termination of the lease. There is no worthwhile explanation or any other reason that can possibly spell a withdrawal of the admission or constitute an

explanation cogent enough to carry conviction with the Court. We have in that view no hesitation in holding that dispossession of the lessee had taken place pursuant to the termination of the lease deed in terms of panchnama dated 14th December, 1978.

17. The next question then is whether the suit for declaration to the effect that the termination of the lease was invalid and that the lease continued to subsist could be filed more than 17 years after the termination had taken place. A suit for declaration not covered by Article 57 of the Schedule to the Limitation Act, 1963 must be filed within 3 years from the date when the right to sue first arises. Article 58 applicable to such suits reads as under:

	Description of suit	**Period of Limitation**	**Time from which period begins to run**
58.	To obtain any other declaration.	Three years	When the right to sue first accrues.

18. The expression right to sue has not been defined. But the same has on numerous occasions fallen for interpretation before the Courts. In *State of Punjab & Ors. V. Gurdev Singh* (1991) 4 SCC 1, the expression was explained as under :

"…….

The words "right to sue" ordinarily mean the right to seek relief by means of legal proceedings. Generally, the right to sue accrues only when the cause of action arises, that is, the right to prosecute to obtain relief by legal means. The suit must be instituted when the right asserted in the suit is infringed or when there is a clear and unequivocal threat to infringe that right by the defendant against whom the suit is instituted."

19. Similarly in *Daya Singh & Anr. V. Gurdev Singh*

(dead) by LRs. & Ors. (2010) 2 SCC 194 the position was re-stated as follows:

"13. Let us, therefore, consider whether the suit was barred by limitation in view of Article 58 of the Act in the background of the facts stated in the plaint itself. Part III of the Schedule which has prescribed the period of limitation relates to suits concerning declarations. Article 58 of the Act clearly says that to obtain any other declaration, the limitation would be three years from the date when the right to sue first accrues.

14. In support of the contention that the suit was filed within the period of limitation, the learned Senior Counsel appearing for the appellant-plaintiffs before us submitted that there could be no right to sue until there is an accrual of the right asserted in the suit and its infringement or at least a clear and unequivocal threat to infringe that right by the defendant against whom the suit is instituted. In support of this contention the learned Senior Counsel strongly relied on a decision of the Privy Council in reported in AIR 1930 PC 270 Bolo v. Koklan. In this decision Their Lordships of the Privy Council observed as follows:

'… There can be no 'right to sue' until there is an accrual of the right asserted in the suit and its infringement, or at least a clear and unequivocal threat to infringe that right, by the defendant against whom the suit is instituted.'

15. *A similar view was reiterated in C. Mohammad Yunus v. Syed Unnissa AIR 1961 SC 808 in which this Court observed: (AIR p.810, para 7)*

' … The period of six years prescribed by Article 120 has to be computed from the date when the right to sue accrues and there could be no right

to sue until there is an accrual of the right asserted in the suit and its infringement or at least a clear and unequivocal threat to infringe that right.'

In C. Mohammad Yunus, this Court held that the cause of action for the purposes of Article 58 of the Act accrues only when the right asserted in the suit is infringed or there is at least a clear and unequivocal threat to infringe that right. Therefore, the mere existence of an adverse entry in the revenue records cannot give rise to cause of action.

…….Accordingly, we are of the view that the right to sue accrued when a clear and unequivocal threat to infringe that right by the defendants……."

20. References may be made to the decisions of this Court in *Khatri Hotels Pvt. Ltd. & Anr. v. Union of India & Anr.* (2011) 9 SCC 126 where this Court observed:

"While enacting Article 58 of the 1963 Act, the legislature has designedly made a departure from the language of Article 120 of the 1908 Act. The word "first" has been used between the words "sue" and "accrued". This would mean that if a suit is based on multiple causes of action, the period of limitation will begin to run from the date when the right to sue first accrues. To put it differently, successive violation of the right will not give rise to fresh cause and the suit will be liable to be dismissed if it is beyond the period of limitation counted from the day when the right to sue first accrued."

(emphasis supplied)

21. The right to sue in the present case first accrued to the lessee on 13th December, 1978 when in terms of order dated 8th August, 1977 the lease in favour of the lessee was terminated. A suit for declaration that the termination of the

lease was invalid hence ineffective for any reason including the reason that the person on whose orders the same was terminated had no authority to do so, could have been instituted by the lessee on 14th of December 1978. For any such suit it was not necessary that the lessee was dispossessed from the leased property as dispossession was different from termination of the lease. But even assuming that the right to sue did not fully accrue till the date the lessee was dispossessed of the plot in question, such a dispossession having taken place on 14th of December, 1978, the lessee ought to have filed the suit within three years of 15th December, 1978 so as to be within the time stipulated under Article 58 extracted above. The suit in the instant case was, however, instituted in the year 1996 i.e. after nearly eighteen years later and was, therefore, clearly barred by limitation. The Courts below fell in error in holding that the suit was within time and decreeing the same in whole or in part.

22. Mr. Ahmadi next argued that the termination of the lease being illegal and non est in law, the plaintiff-respondents could ignore the same, and so long as they or any one of them remained in possession, a decree for injunction restraining the Port Trust from interfering with their possession could be passed by the Court competent to do so. We are not impressed by that submission. The termination of the lease deed was by an order which the plaintiffs ought to get rid of by having the same set aside, or declared invalid for whatever reasons, it may be permissible to do so. No order bears a label of its being valid or invalid on its forehead. Any one affected by any such order ought to seek redress against the same within the period permissible for doing so. We may in this regard refer to the following oft quoted passage in *Smith v. East Elloe Rural District Council* (1956) 1 All ER 855. The following are the observations regarding the necessity of recourse to the Court for getting the invalidity of an order established:

"An order, even if not made in good faith is still an act

capable of legal consequences. It bears no brand of invalidity on its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders.

This must be equally true even where the brand of invalidity is plainly visible : for there also the order can effectively be resisted in law only by obtaining the decision of the court. The necessity of recourse to the court has been pointed put repeatedly in the House of Lords and Privy Council without distinction between patent and latent defects."

23. The above case was approved by this Court in *Krishnadevi Malchand Kamathia & Ors. v. Bombay Environmental Action Group and Ors.* (2011) 3 SCC 363, where this Court observed:

"19. Thus, from the above it emerges that even if the order/notification is void/voidable, the party aggrieved by the same cannot decide that the said order/notification is not binding upon it. It has to approach the court for seeking such declaration. The order may be hypothetically a nullity and even if its invalidity is challenged before the court in a given circumstance, the court may refuse to quash the same on various grounds including the standing of the Petitioner or on the ground of delay or on the doctrine of waiver or any other legal reason. The order may be void for one purpose or for one person, it may not be so for another purpose or another person."

24. To the same effect is the decision of this Court in *Pune Municipal Corporation v. State of Maharashtra and Ors* (2007) 5 SCC 211, where this Court discussed the need for determination of invalidity of an order for public purposes:

"36. *It is well settled that no order can be ignored altogether unless a finding is recorded that it was illegal, void or not in consonance with law. As Prof. Wade states: "The principle must be equally true even where the 'brand of invalidity' is plainly visible: for there also the order can effectively be resisted in law only by obtaining the decision of the Court".*

He further states:

"The truth of the matter is that the court will invalidate an order only if the right remedy is sought by the right person in the right proceedings and circumstances. The order may be hypothetically a nullity, but the Court may refuse to quash it because of the plaintiff's lack of standing, because he does not deserve a discretionary remedy, because he has waived his rights, or for some other legal reason. In any such case the 'void' order remains effective and is, in reality, valid. It follows that an order may be void for one purpose and valid for another, and that it may be void against one person but valid against another."

xx xx xx xx

38. *A similar question came up for consideration before this Court in State of Punjab and Ors. v. Gurdev Singh (1992) ILLJ 283 SC ...*

39. *Setting aside the decree passed by all the Courts and referring to several cases, this Court held that if the party aggrieved by invalidity of the order intends to approach the Court for declaration that the order against him was inoperative, he must come before the Court within the period prescribed by limitation. "If the statutory time of limitation expires, the Court cannot give the declaration sought for"."*

25. Reference may also be made to the decisions of this

Court in *R. Thiruvirkolam v. Presiding Officer and Anr.* (1997) 1 SCC 9, *State of Kerala v. M.K. Kunhikannan Nambiar Manjeri Manikoth, Naduvil (dead) and Ors.* (1996) 1 SCC 435 and *Tayabbhai M. Bagasarwalla & Anr. v. Hind Rubber Industries Pvt. Ltd. etc.* (1997) 3 SCC 443, where this Court has held that an order will remain effective and lead to legal consequences unless the same is declared to be invalid by a competent court.

26. It is true that in some of the above cases, this Court was dealing with proceedings arising under Article 226 of the Constitution, exercise of powers whereunder is discretionary but then grant of declaratory relief under the Specific Relief Act is also discretionary in nature. A Civil Court can and may in appropriate cases refuse a declaratory decree for good and valid reasons which dissuade the Court from exercising its discretionary jurisdiction. Merely because the suit is within time is no reason for the Court to grant a declaration. Suffice it to say that filing of a suit for declaration was in the circumstances essential for the plaintiffs. That is precisely why the plaintiffs brought a suit no matter beyond the period of limitation prescribed for the purpose. Such a suit was neither unnecessary nor a futility for the plaintiff's right to remain in possession depended upon whether the lease was subsisting or stood terminated. It is not, therefore, possible to fall back upon the possessory rights claimed by plaintiffs over the leased area to bring the suit within time especially when we have, while dealing with the question of possession, held that possession also was taken over pursuant to the order of termination of the lease in question.

27. In the light of what we have said above, we consider it unnecessary to examine the question whether the suit in question was barred by Section 120 of the Major Ports Act which stipulates a much shorter period of limitation of six months. We also consider it unnecessary to examine whether the suit filed by the original plaintiff-transferee of the lessee was

barred by the principle of constructive res judicata or Order II, Rule 2 of the Code of Civil Procedure, 1908 in view of the fact that the first suit filed by the lessee in the year 1980 for permanent prohibitory injunction could and ought to have raised the question of validity of the termination of the lease as the termination of the lease had by that time taken place. So also the question whether the transferee, who had not been recognised by the Port Trust, could institute a suit against the Port Trust so as to challenge the termination of the lease in favour of his vendor also need not be examined. All that we need mention is that the addition of the lessee as a co-plaintiff in the suit also came as late as in the year 1999 when the original plaintiff transferee of the lease appears to have realised that it is difficult to assert his rights against the Port Trust on the basis of a transfer which was effected without the permission of the lessor-Port Trust.

28. In the result, we allow this appeal, set aside the impugned judgment and decree passed by the Courts below and dismiss the suit filed by the respondents but in the circumstances without any order as to costs.

R.P. Appeal allowed.

M/S ATLAS CYCLE (HARYANA) LTD.
v.
KITAB SINGH
(Civil Appeal No. 673 of 2013)

JANUARY 24, 2013

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

CONSTITUTION OF INDIA, 1950:

Arts. 226 and 227 – Jurisdiction of High Court – Writ of certiorari – High Court setting aside the award of Labour Court and directing reinstatement of workman with 25% back wages – Held: It is settled law that when Labour Court arrived at a finding overlooking the materials on record, it would amount to perversity and writ Court would be fully justified in interfering with the said conclusion – If a finding of fact is based on no evidence that would be regarded as an error of law which can be corrected by a writ of certiorari – In the instant case, the issue whether resignation of workman was voluntary and the factum of complaint sent by him immediately were not adverted to by Labour Court – High Court thoroughly analyzed all the aspects and arrived at the correct conclusion – Labour law.

The respondent-workman, who was employed by the appellant company on piece rate basis in the year 1977, wrote a letter to the Chief Minister on 7.10.1992, stating that on 30.9.1992 in the evening he was beaten up, given electric shock and was forced to write a resignation letter, on the allegation that he committed a theft of the goods of the factory and on the morning of 1.10.1992 when he went to the factory, he was not allowed to enter. The workman also sent a notice dated 13.10.1992 to the appellant company. The Reference made to the Labour Court was dismissed. However, the single Judge of the

High Court, in the writ petition filed by the workman, set aside the award and directed his reinstatement with 25% back wages. The Letters Patent Appeal filed by the Company was dismissed.

Dismissing the appeal, the Court

HELD: 1.1. Whether the complaint was sent by the workman on 07.10.1992 and the resignation tendered by him on 01.10.1992 was voluntary or not have not been adverted to by the Labour Court. These are the real issues in the case. As rightly observed by the Division Bench of the High Court, there are contradictory findings by the Labour Court with regard to the claim of the workman that he was tortured by the Management on 30.09.1992 and was made to write the resignation letter on 01.10.1992. Again, it was rightly observed by the Division Bench that certain relevant facts such as the workman had been in service since 1977 and in such circumstance whether there is any need to resign without any acceptable reason that too without any monetary incentive and, further, the complaint on the same day to the Management and higher authorities including the Chief Minister, were not at all considered by the Labour Court and it merely accepted that the workman tendered the resignation in his own writing. [para 9] [620-F-H; 621-A-B]

1.2. This Court is satisfied that the single Judge of the High Court thoroughly analysed all the aspects and arrived at a correct conclusion. It is settled law that when the Labour Court arrived at a finding overlooking the materials on record, it would amount to perversity and the writ Court would be fully justified in interfering with the said conclusion. It is true that the High Court exercising *writ jurisdiction* **would not assume the role of the appellate court, however, the High Court is well within its power to interfere if it is shown that in recording the said finding,**

the Tribunal/Labour Court had erroneously refused to admit the admissible and material evidence, or had erroneously admitted any inadmissible evidence which has influenced the impugned finding. If a finding of fact is based on no evidence that would be regarded as an error of law which can be corrected by a *writ of certiorari*. [para 11] [621-C-F]

Surya Dev Rai vs. Ram Chander Rai & Ors. **2003 (2) Suppl. SCR 290 = (2003) 6 SCC 675 – relied on**

1.3. On going through the entire reasoning of the Labour Court, materials placed and stand taken by the workman and the Management, this Court is satisfied that the single Judge of the High Court was fully justified in interfering with the conclusion arrived at by the Labour Court which has been rightly affirmed by the Division Bench. [para 12] [621-F-G]

Case Law Reference:

2003 (2) Suppl. SCR 290 relied on para 7

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 673 of 2013.

From the Judgment & Order dated 04.10.2008 of the High Court of Punjab & Haryana at Chandigarh in Letters Patent Appeal No. 48 of 2008.

Raj Kumar Mehta, Antaryami Upadhyay, Rajeev Ranjan Pathak for the Appellant.

S.N. Bhat for the Respondent.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. Leave granted.

2. This appeal is directed against the final judgment and

order dated 04.10.2008 passed by the High Court of Punjab & Haryana at Chandigarh in Letters Patent Appeal No. 48 of 2008 whereby the Division Bench of the High Court dismissed the appeal filed by the appellant-Company herein and confirmed the order of the learned Single Judge in Civil Writ Petition No.11450 of 1995.

3. Brief facts:

(a) In the year 1977, Kitab Singh – respondent herein was employed by the appellant-Company on piece rate basis in the Packing Department. On 28.11.1988, respondent was charge-sheeted for committing theft of goods belonging to the appellant-Company for which a written explanation dated 12.10.1989 was submitted by the respondent seeking pardon and assuring that he would not indulge in any such misconduct in future. This was accepted by the appellant-Company.

(b) On 01.10.1992, respondent submitted his resignation citing domestic circumstances and the appellant-Company accepted the resignation on the same day.

(c) On 07.10.1992, respondent wrote a letter to the Chief Minister of Haryana, leveling certain allegations against the management of the appellant-Company. In that letter, he alleged that on 30.09.1992, in the evening after finishing his duty, when he went to the puncture shop outside the factory to collect his scooter, which he had left in the morning, the security guard accused him of taking stolen goods in a bag. He further alleged that he was beaten up, given electric shock and forced to write the resignation letter and thereafter, left him in his home in an unconscious condition. It was further stated in that letter that when the respondent had gone to the factory in the morning of 01.10.1992, he was not allowed to enter.

(d) Respondent sent a notice dated 13.10.1992 to the appellant-Company stating that when he went to attend duty on 01.10.1992, the security officer refused to enter him and he had

not been given compensation under Section 25-F of the Industrial Disputes Act, 1947 (hereinafter referred to as "the Act") and that he should be reinstated with continuity of service.

(e) The State Government, vide letter dated 11.01.1993, rejected his request for a Reference on the ground that he himself had resigned from the job after submitting resignation.

(f) Aggrieved by the said reply, respondent filed a Writ Petition being CWP No. 10642 of 1993 before the High Court praying for referring the dispute to the Labour Court. The High Court allowed the same with a direction to the State Government to refer the matter to the Labour Court for adjudication.

(g) On 21.04.1994, respondent filed a Claim Statement before the Labour Court alleging that he had not resigned and that he should be ordered to be reinstated on duty with continuity of service and back wages.

(h) Appellant-Company filed a written statement stating, inter alia, that respondent is not entitled to any relief by way of re-instatement or by way of back wages as he himself resigned from the service.

(i) The Labour Court, by order dated 02.02.2005, dismissed the Reference and the Claim Statement of the respondent.

(j) Aggrieved by the said order, on 07.08.1995, respondent filed a Petition being Civil Writ Petition No. 11450 of 1995 before the High Court. Learned single Judge, by order dated 09.01.2008 set aside the Award of the Labour Court and directed the appellant-Company to reinstate the respondent in service with 25% back wages.

(k) Not satisfied with the order of learned single Judge, on 07.02.2008, the appellant-Company filed a Letters Patent Appeal No. 48 of 2008 before the Division Bench of the High

Court. By judgment dated 04.10.2008, the Division Bench dismissed the said Appeal.

(l) Being aggrieved, the appellant-Company preferred this appeal by way of special leave.

4. We heard Mr. Raj Kumar Mehta, learned counsel for the appellant-Company and Mr. S.N. Bhat, learned counsel for the respondent-workman.

5. The only question that was posed and discussed before the learned single Judge of the High Court was as to whether the workman had voluntarily resigned on 01.10.1992, as claimed by the Management or was he forced to resign on 30.09.1992 as alleged by the workman? After finding that had the workman resigned voluntarily on 01.10.1992, he would not have complained to the Management on that very day and run from pillar to post, by making various complaints to higher authorities, including the Chief Minister of the State and if the workman had committed any misconduct like theft etc., the Management could have held a domestic inquiry and taken a suitable action as per law, the single Judge ultimately concluded that the workman was retrenched from employment without complying with Section 25-F of the Act.

6. Before the Division Bench of the High Court, the Management raised a question relating to the scope of interference by a writ Court in a finding of fact rendered by a Tribunal/Labour Court. It was urged by the Management that the Labour Court, having arrived at a firm finding that the workman was never tortured or that the story of forcible resignation claimed by him was unreliable, the learned single Judge ought not to have interfered with the same in exercise of his extraordinary writ jurisdiction under Article 226 of the Constitution of India. Learned counsel for the Management further contended that in no circumstance, a direction for reinstatement of the workman in service is warranted, particularly when having regard to his misconduct, the

Management had completely lost confidence in the workman. On the other hand, learned counsel for the workman contended that when the findings rendered by the Labour Court are contrary to the material evidence on record, it shall amount to perversity and the writ Court is fully justified in interfering with the same. On going through the entire materials, the Division Bench accepted the stand of the workman and confirmed the order passed by the learned single Judge.

7. Similar contentions as raised before the single Judge and the Division Bench of the High Court were raised before us by both the parties.

8. Before considering the merits of the claim of both the parties, it is useful to refer the jurisdiction of the High Court under Articles 226 and 227 of the Constitution of India. After adverting to earlier decisions, this Court in *Surya Dev Rai vs. Ram Chander Rai & Ors.,* (2003) 6 SCC 675 summarized various circumstances under which the High Court can exercise its jurisdiction under Articles 226 and 227 of the Constitution which are as under:

> "38. Such like matters frequently arise before the High Courts. We sum up our conclusions in a nutshell, even at the risk of repetition and state the same as hereunder:
>
> (1) Amendment by Act 46 of 1999 with effect from 1-7-2002 in Section 115 of the Code of Civil Procedure cannot and does not affect in any manner the jurisdiction of the High Court under Articles 226 and 227 of the Constitution.
>
> (2) Interlocutory orders, passed by the courts subordinate to the High Court, against which remedy of revision has been excluded by CPC Amendment Act 46 of 1999 are nevertheless open to challenge in, and continue to be subject to, certiorari and supervisory jurisdiction of the High Court.

> (3) Certiorari, under Article 226 of the Constitution, is issued for correcting gross errors of jurisdiction i.e. when a subordinate court is found to have acted (i) without jurisdiction — by assuming jurisdiction where there exists none, or (ii) in excess of its jurisdiction — by overstepping or crossing the limits of jurisdiction, or (iii) acting in flagrant disregard of law or the rules of procedure or acting in violation of principles of natural justice where there is no procedure specified, and thereby occasioning failure of justice.
>
> (4) Supervisory jurisdiction under Article 227 of the Constitution is exercised for keeping the subordinate courts within the bounds of their jurisdiction. When a subordinate court has assumed a jurisdiction which it does not have or has failed to exercise a jurisdiction which it does have or the jurisdiction though available is being exercised by the court in a manner not permitted by law and failure of justice or grave injustice has occasioned thereby, the High Court may step in to exercise its supervisory jurisdiction.
>
> (5) Be it a writ of certiorari or the exercise of supervisory jurisdiction, none is available to correct mere errors of fact or of law unless the following requirements are satisfied: (i) the error is manifest and apparent on the face of the proceedings such as when it is based on clear ignorance or utter disregard of the provisions of law, and (ii) a grave injustice or gross failure of justice has occasioned thereby.
>
> (6) A patent error is an error which is self-evident i.e. which can be perceived or demonstrated without involving into any lengthy or complicated argument or a long-drawn process of reasoning. Where two inferences are reasonably possible and the subordinate court has chosen to take one view, the error cannot be called gross or patent.

(7) The power to issue a writ of certiorari and the supervisory jurisdiction are to be exercised sparingly and only in appropriate cases where the judicial conscience of the High Court dictates it to act lest a gross failure of justice or grave injustice should occasion. Care, caution and circumspection need to be exercised, when any of the abovesaid two jurisdictions is sought to be invoked during the pendency of any suit or proceedings in a subordinate court and the error though calling for correction is yet capable of being corrected at the conclusion of the proceedings in an appeal or revision preferred thereagainst and entertaining a petition invoking certiorari or supervisory jurisdiction of the High Court would obstruct the smooth flow and/or early disposal of the suit or proceedings. The High Court may feel inclined to intervene where the error is such, as, if not corrected at that very moment, may become incapable of correction at a later stage and refusal to intervene would result in travesty of justice or where such refusal itself would result in prolonging of the lis.

(8) The High Court in exercise of certiorari or supervisory jurisdiction will not convert itself into a court of appeal and indulge in reappreciation or evaluation of evidence or correct errors in drawing inferences or correct errors of mere formal or technical character.

(9) In practice, the parameters for exercising jurisdiction to issue a writ of certiorari and those calling for exercise of supervisory jurisdiction are almost similar and the width of jurisdiction exercised by the High Courts in India unlike English courts has almost obliterated the distinction between the two jurisdictions. While exercising jurisdiction to issue a writ of certiorari, the High Court may annul or set aside the act, order or proceedings of the subordinate courts but cannot substitute its own decision in place thereof. In exercise of supervisory jurisdiction the High Court may not only give suitable directions so as to

guide the subordinate court as to the manner in which it would act or proceed thereafter or afresh, the High Court may in appropriate cases itself make an order in supersession or substitution of the order of the subordinate court as the court should have made in the facts and circumstances of the case."

In the light of the above principles, while reiterating the same, we have to consider whether the High Court has exceeded its power as claimed by the learned counsel for the appellant?

9. It is relevant to note that in order to find out the correctness of the order passed by the learned single Judge, the Division Bench summoned all the records of the Labour Court and perused the same. In the written claim before the Labour Court, the workman has specifically alleged that on 01.10.1992, he sent a notice-cum-application to the Management and a news item to this effect was duly published in a vernacular local daily. This factual aspect and version, particularly the receipt of notice-cum-application dated 01.10.1992 from the workman, has not been denied in the written statement filed by the Management. The main emphasis in the written statement of the Management was that the workman had voluntarily tendered his resignation on 01.10.1992. It is brought to our notice that the Labour-cum-Conciliation Officer has not disputed the important fact that the workman protested in writing on the very next day of the incident. Whether the complaint sent by the workman on 07.10.1992 and the resignation tendered by him on 01.10.1992 was voluntary or not have not been adverted to by the Labour Court. According to us, these are the real issues in this case. As rightly observed by the Division Bench, we also noticed contradictory findings by the Labour Court with regard to the claim of the workman that he was tortured by the Management on 30.09.1992 and was made to write the resignation letter on 01.10.1992. Again, it was rightly observed by the Division Bench that certain relevant facts such as workman had been

in service since 1977 and in such circumstance whether there is any need to resign without any acceptable reason that too without any monetary incentive and complaint on the same day to the Management and higher authorities including the Chief Minister, were not at all considered by the Labour Court and merely accepted that the workman tendered the resignation in his own writing.

10. Even the claim of theft in the year 1988 by the workman has not been specifically raised in the written statement before the Labour Court and raised for the first time only before the writ Court.

11. We are satisfied that the learned single Judge thoroughly analysed all the aspects and arrived at a correct conclusion. It is settled law that when the Labour Court arrived at a finding overlooking the materials on record, it would amount to perversity and the writ Court would be fully justified in interfering with the said conclusion. We are conscious of the fact that the High Court exercising writ of certiorari would not permit to assume the role of the appellate Court, however, the Court is well within its power to interfere if it is shown that in recording the said finding, the Tribunal/Labour Court had erroneously refused to admit the admissible and material evidence, or had erroneously admitted any inadmissible evidence which has influenced the impugned finding, the writ Court would be justified in exercising its remedy. In other words, if a finding of fact is based on no evidence that would be regarded as an error of law which can be corrected by a writ of certiorari.

12. On going through the entire reasoning of the Labour Court, materials placed and stand taken by the workman and the Management, we are satisfied that the learned single Judge was fully justified in interfering with the conclusion arrived at by the Labour Court which has been rightly affirmed by the Division Bench. Consequently, the appeal of the Management fails and the same is dismissed with costs quantified at Rs.10,000/-.

R.P. Appeal dismissed.

PRIYADARSHINI COLLEGE OF COMPUTER SCIENCE AND ANOTHER

v.

MANISH KUMAR AND OTHERS

(Civil Appeal No. 674 of 2013)

JANUARY 24, 2013

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

Education – Admission – Requiring 60% marks in the qualifying examination – The candidate mentioned in the enrolment form that he had secured 56% marks in the qualifying examination – While in the declaration appended to enrolment form asserted that he had secured 60% marks – University did not permit him to appear in the exam – Writ petition by the candidate seeking direction to appear in the exam or for compensation of Rs. 10 lakhs – Single Judge of High Court did not permit him to appear in exam as he had not got 60% marks in the qualifying exam, but granted him compensation of Rs. 5 lakhs stating that the candidate had declared in admission form that he had got 56% marks, but the college failed to inform him that he was required to possess 60% marks – Division Bench affirmed the order of Single Judge – On appeal, held: Conclusion of High Court is contrary to the materials placed on record – The candidate applied for admission knowing fully well that he had not secured the minimum eligible marks – Candidate cannot claim benefit for his own wrong – College cannot be held liable for the act of the candidate – Direction for compensation, not sustainable.

Appellant-College invited applications against lapsed/vacant seats for various branches including admission for second year (3rd Samester) of Engineering for Diploma Holders/B.Sc. with maths eligibility with 60% marks. In pursuance to the invitation, respondent No. 1

applied for admission in 3rd Semester for the course of B. Tech. When his application was forwarded to the University for examinations, it refused him to appear in the examinations on the ground that he was not having 60% marks in B.Sc. The appellant-College cancelled his admission and refunded the entire fee deposited by him.

Respondent No. 1 filed a Writ Petition praying for a direction to the University to permit him to appear in the exam or to pay him compensation of Rs. 10 Lakhs. Single Judge of High Court rejected the prayer of respondent No. 1 to appear in the examination, but directed the appellant-College to compensate him by paying Rs. 5 lakhs. Division Bench of the High Court affirmed the order of the Single Judge. Hence the present appeal.

Allowing the appeal, the Court

HELD: 1. The conclusion of the Single Judge of High Court that respondent No.1 had declared in the admission form that he got 56% marks in B.Sc examination and the appellant-College was not able to show that prior to granting admission they had informed him that he should possess 60% marks in the qualifying examination is contrary to the materials placed before him. The advertisement calling for applications specifically mentioned that minimum 60% marks in B.Sc. Maths is the eligibility criteria and based on the same, respondent No.1-candidate applied for the same. In the enrolment form in clause 17(ii) respondent No. 1 has specifically stated that he secured 56% marks. The appellant-College could have rejected his application. However, in view of the assertion made by respondent No.1 in Clause 7 of the declaration that he had secured 60% marks, the appellant-College accepted his form and admitted him in the course he applied for. When the deficiency was pointed out by the University, the appellant-College refunded the entire fees received by

them from respondent No.1. In such circumstances, in view of perverse finding by the Single Judge of High Court which was simply affirmed by the Division Bench, the direction to pay compensation of Rs. 5 lakhs to the candidate – respondent No.1 cannot be sustained. [Paras 8 and 9] [629-E-F; 630-A-E]

2. Every candidate applying for a particular course in any College is expected to go through the advertisement thoroughly including the eligibility criteria prescribed for each course and after fulfillment of the required conditions, state the correct particulars in the application form failing which he/she cannot claim any benefit for his/her own wrong. The view that the conclusion arrived at by the Single Judge and the Division Bench finding fault with the appellant-College is clearly erroneous and that the appellant-College cannot be held liable for the act of respondent No.1 herein who knowing fully aware that he had not secured the minimum eligible marks, yet applied for admission. Respondent No.1 applied for the said course with an intention to secure admission by playing fraud with the appellant-College. [Paras 7, 10 and 11] [629-B; 630-F-H; 631-A]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 674 of 2013.

From the Judgment & Order dated 03.08.2009 of the High Court of Allahabad at Allahabad in Special Appeal No. 1110 of 2009.

Aman Vachher, Ashutosh Dubey, Harsh Sharma, Vriti Anand, P.N. Puri for the Appellants.

Satyendra Kumar, S.C. Paul Sunita Bhardwaj, Roopa Paul, Resham Singh for the Respondents.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. Leave granted.

2. This appeal is directed against the final judgment and order dated 03.08.2009 passed by the High Court of Judicature at Allahabad in Special Appeal No. 1110 of 2009, whereby the Division Bench of the High Court dismissed the appeal filed by the appellants herein and confirmed the order dated 01.07.2009 of the learned Single Judge in Civil Writ Petition No. 3465 of 2008.

3. Brief facts:

(a) Priyadarshini College of Computer Science – Appellant No.1-herein (hereinafter referred to as the "appellant-College") is a recognized institution and is affiliated with the Uttar Pradesh Technical University, Lucknow and is imparting technical education for various branches including B.Tech (Computer Science), B.Tech (Electronics & Communication), B.Tech (Information & Technology) and B.Tech (Electronics & Instrumentation).

(b) On 21.08.2007, the appellant-College published a notice in the daily Hindi Newspaper "Dainik Jagran" inviting applications against lapsed/vacant seats for the Session 2007-08 for various branches including admission for Second Year (3rd Semester) of Engineering for Diploma Holders/B.Sc. with Maths eligibility with minimum 60% marks.

(c) In pursuance of the aforesaid notice, Manish Kumar - respondent No.1 applied for admission in 3rd Semester for the course of B.Tech (Computer Science) in the appellant-College. At the same time, admission in the First Year (1st Semester) of the aforesaid branches was also going on in which the minimum qualification was 10+2 with 50% marks.

(d) The appellant-College relying on the declaration made by respondent No.1 in the admission form that he is having 60% marks in the qualifying subjects (though actually he secured 56%) admitted him in B.Tech (Computer Science) for the

Second Year (3rd Semester) by taking the requisite fee.

(e) On 03.12.2007, when his application was forwarded to the University for 3rd Semester Examinations, it refused to issue admit card to appear in the examination, since he was not having the required percentage of marks i.e. 60%. Subsequently, the appellant-College cancelled the admission of respondent No.1 and refunded the entire fee of Rs.59,715/- deposited by him on the same day.

(f) Aggrieved by the same, in January, 2008, respondent No.1 filed a petition being Writ Petition No. 3465 of 2008 before the High Court praying for a direction to the University to permit him to appear in the examination or to pay a compensation of Rs. 10 lakhs to him.

(g) Learned Single Judge of the High Court, vide order dated 01.07.2009, treating the writ petition as that of a Public Interest Litigation allowed the writ petition in part and held that since respondent No.1-herein does not possess the minimum qualification for appearing in the 3rd Semester of B.Tech (Computer Science) rejected his prayer to appear in the examination but in order to compensate him for the loss suffered directed the appellant-College to pay a compensation of Rs. 5 lakhs to him within six weeks from the date of the order. The High Court also held that if appellant-herein fails to pay the said amount, respondent No.1 is at liberty to approach the District Magistrate, G.B. Nagar, Noida for realizing the said amount from the respondent-College as arrears of land revenue. It further held that respondent No.3-University shall be at liberty to initiate appropriate proceedings against the appellant-College for granting admission to respondent No.1.

(h) Being aggrieved by the order of the learned Single Judge, the appellant-College filed an appeal being Special Appeal No. 1110 of 2009 before the Division Bench of the High Court. The Division Bench, by order dated 03.08.2009, dismissed the appeal of the appellants.

(i) Being dissatisfied, the appellants have preferred the above appeal by way of special leave.

4. We heard Mr. Aman Vachher, learned counsel for the appellants and Mr. Satyendra Kumar, learned counsel for respondent No.1.

5. In order to understand the rival claim and the decision of the learned single Judge as well as the Division Bench of the High Court, it is useful to reproduce the advertisement dated 21.08.2007 published by the appellant-College in Dainik Jagran which reads as under:

"Established in 1991

Priyadarshini College of Computer Sciences

(Affiliated to U.P. Technical University Lucknow and approved by AICTE Govt. of India)

SPOT ADMISSION 2007-2008

Applications are invited against lapsed/vacant seats. Admission open in IInd year of Engg for Diploma holders/ BSc. with Maths Eligibility minimum 60% marks in the following branches.

i. B Tech (Computer Science & Engg.)
ii B Tech (Electronics & Comm.)
iii. B Tech (Information Technology)
iv. B Tech (Electronics & Instrumentation)

ALSO URGENTLY REQUIRED

1. Accountants, PA/PS
2. Catering Contractor for Running Mess & Canteen

CONTACT

Plot No.6-A, Institutional Area, Knowledge Park – I
Greater Noida 201306 Ph:-0120-2322751, 09911027176"

6. Pursuant to the aforesaid publication, like others, respondent No.1-herein also submitted duly filled in application form and the same was received by the office of the appellant-College. The advertisement referred above clearly mentions the eligibility of minimum 60% marks in B.Sc with Maths for admission in the IInd year (3rd Semester) in B.Tech (Computer Science). It is the claim of the appellant-College that respondent No.1 has not disclosed the percentage of marks of qualifying examination and according to clause (b) of the undertaking given by him in the admission form that if any of the statement is subsequently found to be untrue, his admission to the College would be cancelled. It is also brought to our notice that there was a specific clause in the admission form about the disclosure of the percentage of marks of qualifying subject but in that respondent No.1 has not disclosed the percentage of marks, namely, 56%. In this way, according to the appellant-College, respondent No.1 has concealed the relevant facts. It is also brought to our notice that in the duly filled in enrolment form by respondent No.1, in Column 17 (ii), with reference to percentage of marks obtained in qualifying level examination, he correctly mentioned the marks secured by him as 56%, on the other hand, in the declaration made by him which was appended along with the enrolment form, in Clause 7 he unequivocally declared that he secured 60% marks in qualifying subjects.

7. From the details mentioned in the advertisement, it is clear that in respect of lapsed/vacant seats, applications are invited for admission in IInd Year of Engineering for Diploma holders/B.Sc with Maths with minimum 60% marks. It is further clear that respondent No.1 has secured only 56% marks in the qualifying level examination which is evident from Clause 17(ii)

of the enrolment form. It is true that in the scrutiny itself, it would be open to the appellant-College to reject his application. However, since respondent No. 1 has made a categorical declaration (which is mandatory by a candidate) declaring that he had secured 60% marks in the qualifying subject, the appellant-College admitted him and received fees. The fact is that the eligibility condition is 60%, however, respondent No.1 has secured only 56% marks applied for the said course with an intention to secure admission by playing fraud with the appellant-College. Unfortunately, learned single Judge failed to take note of this relevant aspect which was merely affirmed by the Division Bench of the High Court.

8. It is relevant to point out that when the University found that respondent No.1 was not eligible for the said course, it rejected his candidature and he was not allowed to appear in the examination. In such circumstance, respondent No.1 approached the High Court for appropriate direction for allowing him to appear in the examination. In the said writ petition, though the prayer of respondent No.1 was not considered by the learned single Judge, however, a direction was issued to the appellant-College herein to pay a compensation of Rs. 5 lakhs to him within six weeks from the date of its order, namely, 01.07.2009. The perusal of the order of learned single Judge proceeds that respondent No.1 herein had declared in the admission form that he got 56% marks in B.Sc examination and the appellant-College was not able to show that prior to granting admission they had informed him that he should possess 60% marks in the qualifying examination. Learned single Judge has also concluded that it would have been a different case if the candidate had provided wrong information to the College that he had 60% marks in B.Sc and it was later found that he had marks less than 60% marks. Learned single Judge has also concluded that the appellant-College has cheated the candidate by granting him admission taking fees from him knowing fully aware that he does not have the requisite qualification for grant of admission.

The above-mentioned conclusion of the learned single Judge is contrary to the materials placed before him.

9. We have already extracted the entire advertisement calling for applications in which they specifically mentioned that minimum 60% marks in B.Sc. Maths is the eligibility criteria and based on the same, respondent No.1-candidate also applied for the same. We have also pointed out that in the enrolment form in clause 17(ii) he has specifically stated that he secured 56% marks. As observed earlier, the appellant-College could have rejected his application. However, in view of the assertion made by respondent No.1 in Clause 7 of the declaration that he had secured 60% marks, the appellant-College accepted his form and admitted him in the course he applied for. It is also relevant to point out that when the deficiency was pointed out by the University, the appellant-College refunded the entire fees received by them from respondent No.1. It is not disputed by the candidate – respondent No1 herein. In such circumstances, in view of perverse finding by the learned single Judge as mentioned above, which was simply affirmed by the Division Bench, we hold that the direction to pay compensation of Rs. 5 lakhs to the candidate – respondent No.1 herein cannot be sustained. As a matter of fact, it is pointed out by learned counsel for the appellant-College that respondent No.1-candidate has not complained about any claim of donation or additional money paid by him to the appellant-College.

10. It has to be kept in mind that every candidate applying for a particular course in any College is expected to go through the advertisement thoroughly including the eligibility criteria prescribed for each course and after fulfillment of the required conditions, state the correct particulars in the application form failing which he/she cannot claim any benefit for his/her own wrong.

11. We are of the view that the conclusion arrived at by the learned single Judge and the Division Bench finding fault

with the appellant-College is clearly erroneous and that the appellant-College cannot be held liable for the act of respondent No.1 herein who knowing fully aware that he had not secured the minimum eligible marks, yet applied for admission.

12. In the light of the above discussion, the orders passed by the learned single Judge dated 01.07.2009 in Civil Writ Petition No. 3465 of 2008 and the Division Bench of the High Court dated 03.08.2009 in Special Appeal No. 1110 of 2009 are quashed insofar as direction for payment of compensation of Rs 5 lakhs is concerned, consequently, the appeal is allowed. No order as to costs.

K.K.T. Appeal allowed.

LAXMIBAI (DEAD) THR. LRS. & ANR.
v.
BHAGWANTBUVA (DEAD) THR. LRS. & ORS.
(Civil Appeal No. 2058 of 2003)

JANUARY 29, 2013

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

Hindu Adoptions and Maintenance Act, 1956:

s.16 read with ss.10 and 11 – Adoption of male child by a female – Adoption deed got registered – Presumption of a valid adoption – Held: If there is a registered adoption deed, there is a presumption u/s 16 to the effect that the adoption has been made in compliance with the provisions of the Act until and unless such presumption is disproved – Burden to rebut the presumption lies on the person who challenges such adoption – In the instant case, defendants/respondents never made any attempt whatsoever, to rebut the presumption.

ss. 10 and 11 read with s. 16 – Adoption – Held: In the instant case, there is ample evidence on record to prove occurrence of giving and taking ceremony – Adoptive mother put her thumb impression on the deed, and it was also signed by natural parents of child – The deed was signed by witnesses – Appellate courts could not have drawn any adverse inference against the appellants/plaintiffs on the basis of a mere technicality, to the effect that the natural parents of the adoptive child had acted as witnesses, and not as executors of the document – It is, therefore, held that the document was valid.

Custom – Defendant pleading a special family custom that a child from outside the family could not have been adopted – Held: He who relies upon custom varying general law, must plead and prove it – Special customs which prevail

in a family, a particular community etc., require strict proof and the defendants/respondents have failed to prove the same – Evidence Act, 1872 – s.57 – Judicial notice.

Code of Civil Procedure, 1908:

O. 18, r.16 – Power to examine witness immediately – Held: Mere apprehension of death of a witness cannot be a sufficient cause for immediate examination of a witness – More so, it is the discretion of court to come to a conclusion as to whether there is a sufficient cause or not to examine the witness immediately – In the instant case, plaintiff was just above 70 years of age and hale and hearty and, as such, there was no occasion for her to file an application under O. 18, r. 16 CPC for recording statement prior to commencement of trial.

Evidence Act, 1872:

s.134 read with ss.138 and 146 – Number of witnesses and cross-examination – It is not the number of witnesses but quality of their evidence which is important – If a party wishes to raise any doubt as regards correctness of statement of a witness, the said witness must be given an opportunity to explain his statement by drawing his attention to that part of it, which has been objected to – Without this, it is not possible to impeach his credibility.

The appellant's husband, being the descendant of Shri Sant Eknath Maharaj, was vested with exclusive right to carry the Palki and Padukas of Sant Maharaj from Paithan to Pandharpur, at the time of Ashadi Akadashi; and after her husband's death, the appellant was vested with the said right. (The brother of appellant's husband had predeceased him.) On 11.5.1971 the appellant adopted 'R', the son of 'VBP'. On the same day the adoption deed was executed and registered. The appellant and her sister-in-law (the wife of the deceased

brother of appellant's husband) filed a suit against the respondents seeking a decree of perpetual injunction preventing them from causing any obstruction or interference in exercise of their exclusive rights to carrying the Palki and Padukas. The trial court decreed the suit, *inter alia,* holding that the adoption was valid. The appellant died during the trial and the adopted child inherited all her property. However, the first appellate court held that the respondents had proved that there existed a custom which prohibited the taking of a male child in adoption from outside. The adoption deed was also held to be suspicious. The second appeal of the appellants, having been dismissed by the High Court, led them to file an appeal.

Allowing the appeal, the Court

HELD: 1.1. Custom is a rule, which in a particular family, a particular class, community, or in a particular district has, owing to prolonged use, obtained the force of law. Custom has the effect of modifying general personal law, but it does not override statutory law, unless the custom is expressly saved by it. He who relies upon custom varying general law, must plead and prove it. A custom must be established by clear and unambiguous evidence, unless it has been judicially recognised by the courts and proof of it becomes unnecessary u/s 57(1) of the Evidence Act, 1872. [para 7 and 9] [646-A-B, F]

Dr. Surajmani Stella Kujur v. Durga Charan Hansdah **2001 (1) SCR 1028 = AIR 2001 SC 938;** *Salekh Chand (Dead) thr. Lrs. v. Satya Gupta & Ors*. **2008 (3) SCR 833 = (2008) 13 SCC 119;** *Bhimashya & Ors. v. Smt. Janabi @ Janawwa,* **2006 (10) Suppl. SCR 628 = (2006) 13 SCC 627;** *Ram Kanya Bai & Anr. v. Jagdish & Ors*. **2011 (7) SCR 817 = AIR 2011 SC 3258;** *Effuah Amissah v. Effuah Krabah*, **AIR 1936 P.C. 147;** ***T****. Saraswati Ammal v. Jagadambal & Anr.* **1953 SCR 939 = AIR 1953 SC 201;** *Ujagar Singh v. Mst. Jeo*,

1959 Suppl. SCR 781 = AIR 1959 SC 1041; and *Siromani v. Hemkumar & Ors.,* **1968 SCR 639 = AIR 1968 SC 1299 – referred to**

Ramalakshmi Ammal v. Sivanatha Perumal Sethuraya, **14 Moo. Ind. App. 570, referred to**

1.2. In the instant case, only four adoptions have taken place over a time-span of 375 years and even though each time, a male child was taken from within the same family, this itself would not be sufficient to establish the existence of a custom in this regard. There is nothing on record to establish that a child from outside the family could not have been adopted, or that any such attempt was ever made, but was resisted and discarded. Special customs; which prevail in a family, a particular community etc., require strict proof. The respondents/ defendants could not establish that a male child from outside the family could not be adopted. The appellate courts have failed to appreciate that a negative fact cannot be proved by adducing positive evidence. [para 15] [649-F-G; 650-B-D]

Gherulal Parakh v. Mahadeodas Maiya, **1959 Suppl. SCR 406 = AIR 1959 SC 781; and** *V.T.S. Chandrashekhara Mudaliar (Dead thr. Lrs.) & Ors. v. Kulandaivelu Mudaliar,* **1963 SCR 440 = AIR 1963 SC 185- referred to**

2.1. In the event that there is a registered adoption deed, there is a presumption of validity with respect to the said adoption. Therefore, there is a presumption u/s 16 of the Hindu Adoptions and Maintenance Act, 1956 (the Act) to the effect that the adoption has been made in compliance with the provisions of the Act until and unless such presumption is disproved. In the event that a person chooses to challenge such adoption, the burden of proof with respect to rebutting the same, by way of procedures accepted by law, is upon him. In the instant

case, the defendants/respondents never made any attempt whatsoever, to rebut the presumption u/s 16 of the Act. [para 15] [650-F-H; 651-A-B]

2.2. Undoubtedly, the court while construing a document, is under an obligation to examine the true purport of the document and draw an inference with respect to the actual intention of the parties. In the instant case, the adoption deed was registered on 11.5.1971, and the same provided complete details of the adoption. Registration of the adoption deed was done on the same day, immediately after its execution, before the Registrar. The adoptive mother put her thumb impression on the deed, and it was also signed by the natural parents of the child. Additionally, the deed was signed by 7 witnesses, and all the parties have been identified. There is ample evidence on record to prove the occurrence of the giving and taking ceremony, including photographs of the 'Datta Homam' ceremony taken by PW-2 on 11.5.1971. The appellate courts could not have drawn any adverse inference against the appellants/plaintiffs on the basis of a mere technicality, to the effect that the natural parents of the adoptive child had acted as witnesses, and not as executors of the document. The correctness or authenticity of the adoption deed is not disputed. In such a fact-situation, by gathering the intention of the parties and by reading the document as a whole and considering its purport, it can be concluded that the adoption stood the test of law. This Court, therefore, holds that the document was valid, and that the same could not have been discarded by the appellate courts. [para 16,25,28, 32 and 40] [655-B; 656-E-F; 659-E-F; 664-B-C]

Delta International Limited v. Shyam Sundar Ganeriwalla & Anr **1999 (2) SCR 541 = AIR 1999 SC 2607;** *Vodafone International Holdings B.V v. Union of India & Anr*. **2012 (1) SCR 573 = (2012) 6 SCC 613;** *S.T. Krishnappa v.*

Shivakumar & Ors., **2007 (5) SCR 890 = (2007) 10 SCC 761;** *Debi Prasad (dead) by L.Rs. v. Smt. Tribeni Devi,* **AIR 1970 SC 1286,;** *Mst. Deu & Ors. v. Laxmi Narayan & Ors.,* **1971 (1) SCR 101 = (1998) 8 SCC 701;** *Kumar Harish Chandra Singh Deo & Anr. v. Bansidhar Mohanty & Ors.,* **1966 SCR 153 = AIR 1965 SC 1738;** *Atluri Brahmanandam (D), Thr. LRs. v. Anne Sai Bapuji,* **2010 (14) SCR 339 = AIR 2011 SC 545;** *Smt. Rajbir Kaur & Anr. v. M/s. S. Chokosiri & Co.*, **1988 (2) Suppl. SCR 310 = AIR 1988 SC 1845,** *Sarju Pershad Ramdeo Sahu v. Jwaleshwari Pratap Narayan Singh & Ors.* **1950 SCR 781 = AIR 1951 SC 120 - referred to**

2.4. Mere apprehension of the death of a witness cannot be a sufficient cause for immediate examination of a witness. More so, it is the discretion of the court to come to a conclusion as to whether there exists a sufficient cause or not, to examine the witness immediately. The appellant was just over 70 years of age and was hale and hearty. Thus, there was no occasion for her to file an application under O. 18, r. 16 CPC which provides for the taking of evidence *De Bene Esse* for recording a statement prior to the commencement of the trial. Though the plaintiff had died before the trial commenced, the other witnesses who entered the witness box proved the adoption ceremony and adoption deed. It is not the number of witnesses but their quality which is important. The test is whether the evidence has a ring of truth, is cogent, credible and trustworthy or otherwise. It is quality and not quantity, which determines the adequacy of evidence as has been provided by s.134 of the Evidence Act. [para 28-30 and 32] [658-B-D; 657-D-F-H]

Vadivelu Thevar v. State of Madras **1957 SCR 981 = AIR 1957 SC 614;** *Jagdish Prasad v. State of M.P.* **AIR 1994 SC 1251;** *Sunil Kumar v. State Govt. of NCT of Delhi* **AIR 2003 (4) Suppl. SCR 767 = 2004 SC 552;** *Namdeo v. State*

of Maharashtra **AIR 2007 SC (Supp) 100;** *Kunju @ Balachandran v. State of Tamil Nadu,* **2008 (1) SCR 781 = AIR 2008 SC 1381;** *Bipin Kumar Mondal v. State of West Bengal* **2010 (8) SCR 1036 = AIR 2010 SC 3638;** *Mahesh & Anr. v. State of Madhya Pradesh* **2011 (11) SCR 377 = (2011) 9 SCC 626;** *Kishan Chand v. State of Haryana* **JT 2013(1) SC 222 – referred to**

2.5. Furthermore, if a party wishes to raise any doubt as regards the correctness of the statement of a witness, the said witness must be given an opportunity to explain his statement by drawing his attention to that part of it, which has been objected to by the other party, as being untrue. Without this, it is not possible to impeach his credibility. [ss.138 and 146 of the Evidence Act, 1872.] [para 31] [658-G-H]

Khem Chand v. State of Himachal Pradesh, **AIR 1994 SC 226;** *State of U.P. v. Nahar Singh (dead) & Ors.,* **1998 (1) SCR 948 = AIR 1998 SC 1328;** *Rajinder Pershad (Dead) by L.Rs. v. Darshana Devi (Smt.),* **2001 (1) Suppl. SCR 442 = AIR 2001 SC 3207; and** *Sunil Kumar & Anr. v. State of Rajasthan,* **2005 (1) SCR 612 = AIR 2005 SC 1096 – referred to**

2.6. The cause of justice would be served, instead of being thwarted, where there has been substantial compliance with the legal requirements, specified in s.16 of the Act. When substantial justice and technical considerations are pitted against each other, the cause of substantial justice deserves to be preferred and the courts may, in the larger interests of the administration of justice, excuse or overlook a mere irregularity or a trivial breach of law for doing real and substantial justice to the parties and pass orders which will serve the interest of justice best. The appellate court has erred by considering irrelevant material, while the most relevant evidence, i.e., the adoption ceremony and the adoption

deed, have been disregarded on the basis of mere surmises and conjectures. The judgments of the appellate courts are set aside and judgment of the trial court is restored. [para 40] [664-A-B-C-F]

Jagdish Singh v. Madhuri Devi, **2008 (6) SCR 1176 = AIR 2008 SC 2296;** *Dharamvir v. Amar Singh*, **1996 (2) SCR 156 = AIR 1996 SC 2314;** *Santosh Hazari v. Purushottam Tiwai (Dead) by Lrs.* **2001 (1) SCR 948 = AIR 2001 SC 965;** *G. Amalorpavam & Ors. v. R.C. Diocese of Madurai & Ors*. **2006 (2) SCR 899 = (2006) 3 SCC 224;** *Santosh Hazari v. Purushottam Tiwari*, **2001 (1) SCR 948 = (2001) 3 SCC 179;** *Union of India & Anr. v. Ranchod & Ors.,* **2007 (12) SCR 873 = AIR 2008 SC 938;** *Ashish Batham v. State of Madhya Pradesh*, **2002 (2) Suppl. SCR 146 = AIR 2002 SC 3206; and** *Rathinam alias Rathinam v. State of Tamil Nadu & Anr.* **2010 (11) SCR 871 = (2011) 11 SCC 140 - referred to.**

Case Law Reference

2001 (1) SCR 1028	**referred to**	**para 8**
2008 (3) SCR 833	**referred to**	**para 8**
AIR 1936 P.C. 147	**referred to**	**para 9**
1953 SCR 939	**referred to**	**para 9**
1959 Suppl. SCR 781	**referred to**	**para 9**
1968 SCR 639	**referred to**	**para 9**
14 Moo. Ind. App. 570	**referred to**	**para 10**
2006 (10) Suppl. SCR 628	**referred to**	**para 12**
2011 (7) SCR 817	**referred to**	**para 12**
1959 Suppl. SCR 406	**referred to**	**para 13**
1963 SCR 440	**referred to**	**para 13**

1966 SCR 153	**referred to**	**para 17**
1999 (2) SCR 541	**referred to**	**para 19**
2012 (1) SCR 573	**referred to**	**para 20**
2007 (5) SCR 890	**referred to**	**para 21**
1971 (1) SCR 101	**referred to**	**para 22**
2010 (14) SCR 339	**referred to**	**para 24**
1957 SCR 981	**referred to**	**para 30**
1994 AIR 1251	**referred to**	**para 30**
2003 (4) Suppl. SCR 767	**referred to**	**para 30**
AIR 2007 SC (Supp) 100	**referred to**	**para 30**
2008 (1) SCR 781	**referred to**	**para 30**
2010 (8) SCR 1036	**referred to**	**para 30**
2011 (11) SCR 377	**referred to**	**para 30**
JT 2013(1) SC 222	**referred to**	**para 30**
1994 AIR 226	**referred to**	**para 31**
1998 (1) SCR 948	**referred to**	**para 31**
2001 (1) Suppl. SCR 442	**referred to**	**para 31**
2005 (1) SCR 612	**referred to**	**para 31**
1988 (2) Suppl. SCR 310	**referred to**	**para 34**
1950 SCR 781	**referred to**	**para 34**
2008 (6) SCR 1176	**referred to**	**para 35**
1996 (2) SCR 156	**referred to**	**para 35**
2001 (1) SCR 948	**referred to**	**para 35**
2006 (2) SCR 899	**referred to**	**para 35**

2001 (1) SCR 948	**referred to**	**para 36**
2007 (12) SCR 873	**referred to**	**para 36**
2002 (2) Suppl. SCR 146	**referred to**	**para 39**
2010 (11) SCR 871	**referred to**	**para 39**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2058 of 2003.

From the Judgment & Order dated 09.02.2001 of the High Court of Bombay at Aurangabad in Second Appeal No. 906 of 1980.

Aarohi Bhalla, Subodh S. Patil, Sujata Kurdukar for the Appellant.

Aniruddha P. Mayee, Devansh A. Mohta, Shishir Deshpande, Amit Yadav, Kaushal Naryan Mishra, Yash Pal Dhingra for the Respondent.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. This appeal has been preferred against the impugned judgment and order dated 9.2.2001, passed by the High Court of Judicature at Bombay (Aurangabad Bench) in Second Appeal No. 906 of 1980, by way of which the High Court has affirmed the judgment and order of the First Appellate Court in Regular Civil Appeal No. 92 of 1977, dismissing Civil Suit No. 52 of 1971, which stood allowed by the trial court vide judgment and decree dated 15.3.1977.

2. The facts and circumstances giving rise to this appeal are :

A. One Narayanbuva Gosavi, a descendant of Shri Sant Eknath Maharaj was vested with the exclusive right to carry the Palki and Padukas of Sri Sant Eknath Maharaj from Paithan to Pandharpur at the time of Ashadi Ekadashi. He died in 1951,

leaving behind his widow, namely, Smt. Laxmibai. Krishnabuva. Brother of Narayanbuva had pre-deceased him leaving behind his widow, Smt. Gopikabai.

B. After the death of Narayanbuva, the appellant Smt. Laxmibai, was vested with the exclusive right to carry the Palki and Padukas. The respondents herein, who are also descendants of Sri Sant Eknath Maharaj, served notice dated 6.5.1971 upon Shri Vasant Bhagwant Pandav, stating that he must not give his son Raghunath, aged 8 years, in adoption to Smt. Laxmibai.

C. On 10.5.1971, some of the respondents herein, filed Civil Suit No. 47 of 1971 against Shri Vasant Bhagwant Pandav, Smt. Laxmibai and Smt. Gopikabai, restraining them from effectuating the adoption of Raghunath. The aforementioned suit was withdrawn subsequently, in September 1974.

It was during the pendency of the said suit filed by the respondents, that on 11.5.1971, Raghunath was adopted by Smt. Laxmibai after the performance of all requisite ceremonies which were conducted in the presence of a huge crowd, wherein the process of giving and taking of the child by the parents of Raghunath and by Smt. Laxmibai respectively, was held. The ceremony was performed by a priest, and several photographs were also taken on this occasion. On the same day, an adoption deed was executed and registered in this respect, and the said deed was duly signed by seven witnesses. Owing to the fact that the respondents had tried to create some hindrance in the performance of the duties of the appellants, in relation to carrying the Palki and Padukas, Smt. Laxmibai and Smt. Gopikabai filed Suit No. 52 of 1971, against the respondents seeking a decree of perpetual injunction preventing them from causing any obstruction or interference in the exercise of their exclusive rights, on 14.6.1971.

D. The suit was contested by the respondents and a large number of issues were framed. The trial court decreed the suit, holding that the adoption of Raghunath by Smt. Laxmibai was valid; that the adoption deed was a legal document which could in fact, be relied upon; that the ceremony of giving and taking of the child and that performance of all other religious ceremonies was conducted ; and also that photographs taken at the time of adoption could be relied upon. The said adopted child Raghunath, inherited all the property of Smt. Laxmibai when she died before the trial of the suit even commenced. The inheritance was held to be valid, as it was held that there was no custom of adopting of a male child only from within the said family and, consequently, the adoption of Raghunath by Smt. Laxmibai from outside, was upheld.

E. Aggrieved, the respondents preferred Civil Appeal No. 92 of 1977 and for certain reliefs, the appellants also filed a cross appeal. Various points were considered by the First Appellate Court, after which, the decree of the Civil Court was reversed vide judgment and decree dated 1.8.1980, by which it was held that the respondents had proved, that there did in fact exist a custom which prohibited the taking of a male child in adoption from outside. The adoption itself was suspicious as independent witnesses were not examined. The witnesses who proved the validity of the adoption were interested witnesses, and the adoption deed was also suspicious.

F. Aggrieved, the appellants preferred a Second Appeal, which was dismissed by the High Court vide impugned judgment concurring with the First Appellate Court.

Hence, this appeal.

3. Shri Aarohi Bhalla, learned counsel appearing for the appellants, has submitted that there is a presumption of validity with respect to the registered adoption deed under Section 16 of Hindu Adoptions and Maintenance Act, 1956 (hereinafter referred to as 'the Act 1956'). Therefore, the appellate courts

committed an error in doubting the validity of the registered adoption deed. The burden of rebutting the aforementioned presumption which was on the respondents, was not discharged effectively, as they examined only two witnesses, Narharibuva (DW.1) and Somnath (DW.2), and neither of them made any reference to the said deed at all. Therefore, in the absence of any attempt on the part of the respondents to rebut the said presumption, holding that the adoption deed was suspicious, is not sustainable. The appellate courts have categorically held, that in the past 375 years, a total of four adoptions have taken place, and that it was only in each of these cases that a male child from within the family was adopted, and not one from outside. Thus, the appellate courts committed an error in holding that there was a custom to this effect. In the absence of any evidence, a statement alleging that either one of the said adoptive parents wanted to take a child in adoption from outside, and that the same was attempted, must not be accepted. Moreover, the occurance of only four instances, over a period of almost four centuries, is not sufficient to establish the existence of a custom. The non-examination of Smt. Laxmibai during the trial of the suit on account of her death, prior to the commencement of the trial, cannot be taken as a circumstance against the appellants. Thus, the appellate courts have erred in taking such a perverse view. The photographer present at the adoption ceremony, who was examined by the appellants before the trial court, was not asked any questions in the cross-examination by the respondents, with respect to any doubts they had regarding the genuineness of either the negatives, or the photographs of the ceremony. In the absence of resorting to such a course by the respondents, the appellate courts could not have drawn any adverse inference as regards his deposition, particularly when the photographer had proved the existence and validity of both the negatives, and the photographs. Thus, the judgments and decrees of the appellate courts are liable to be set aside, and the judgment of the trial court deserves to be restored.

4. Per contra, Shri Aniruddha P. Mayee and Shri Devansh A. Mohta, learned counsel appearing for the respondents, have opposed the appeal, contending that the first appellate court has the right to re-appreciate all material on record, after which it has rightly reached a conclusion as regards the suspicious nature of the adoption deed and adoption ceremonies, and has also rightly concluded, that since over a period of 375 years only four adoptions have taken place, and as in each case, a male child was adopted only from within the family, there certainly existed a custom which did not permit the adoption of a male child from outside the family. Such findings do not warrant any interference by this court. The appeal lacks merit, and is therefore, liable to be dismissed.

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

6. Section 3(a) of the Act 1956 defines 'custom' as follows:

"*The expressions, 'custom' and 'usage' signify any rule which, having been continuously and uniformly observed for a long time, has obtained the force of law among Hindus in any local area, tribe, community, group or family:*

Provided that the rule is certain and not unreasonable or opposed to public policy: and

Provided further that, in the case of a rule applicable only to a family, it has not been discontinued by the family".

7. Custom is an established practice at variance with the general law. A custom varying general law may be a general, local, tribal or family custom. A general custom includes a custom common to any considerable class of persons. A custom which is applicable to a locality, tribe, sect or a family is called a special custom.

Custom is a rule, which in a particular family, a particular class, community, or in a particular district, has owing to prolonged use, obtained the force of law. Custom has the effect of modifying general personal law, but it does not override statutory law, unless the custom is expressly saved by it.

Such custom must be ancient, uniform, certain, continuous and compulsory. No custom is valid if it is illegal, immoral, unreasonable or opposed to public policy. He who relies upon custom varying general law, must plead and prove it. Custom must be established by clear and unambiguous evidence.

8. In *Dr. Surajmani Stella Kujur v. Durga Charan Hansdah* AIR 2001 SC 938, this Court held that custom, being in derogation of a general rule, is required to be construed strictly. A party relying upon a custom, is obliged to establish it by way of clear and unambiguous evidence. (Vide: *Salekh Chand (Dead) thr. Lrs. v. Satya Gupta & Ors.* (2008) 13 SCC 119).

9. A custom must be proved to be ancient, certain and reasonable. The evidence adduced on behalf of the party concerned must prove the alleged custom and the proof must not be unsatisfactory and conflicting. A custom cannot be extended by analogy or logical process and it also cannot be established by a priori method. Nothing that the Courts can take judicial notice of needs to be proved. When a custom has been judicially recognised by the Court, it passes into the law of the land and proof of it becomes unnecessary under Section 57(1) of the Evidence Act, 1872. Material customs must be proved properly and satisfactorily, until the time that such custom has, by way of frequent proof in the Court become so notorious, that the Courts take judicial notice of it. (See also: *Effuah Amissah v. Effuah Krabah,* AIR 1936 P.C. 147; *T. Saraswati Ammal v. Jagadambal & Anr.,* AIR 1953 SC 201; *Ujagar Singh v. Mst. Jeo,* AIR 1959 SC 1041; and *Siromani v. Hemkumar & Ors.,* AIR 1968 SC 1299)**.**

10. In *Ramalakshmi Ammal v. Sivanatha Perumal Sethuraya,* 14 Moo. Ind. App. 570, it was held: "It is essential that special usage, which modifies the ordinary law of succession is ancient and invariable; and it is further essential that such special usage is established to be so, by way of clear and unambiguous evidence. It is only by means of such evidence, that courts can be assured of their existence, and it is also essential that they possess the conditions of antiquity and certainty on the basis of which alone, their legal title to recognition depends."

11. In *Salekh Chand* (supra), this Court held as under:

"Where the proof of a custom rests upon a limited number of instances of a comparatively recent date, the court may hold the custom proved so as to bind the parties to the suit and those claiming through and under them.

All that is necessary to prove is that the usage has been acted upon in practice for such a long period and with such invariability as to show that it has, by common consent, been submitted to as the established governing rule of a particular locality. *A custom may be proved by general evidence as to its existence by members of the tribe or family who would naturally be cognizant of its existence, and its exercise without controversy."*

12. In *Bhimashya & Ors. v. Smt. Janabi @ Janawwa,* (2006) 13 SCC 627, this Court held:

"A custom is a particular rule which has existed either actually or presumptively from time immemorial, and has obtained the force of law in a particular locality, although contrary to or not consistent with the general common law of the realm……it must be certain in respect of its nature generally as well as in respect of the locality

where it is alleged to obtain and the persons whom it is alleged to affect.

xx xx xx xx

Custom is authoritative, it stands in the place of law, and regulates the conduct of men in the most important concerns of life; fashion is arbitrary and capricious, it decides in matters of trifling import; manners are rational, they are the expressions of moral feelings. Customs have more force in a simple state of society. Both practice and custom are general or particular but the former is absolute, the latter relative; a practice may be adopted by a number of persons without reference to each other; but a custom is always followed either by limitation or prescription; the practice of gaming has always been followed by the vicious part of society, but it is to be hoped for the honour of man that it will never become a custom."

(See also: *Ram Kanya Bai & Anr. v. Jagdish & Ors.* AIR 2011 SC 3258).

13. Adoption is made to ensure spiritual benefit for a man after his death. The primary object of adoption was to gratify ancestors' by means of annual offerings, and therefore it was considered necessary that the offerer, must as far as possible be a reflection of the real descendant, and must look as much like a real son as possible, and must certainly not be one, who could never have been a son. *Therefore, the present body of rules has evolved out of a phrase of Saunaka, which emphasizes that an adopted male, must be 'the reflection of a son'.* (Vide: Gherulal Parakh v. Mahadeodas Maiya, AIR 1959 SC 781; and *V.T.S. Chandrashekhara Mudaliar (Dead thr. Lrs.) & Ors. v. Kulandaivelu Mudaliar,* AIR 1963 SC 185).

14. So far as the present case is concerned, the trial court, after appreciating the evidence on record regarding custom,

came to the conclusion that the evidence led by the defendants/respondents revealed, that over a period of 375 years, there had arisen only 4 occasions, when an adoption had taken place, and in each of these cases, a male child from the same family was adopted. It therefore, did not establish the existence of any custom. Moreover, while serving notice dated 6.5.1971 upon Vasant Bhagwant Pandav, the natural father of Raghunath, asking him not to give his son in adoption, the defendants/respondents made no reference to the existence of any such special custom in their family. The documents submitted on record also did not reveal the existence of any such custom prevailing in their family, and no reference was ever made in this regard by them in their pleadings. The burden of proof with respect to this issue, was placed upon the defendants/respondents, which they failed to discharge. The First Appellate Court rejected the argument of the appellants/ plaintiffs, to the effect that the issue of the existence of such custom, was neither specifically pleaded, nor proved, by the defendants/respondents. After considering a large number of cases decided by various courts, the High Court while deciding Second Appeal reached the conclusion that there was, in fact, a special custom that existed, which required the taking of a child from within the same family.

15. We have appreciated the evidence on record, and are of the view that in the present case, only four adoptions have taken place over a time-span of 375 years and even though each time, a male child was taken from within the same family, the same may merely have been done as a matter of convenience, and may additionally also be only to prevent the property of the family, from going to an outsider. There is nothing on record to establish that a child from outside the family could not have been adopted, or that any such attempt was ever made, but was resisted and discarded. The respondents/defendants could not establish that a male child from outside the family could not be adopted. Thus, in view of the fact that the defendants/respondents have never made any

reference with respect to the existence of a custom prohibiting the adoption of a child from outside the family, either in the notice served by them on 6.5.1971 upon Vasant Bhagwant Pandav, or in their written statement, the mere fact that it may only be for the sake of convenience, that a child was taken in adoption from within the same family on each of the four occasions over a period of 375 years, would not be sufficient to establish the existence of a custom in this regard, for the reason that custom cannot be proved by way of logic or analogy. Thus we hold, that the finding recorded by the Appellate Courts on this issue, is not based on any evidence, and that the appellate courts have committed an error in holding that the defendants/respondents have successfully proved the existence of such special family custom. The appellate courts have failed to appreciate that a negative fact cannot be proved by adducing positive evidence. This is not a case where there have been adequate judicial pronouncements on the said issue previously, of which the court could have taken judicial notice.

Special customs; which prevail in a family, a particular community etc., require strict proof and the defendants/ respondents have failed to prove the same.

Section 10 of the Act 1956, provides that a child upto the age of 15 years can be taken in adoption. Section 11 thereof prescribes, that in the event that a female adopts a male child, there must be a difference of 21 years between the age of the female and that of the adoptive child. In the event that there is a registered adoption deed, there is a presumption of validity with respect to the said adoption. If these tests are applied, the following situation emerges:

The adopted child was 8 years of age at the time of adoption. Laxmibai, the adoptive mother, was 70 years of age at the relevant time and there is in fact, a registered adoption deed. Therefore, there is a presumption under Section 16 of the Act 1956, to the effect that the aforementioned adoption has been made in compliance with the provisions of the Act, 1956

until and unless such presumption is disproved. In the event that a person chooses to challenge such adoption, the burden of proof with respect to rebutting the same, by way of procedures accepted by law, is upon him. In the instant case, the defendants/respondents never made any attempt whatsoever, to rebut the presumption under Section 16 of the Act 1956. The defendants have examined two witnesses, namely Narharibuva (DWI) and Somnath (DW2). We have been taken through their depositions, in which there has been no reference whatsoever to the registered adoption deed, let alone any attempt of rebuttal. Therefore, the defendants/respondents have failed to discharge the burden of rebuttal placed upon them, with respect to the presumption of validity of adoption under Section 16 of the Act 1956.

16. Undoubtedly, the court while construing a document, is under an obligation to examine the true purport of the document and draw an inference with respect to the actual intention of the parties. The adoption deed was registered on 11.5.1971, and the same provided complete details stating that the adopted child was 8 years of age, and that the adoptive mother was an old lady of 70 years of age. The adoptive child was related to Smt. Laxmibai. Her husband had expired in 1951 and it had been his desire to adopt a son in order to perpetuate the family line and his name. The natural parents of the adoptive child had agreed to give their child in adoption, and for the purpose of the same, the requisite ceremony for a valid adoption was conducted, wherein the natural parents, Vasant Bhagwant Pandav and Smt. Sushilabai Vasantrao Pandav, placed the adoptive child in the lap of the adoptive mother, in the presence of a large number of persons, including several relatives. A religious ceremony called "Dutta Homam", involving vedic rites was performed by a pandit, and photographs of the said occasion were also taken. Registration of the adoption deed was done on the same day, immediately after its execution, before the concerned Registrar. The adoptive mother put her thumb impression on the deed, and it was also

signed by the natural parents of the child. Additionally, the deed was signed by 7 witnesses, and all the parties have been identified. The registered document when read as a whole, makes it evident that Vasant Bhagwant Pandav and Smt. Sushilabai, the natural parents of the adoptive child, have signed the same as attesting witnesses, and not as executing parties.

17. It has been laid down that it would defy common sense, if a party to a deed could also attest the same. Thus, a party to an instrument cannot be a valid attesting witness to the said instrument, for the reason, that such party cannot attest its own signature. (Vide: *Kumar Harish Chandra Singh Deo & Anr. v. Bansidhar Mohanty & Ors.,* AIR 1965 SC 1738).

18. A document must be construed, taking into consideration the real intention of the parties. The substance, and not the form of a document, must be seen in order to determine its real purport.

19. In *Delta International Limited v. Shyam Sundar Ganeriwalla & Anr.,* AIR 1999 SC 2607, this Court held that the intention of the parties is to be gathered from the document itself. Intention must primarily be gathered from the meaning of the words used in the document, except where it is alleged and proved that the document itself is a camouflage. If the terms of the document are not clear, the surrounding circumstances and the conduct of the parties have also to be borne in mind for the purpose of ascertaining the real relationship between the parties. If a dispute arises between the very parties to the written instrument, then intention of the parties must be gathered from the document by reading the same as a whole.

20. In *Vodafone International Holdings B.V v. Union of India & Anr.,* (2012) 6 SCC 613, while dealing with a similar situation, this Court held:

"The Court must look at a document or a transaction in

a context to which it properly belongs to. While obliging the court to accept ***documents*** *or transactions, found to be genuine, as such, it does not compel the court to* ***look at*** *a* ***document*** *or a transaction in blinkers, isolated from any context to which it properly belongs.*

If it can be seen that a ***document*** *or transaction was intended to have effect as part of a nexus or series of transactions, or as an ingredient of a wider transaction intended as a whole, there is nothing in the doctrine to prevent it being so regarded; to do so in* ***not to prefer form to substance, or substance to form.*** *It is the task of the court to ascertain the legal nature of any transaction to which it is sought to attach a tax or a tax consequence and if that emerges from a series or combination of transactions intended to operate as such, it is that series or combination which may be regarded." (emphasis added)*

21. In *S.T. Krishnappa v. Shivakumar & Ors.,* (2007) 10 SCC 761, this Court observed that the "**adoption deed**" must be read as a whole and that on reading the same in such a way, the intention of the parties with respect to whether the adoptive father/mother wanted to make an adoption according to law and not merely, to appoint an heir, must be clearly established.

22. In *Debi Prasad (dead) by L.Rs. v. Smt. Tribeni Devi,* AIR 1970 SC 1286, this Court held that the giving and receiving are absolutely necessary to the validity of an adoption. All that is required is that the natural father be asked by the adoptive parent to give his son in adoption, and that the boy be handed over and taken for this purpose.

Furthermore, in *Mst. Deu & Ors. v. Laxmi Narayan & Ors.,* (1998) 8 SCC 701, the presumption of registered documents under Section 16 of the Act was discussed. It was held that in view of Section 16, wherever any document registered under

any law is produced before any court purporting to record an adoption made, and the same is signed by the persons mentioned therein, the court shall presume that the said adoption has been made in compliance with the provisions of the Act, until and unless such presumption is disproved. It was further held, that in view of Section 16 it is open for a party to attempt to disprove the deed of adoption by initiating independent proceedings.

23. Mere technicalities therefore, cannot defeat the purpose of adoption, particularly when the defendants/ respondents have not made any attempt to disprove the said document. No reference was ever made either by them, or by their witnesses, to this document i.e. registered adoption deed. Undoubtedly, the natural parents had signed alongwith 7 witnesses and not at the place where the executants could sign. But it is not a case where there were no witnesses except the executants. Instead of two witnesses, seven attesting witnesses put their signatures.

24. In *Atluri Brahmanandam (D), Thr. LRs. v. Anne Sai Bapuji,* AIR 2011 SC 545, the Court held:

"The aforesaid deed of adoption was produced in evidence and the same was duly proved in the trial by the evidence led by PW-1, the respondent. We have carefully ***scrutinized the cross-examination of the said witness.*** *In the entire cross-examination,* ***no challenge was made by the appellant herein either to the legality of the said document or to*** *the* ***validity*** *of the same. Therefore, the said registered* ***adoption deed*** *went unrebutted and unchallenged.*

We have already referred to the recitals in the said documents which is a registered document and according to the recitals therein, the respondent was legally and validly adopted by the adoptive father. Since the aforesaid custom and aforesaid adoption was also recorded in a

registered deed of adoption, the Court has to presume that the adoption has been made in compliance with the provisions of the Act, since the respondent has utterly failed to challenge the said evidence and also to disprove the aforesaid adoption." (emphasis added)

25. The appellate courts could therefore, not have drawn any adverse inference against the appellants/plaintiffs on the basis of a mere technicality, to the effect that the natural parents of the adoptive child had acted as witnesses, and not as executors of the document. Undoubtedly, adoption disturbs the natural line of succession, owing to which, a very heavy burden is placed upon the propounder to prove the adoption. However, this onus shifts to the person who challenges the adoption, once a registered document recording the adoption, is brought before the court. This aspect must be considered taking note of various other attending circumstances i.e., evidence regarding the religious ceremony (giving and taking of the child), as the same is a *sine qua non* for valid adoption.

26. The trial court in this regard, has held that the fact that the natural parents of the adoptive child had signed alongwith seven other witnesses as attestants to the deed, and not as its executors, would not create any doubt regarding the validity of the adoption, or render the said registered document invalid, as they possessed sufficient knowledge with regard to the nature of the document that they were executing, and that additionally, no challenge was made to the registration of the document, immediately after its execution. The First Appellate Court took note of the deposition of Shri Vasant Bhagwantrao Pandav (PW-1), who had deposed that the adoption deed had been scribed, and that the signatures of the parties and witnesses to the deed had been taken on the same, only after the contents of the said document had been read over to Smt. Laxmibai, the adoptive mother, and then to all parties present. Smt. Laxmibai, appellant/plaintiff was in good health, both physically and mentally, at the time of the adoption. The validity

of the adoption deed, however, was being challenged on the basis of the mere technicality, that only interested witnesses had been examined and the court finally rejected the authenticity of the said document, observing that witnesses who wanted to give weight to their own case, could not be relied upon.

27. The appellate courts further held that the adoption deed had neither been properly executed, nor satisfactorily proved, and that as the adoption remains a unilateral declaration by the appellants/plaintiffs, owing to the fact that the natural parents of the adopted child, had not signed the adoption deed as executors but as witnesses, the same could not be held to be a valid deed. Undoubtedly, a mere signature or thumb impression on a document is not adequate with respect to proving the contents of a document, but in a case where the person who has given his son in adoption, appears in the witness box and proves the validity of the said document, the court ought to have accepted the same, taking into consideration the presumption under Section 16 of the Act 1956, and visualising the true purport of the document, without going into such technicalities. This must be done particularly in view of the fact that the defendants/respondents have not made even a single attempt to challenge the validity of the said document. In fact, they have not made any reference to the same. We have no hesitation in holding that the document was valid, and that the same could not have been discarded by the appellate courts.

28. There is ample evidence on record to prove the occurrence of the giving and taking ceremony. The trial court, after appreciating such evidence, found the same to be a valid ceremony. The appellate courts have expressed their doubts only with reference to the fact that the witnesses that were examined in court, were all beneficiaries of the said adoption. Shri Vithal Pandit Mahajan (PW-4), by any means, cannot be labeled as an interested witness. He was a freedom fighter, who worked in the Hyderabad Liberation Movement. He was

a medical man by profession, and was also involved in public life. He was not therefore, likely to be influenced by any of the parties, and he had duly supported the case of the appellants/ plaintiffs regarding the adoption ceremony. The appellate courts adopted a rather unusual course, and drew adverse inference on the basis of the non-examination of the appellant/plaintiff, Smt. Laxmibai, observing that considering her old age, she could have taken recourse to the procedure, prescribed under Order XVIII Rule 16, Code of Civil Procedure, 1908, which lays down, that where a witness is about to leave the jurisdiction of the court, or where some other **sufficient cause** is shown to the court owing to which it would be prudent for it to ensure that his evidence is taken immediately, the court may, upon the application of the party or of the witness at any time after the institution of the suit, take the evidence of such witness/party, in the manner provided therein.

The appellant was just above 70 years of age and hale and hearty. She was not suffering from any serious ailment e.g. cancer or has been on death bed. Thus, there was no occasion for her to file an application under Order XVIII Rule 16 CPC which provides for taking evidence *De Bene Esse* for recording statement prior to the commencement of the trial. Mere apprehension of death of a witness cannot be a **sufficient cause** for immediate examination of a witness. Apprehension of a death applies to each and every witness, he or she, young or old, as nobody knows what will happen at the next moment. More so, it is the discretion of the court to come to a conclusion as to whether there is a **sufficient cause** or not to examine the witness immediately.

We are of the view that had Smt. Laxmibai moved such an application, the trial court could not have allowed it after considering the aforesaid facts.

29. Admittedly, before the trial commenced, Smt. Laxmibai had died. The other witnesses who entered the witness box however, proved the adoption ceremony and adoption deed.

Smt. Gopikabai was not examined. Thus, the question that arises is whether the court has to weigh or count the evidence and also whether a deposition of a witness is to be doubted merely on the ground that the witness happened to be related to the plaintiff.

30. In the matter of appreciation of evidence of witnesses, it is not the number of witnesses but quality of their evidence which is important, as there is no requirement in law of evidence that any particular number of witnesses is to be examined to prove/disprove a fact. It is a time- honoured principle, that evidence must be weighed and not counted. The test is whether the evidence has a ring of truth, is cogent, credible and trustworthy or otherwise. The legal system has laid emphasis on value provided by each witness, rather than the multiplicity or plurality of witnesses. It is quality and not quantity, which determines the adequacy of evidence as has been provided by Section 134 of the Evidence Act. Where the law requires the examination of at least one attesting witness, it has been held that the number of witnesses produced, do not carry any weight. (Vide: *Vadivelu Thevar v. State of Madras;* AIR 1957 SC 614; *Jagdish Prasad v. State of M.P.* AIR 1994 SC 1251; *Sunil Kumar v. State Govt. of NCT of Delhi* AIR 2004 SC 552; *Namdeo v. State of Maharashtra* AIR 2007 SC (Supp) 100; *Kunju @ Balachandran v. State of Tamil Nadu,* AIR 2008 SC 1381; *Bipin Kumar Mondal v. State of West Bengal* AIR 2010 SC 3638; *Mahesh & Anr. v. State of Madhya Pradesh* (2011) 9 SCC 626; *Kishan Chand v. State of Haryana* JT 2013 (1) SC 222).

31. Furthermore, there cannot be any dispute with respect to the settled legal proposition, that if a party wishes to raise any doubt as regards the correctness of the statement of a witness, the said witness must be given an opportunity to explain his statement by drawing his attention to that part of it, which has been objected to by the other party, as being untrue. Without this, it is not possible to impeach his credibility. Such

a law has been advanced in view of the statutory provisions enshrined in Section 138 of the Evidence Act, 1872, which enable the opposite party to cross-examine a witness as regards information tendered in evidence by him during his initial examination in chief, and the scope of this provision stands enlarged by Section 146 of the Evidence Act, which permits a witness to be questioned, *inter-alia*, in order to test his veracity. Thereafter, the unchallenged part of his evidence is to be relied upon, for the reason that it is impossible for the witness to explain or elaborate upon any doubts as regards the same, in the absence of questions put to him with respect to the circumstances which indicate that the version of events provided by him, is not fit to be believed, and the witness himself, is unworthy of credit. Thus, if a party intends to impeach a witness, he must provide adequate opportunity to the witness in the witness box, to give a full and proper explanation. The same is essential to ensure fair play and fairness in dealing with witnesses. (See: *Khem Chand v. State of Himachal Pradesh,* AIR 1994 SC 226; *State of U.P. v. Nahar Singh (dead) & Ors.*, AIR 1998 SC 1328; *Rajinder Pershad (Dead) by L.Rs. v. Darshana Devi (Smt.),* AIR 2001 SC 3207; and *Sunil Kumar & Anr. v. State of Rajasthan,* AIR 2005 SC 1096).

32. Binorkar (PW-2), photographer was examined by the appellant, and he deposed that he was engaged by Laxmibai, the appellant, to take photographs of the 'Datta Homam' ceremony on 11.5.1971. He narrated the manner in which the adoption ceremony had taken place, and further stated that one another photographer had also been present at the said ceremony. He further deposed that he had developed the photographs taken by him, and also identified the photographs produced under exhibit 112/18. Photographs marked as serial nos.11, 12 and 13, alongwith their negatives, were produced by him in court. Thus, the photographs as exhibits 251, 252 and 253 were admitted in evidence. He also proceeded to identify Laxmibai appellant, and the adopted son in these photographs, as also Vasantrao, who was present in court and stated that

he had in fact, been present at the time of adoption. He was cross-examined thoroughly, and was asked a large number of questions regarding his dealings with clients. However, in the course of the cross-examination, he was not asked whether he had followed the practices mentioned by him in the case of Laxmibai as well. He denied suggestions made to him with respect to whether the aforesaid photographs had been developed by him by resorting to trick photography, in view of the fact that he had certain obligations towards Vasantrao Pandav, on account of financial assistance provided to him by the latter. The trial Court found his deposition worthy of reliance, taking note of the fact that once he had deposed that he had himself taken the photographs, and had also developed the negatives, there was no reason to doubt his veracity. It was not put to him in the cross-examination, whether, for the purpose of making or preparing enlarged prints of the photographs from the negatives thereof, the negatives themselves were also required to be enlarged. Moreover, the defendants/respondents did not examine any expert on this point, who could have provided clarity with respect to whether the aforesaid negatives of the photographs of which enlarged prints were taken, were also required to be enlarged. It was in this backdrop that his version was found to be correct, and that the same came to support the case of the validity of the adoption.

33. The First Appellate Court dealt with the same issue and doubted the veracity thereof, on the ground that there was another photographer as per the version of events provided by this witness, who was not examined. Therefore, the occasion itself was deemed suspicious. Furthermore, the photographer failed to produce the record of his studio to show that he had been called to photograph the said occasion, or that any order was given to him in this connection. In such circumstances, it was difficult to hold that he had in fact been engaged for the purpose of taking photographs of the adoption ceremony and the entire testimony of Binorkar (PW-2) became doubtful. The photographs produced in court, did not contain a stamp and

date on their rear side, to show for holding that they were prepared at a particular juncture, as per the instructions of the appellants/plaintiffs. The photographs were of different sizes. The First Appellate Court also doubted the enlargement of the said photographs. In addition to this, he was labeled as an interested witness merely on the basis of a statement made by him, stating that he wished that Raghunath be recognised as the adopted son of Laxmibai. The witness (PW-2), produced only 3 undeveloped negatives, even though he had stated that he had taken a total of 15 photographs.

34. In *Smt. Rajbir Kaur & Anr. v. M/s. S. Chokosiri & Co.,* AIR 1988 SC 1845, this Court held that the trial Court is the best judge of evidence. Furthermore, in *Sarju Pershad Ramdeo Sahu v. Jwaleshwari Pratap Narayan Singh & Ors.,* AIR 1951 SC 120, this Court held, that when there is conflict of oral evidence of the parties on any matter in issue and the decision hinges upon the credibility of the witnesses, then unless there is some special feature about the evidence of a particular witness which has escaped the trial Judge's notice, or where there is a sufficient balance of improbability to displace his opinion as to where credibility lies, the appellate court must interfere with the finding of the trial Judge on a question of fact.

35. In *Jagdish Singh v. Madhuri Devi,* AIR 2008 SC 2296, this Court held:

> *"When there is a conflict of oral evidence on any matter in issue and its resolution turns upon the credibility of the witnesses, the general rule is that the appellate court should permit the findings of fact rendered by the trial court to prevail unless it clearly appears that some special feature about the evidence of a particular witness has escaped the notice of the trial court or there is a sufficient balance of improbability to displace its opinion as to where the credibility lies.... When the Court of original jurisdiction has considered oral evidence and recorded findings after seeing the demeanour of witnesses and having applied its mind, the appellate court is enjoined to keep that fact in mind. It has to deal with the reasons recorded and conclusions arrived at by the trial court. Thereafter, it is certainly open to the appellate court to come to its own conclusion if it finds that the reasons which weighed with the trial Court or conclusions arrived at were not in consonance with law."*

(See also: *Dharamvir v. Amar Singh,* AIR 1996 SC 2314; *Santosh Hazari v. Purushottam Tiwai (Dead) by Lrs.,* AIR 2001 SC 965; and *G. Amalorpavam & Ors. v. R.C. Diocese of Madurai & Ors.* (2006) 3 SCC 224)

36. Similarly, in *Santosh Hazari v. Purushottam Tiwari,* (2001) 3 SCC 179, this Court observed :

> *"The appellate Court has jurisdiction to reverse or affirm the findings of the trial Court. First appeal is a valuable right of the parties and unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. .....While writing a judgment of reversal the appellate Court must remain conscious of two principles. Firstly, the findings of fact based on conflicting evidence arrived at by the trial Court must weigh with the appellate Court, more so when the findings are based on oral evidence recorded by the same Presiding Judge who authors the judgment. This certainly does not mean that when an appeal lies on facts, the appellate Court is not competent to reverse a finding of fact arrived at by the trial Judge. As a matter of law if the appraisal of the evidence by the trial Court suffers from a material irregularity or is based on inadmissible evidence or on conjectures and surmises, the appellate Court is entitled to interfere with the finding of fact."*

(See also: *Union of India & Anr. v. Ranchod & Ors.,* AIR 2008 SC 938)

37. There is no prohibition in law for the appellate court to reappreciate the evidence where compelling and substantial reasons exist. The findings can also be reversed, in case convincing material has been unnecessarily and unjustifiably stood eliminated from consideration. However, the evidence is to be viewed collectively. The statement of a witness must be read as a whole as reliance on a mere line in a statement of a witness is not permissible. The judgment of a court can be tested on "touchstone of dispassionate judicial scrutiny based on a complete and comprehensive appreciation of all views of the case, as well as on the quality and credibility of the evidence brought on record". The judgment must not be clouded by the facts of the case.

38. The High Court dealt with an issue and disbelieved the testimony of said witness, observing as under :-

> "Apparently, the photographer did not produce any record whatsoever other than the negative and the photographs. Therefore, the lower appellate Court had rightly concluded that the photographs could not be taken in evidence as the same were not proved as per law for the cogent and proper reasons mentioned therein."

39. Respondents/defendants did not examine any expert to discredit the testimony of their witness. The adoption had taken place on 11.5.1971, and the evidence of Binorkar (PW-2) was recorded on 7.2.1977. Thus, we are of the view that the view taken by the appellate courts is entirely impracticable and does not resonate with the attending circumstances, particularly, when the photographer (PW-2), had denied the suggestion that he had not brought the Account Bill Books etc. of his studio as he had not taken the photographs as stated by him, on 11.5.1971 i.e., the day of adoption. His evidence has also wrongly been doubted because there were two photographers and the other was not examined by the appellants/plaintiffs. It is not permissible to reject evidence on irrelevant grounds. Nor the judgment can be based on surmises

and conjectures. (Vide: *Ashish Batham v. State of Madhya Pradesh,* AIR 2002 SC 3206; and *Rathinam alias Rathinam v. State of Tamil Nadu & Anr.,* (2011) 11 SCC 140)

40. The appellate court has erred by considering the irrelevant material, while the most relevant evidence, i.e., the adoption ceremony and the adoption deed, have been disregarded on the basis of mere surmises and conjectures. The correctness or authenticity of adoption deed is not disputed. What is disputed is that the natural parents of adoptive child who were definitely executing parties of the deed have signed as witnesses alongwith 7 other witnesses. In such a fact-situation, by gathering the intention of the parties and by reading the document as a whole and considering its purport, it can be concluded that the adoption stood the test of law. We think that cause of justice would be served, instead of being thwarted, where there has been substantial compliance of the legal requirements, specified in Section 16 of the Act 1956. When substantial justice and technical considerations are pitted against each other, the cause of substantial justice deserves to be preferred and the courts may in the larger interests of administration of justice may excuse or overlook a mere irregularity or a trivial breach of law for doing real and substantial justice to the parties and pass orders which will serve the interest of justice best.

In view of the above, the appeal succeeds and is allowed. The judgments and decrees of the appellate courts are set aside and judgment and decree of the trial court is restored. There shall be no order as to costs.

R.P. Appeal allowed.

BABUBHAI BHIMABHAI BOKHIRIA & ANR.
v.
STATE OF GUJARAT & ORS.
(CRLMP NO. 20502 OF 2008 AND NO. 24292 OF 2011)
in
Petition for Special Leave to Appeal (Crl.)
No. 9184 of 2008

JANUARY 30, 2013

[T.S. THAKUR AND FAKKIR MOHAMED IBRAHIM KALIFULLA, JJ.]

CONSTITUTION OF INDIA, 1950:

Art. 21 read with s. 319 CrPC – Right to speedy trial – SLP of newly added ccused, referred to Constitution Bench – Court granting stay – Prayer by one of the accused seeking vacation of stay order/grant of bail – Held: Stay order modified to the effect that while stay of trial of newly added accused shall continue qua him only, trial court shall be free to proceed with trial qua other accused persons – Constitution of India, 1950 – Art. 21.

CODE OF CRIMINAL PROCEDURE, 1973:

s. 319 –Power to proceed against other persons appearing to be guilty of offence – Held: The words "could be tried together with the accused" in s. 319(1) appear to be only directory – "Could be" cannot under the circumstances be held to be "must be" and the opinion formed by court on the basis of evidence would not be nullified – Even if addition of new accused is ultimately held to be justified, mere fact that trial of remaining accused had already concluded would not prevent prosecution of newly added accused for offences for which he has been summoned by trial court.

The petition for special leave to appeal arising out of

the order adding the petitioner as a co-accused in a case pending before the Court of Session for offences punishable u/ss 302, 201 read with s.34 and ss. 120-B, 465, 468 and 471 IPC, s.25 of Arms Act and s.135 of Bombay Police Act, was referred to a Constitution Bench. In Crl. Misc. Petition No. 20502 of 2008 filed in the SLP, the Supreme Court, by order dated 17.12.2008 granted stay. Crl. Misc. Petition No. 24292 of 2011 was filed by one of the co-accused seeking to add himself as a party to the instant proceedings and for vacation of the order dated 17.12.2008 by which further steps in the case were stayed. In the alternative the applicant prayed for bail. By order dated 8.12.2011, a three-Judge Bench allowed the prayer for impleadment and directed that grant of bail be considered by the regular Bench. Accordingly, Crl. Misc. Petition No. 20502 of 2008 and Crl. Misc. Petition No. 24292 of 2011 came to be listed before the instant Bench.

Allowing the criminal miscellaneous petitions in part, the Court

HELD: 1.1. A perusal of the order dated 17.12.2008 makes it evident that while the prayer was simply for stay of operation of the High Court's order, the direction issued by this Court stayed further steps in the case. *"Further steps"* **would mean not only stay of the addition of the petitioner but also stay of any further action in relation to the trial which had by that time concluded before the trial court. So long as the petitioner is not tried, pursuant to the order passed against him, he had no objection to the trial court concluding the proceedings against the remaining accused persons. If the petitioner as** *dominus litis* **has no objection to the continuance and conclusion of the trial in his absence *qua* other accused persons and is not, therefore, asking for stay of the trial *qua* everybody, there is no justification for granting him a relief larger than what is prayed for. [para 11] [673-E-F, G-H; 674-A-B]**

1.2. Besides, prosecution has already examined as many as 134 witnesses at the trial. With the addition of the petitioner as accused, all those witnesses shall have to be recalled for a fresh examination and the trial would go on for a few more years. This would in turn mean that the right of the accused to a speedy trial will be in serious jeopardy on account of the entire process being resumed *de novo*. The essence of Art. 21 lies not only in ensuring that no citizen is deprived of his life or personal liberty except according to procedure established by law, but also that such procedure ensures both fairness and an expeditious conclusion of the trial. [para 16 and 18] [676-E-G; 677-G-H]

Hussainara Khatoon and Ors. v. Home Secretary, State of Bihar, Patna **(1980) 1 SCC 91;** *A.R. Antulay v. R.S. Nayak* **1991 (3) Suppl. SCR 325 = (1992) 1 SCC 225; and** *Sher Singh v. State of Punjab* **(1983) 2 SCC 344;** *Javed Ahmed Abdul Hamid Pawala v. State of Maharashtra* **1985 (2) SCR 8 = (1985) 1 SCC 275 and** *Triveni Ben v. State of Gujarat* **1989 (1) SCR 509 = (1989) 1 SCC 678;** *Biswanath Prasad Singh v. State of Bihar* **1994 Supp. (3) SCC 97 and** *Mahendra Lal Das v. State of Bihar and Ors.* **2001 (4) Suppl. SCR 157 = (2002) 1 SCC 149 – referred to.**

1.3. As regards the expression "*could be tried together*" appearing in s.319 Cr.P.C., so as to infer that the newly added accused must be tried along with the accused already sent up for trial, the issue is no longer *res integra.* This Court in *Shashikant Singh's* case held that the words "could be tried together with the accused" in s. 319(1) appear to be only directory. "Could be" cannot under the circumstances be held to be "must be" and the opinion formed by the court on the basis of the evidence would not be nullified. Even if the addition of the petitioner is ultimately held to be justified by the Constitution Bench of this Court, the mere fact that the

trial of the remaining accused has already concluded, would not prevent the prosecution of the petitioner for the offences for which he has been summoned by the trial court. [para 12 and 15] [674-C-D; 675-A-B-C; 676-C-D]

Shashikant Singh v. Tarkeshwar Singh and Anr. **2002 (3) SCR 400 = (2002) 5 SCC 738; and** *Rajendra Singh v. State of U.P. & Anr.* **2007 (8) SCR 834 = (2007) 7 SCC 378 – relied on**

Municipal Corporation of Delhi v. Ram Kishan Rohtagi **1983 (1) SCR 884 = (1983) 1 SCC 1 and** *Michael Machado v. Central Bureau of Investigation* **2000 (1) SCR 981 = (2000) 3 SCC 262 – distinguished**

1.4. In the totality of the circumstances, the order dated 17.12.2008 is modified. It is made clear that while the stay of the trial against the petitioner shall continue *qua* the said petitioner, the trial court shall be free to proceed with the trial *qua* the other accused persons. [para 19] [678-C-D]

Hardeep Singh v. State of Punjab **2008 (15) SCR 735 = AIR 2009 SC 483;** *Shashikant Singh v. Tarkeshwar Singh and Anr.* **2002 (3) SCR 400 = (2002) 5 SCC 738,** *Michael Machado and Anr. v. Central Bureau of Investigation & Anr.* **2000 (1) SCR 981 = (2000) 3 SCC 262 *and*** *Rajendra Singh v. State of U.P. & Anr.* **2007 (8) SCR 834 = (2007) 7 SCC 378 – cited.**

Case Law Reference:

2008 (15) SCR 735	**cited**	**para 4**
2002 (3) SCR 400	**cited**	**para 6**
2000 (1) SCR 981	**cited**	**para 6**
2007 (8) SCR 834	**cited**	**para 6**
2002 (3) SCR 400	**relied on**	**para 12**

1983 (1) SCR 884	**distinguished**	**para 13**
2000 (1) SCR 981	**distinguished**	**para 13**
2007 (8) SCR 834	**relied on**	**para 14**
(1980) 1 SCC 91	**referred to**	**para 16**
1991 (3) Suppl. SCR 325	**referred to**	**para 16**
1983 (2) SCC 344	**referred to**	**para 16**
1985 (2) SCR 8	**referred to**	**para 17**
1989 (1) SCR 509	**referred to**	**para 17**
1994 Supp. (3) SCC 97	**referred to**	**para 17**
2001 (4) Suppl. SCR 157	**referred to**	**para 17**

CRIMINAL APPELLATE JURISDICTION : Crl. M.P. No. 20502 of 2008 & Crl. M.P. No. 24292 of 2011.

IN

SLP (Criminal) No. 9184 of 2008

From the Judgment & Order dated 11.12.2008 of the High Court of Gujarat at Ahmedabad in Special Criminal Application No. 638 of 2008.

Uday U. Lalit, A.M. Singhvi, Shubhraushu Padhi, Virat Popat, Peetibhe Jain, Aniruddha P. Mayee, Huzefa Ahmadi, N.D. Nanavati, B.M. Mangukiya, V.H. Kanara, Mrigank Prabhakar, Ejaz Maqbool, Hemantika Wahi, Jesal, Nandini Gupta, Meenakshi Arora, Pratibha Jain for the appearing parties.

The Judgment of the Court was delivered by

T.S. THAKUR, J. 1. This special leave petition arises out of an order dated 11th December, 2008 passed by the High Court of Gujarat at Ahmedabad whereby Special Criminal

Application No.638 of 2008 filed by the petitioner-Babubhai Bhimabhai Bokhiria has been dismissed and order dated 29th March, 2008 passed by the Additional Sessions Judge, Porbandar affirmed. The Additional Sessions Judge, Porbandar had by the said order summoned the petitioner as an accused person in exercise of his power under Section 319 of the Cr.P.C. in Sessions Case No.5 of 2007 for offences punishable under Sections 302, 201 read with Sections 34, 120-B, 465, 468 and 471 of the Indian Penal Code, Section 25 of the Arms Act and Section 135 of the Bombay Police Act.

2. The incident that provides the genesis of the case aforementioned took place on 16th November, 2005 in which one Mulubhai Modhwadiya was gunned down resulting in registration of Criminal Case No.I 170 of 2005 at Kamlabaug Police Station, Porbandar for the offences mentioned earlier. Upon completion of the investigation, the jurisdictional police filed a charge sheet on 15th February, 2006 before a Magistrate who committed the same to the Sessions Court to be registered as Case No.5 of 2007.

3. The police charge-sheet cited a large number of witnesses out of whom as many as 134 have been examined by the prosecution. It was, at this stage, that an application was filed by the son of the deceased on 17th March, 2008 in which the applicant prayed for adding the petitioner-Babubhai Bhimabhai Bokhiria as an accused in exercise of the Courts power under Section 319 of the Cr.P.C. The Sessions Judge allowed the said application and added the said Shri Babubhai Bhimabhai Bokhiria as a co-accused in the case vide order dated 29th March, 2008. Aggrieved by his addition as an accused the petitioner preferred Special Criminal Application No.638 of 2008 before the High Court of Gujarat which, as noticed earlier, has been dismissed by the High Court in terms of the order impugned in this special leave petition.

4. When the special leave petition came up before a Bench comprising of P. Sathasivam and H.L. Dattu, JJ., this

Court referred the matter to a larger Bench in view of a similar reference made in *Hardeep Singh v. State of Punjab (AIR 2009 SC 483)*. The Court at the same time granted permission to the accused persons to move an application for bail before the competent Court. The matter then came up before a Bench of three Judges who formulated five different questions and referred the same to a Constitution Bench, for an authoritative pronouncement.

5. Criminal Miscellaneous Petition No.24292 of 2011 was at that stage filed by the applicant-Veja Prabhat Bhutiya in which he prayed for his addition as a party to the present proceedings and for vacation of order dated 17th December, 2008 by which further steps in the case were stayed. In the alternative the applicant prayed for grant of bail to him. By an order dated 8th December, 2011 a three-Judge Bench of this Court allowed the prayer for impleadment but directed that the prayer for grant of bail be considered by the regular Bench. That is precisely how Criminal Miscellaneous No.24292 of 2011 seeking vacation of the stay order and/or grant of bail and Criminal Miscellaneous No.20502 of 2008 filed by the petitioner in the special leave petition has come up before us for hearing.

6. Appearing for the applicant Mr. U.U. Lalit, learned Senior Counsel, strenuously argued that the applicant has been in custody for over six years. Even so there are no prospects of the Constitution Bench taking up the reference in the near future which implies that unless this Court either vacates the said order passed on 17th December, 2008 or grants bail to the applicant, there is no chance of the applicant or other persons who are similarly languishing in jail for years seeing the end of their trial and resultant agony. It was also urged that although the special leave petition has been filed on behalf of the petitioner in the main petition only and although the prayer for stay made in Criminal Miscellaneous No.20502 of 2008, he had simply asked for stay of the judgment and final order passed by the High Court. The order passed by this Court on

17th December, 2008 was, however, understood as though the trial itself was stayed in *toto*. This was, according to Mr. Lalit, not only depriving the applicant of his fundamental right of a speedy trial but also depriving him of his personal liberty with hardly any chances of an early conclusion of the trial in the near future. He submitted that even if the order passed by the trial Court and affirmed by the High Court was eventually upheld and the addition of the petitioner in the special leave petition was declared to be justified, the said petitioner could be tried separately as there was no legal bar to such a trial. Reliance in support was placed by learned Counsel upon the decisions of this Court in *Shashikant Singh v. Tarkeshwar Singh and Anr. (2002)* 5 SCC 738, *Michael Machado and Anr. v. Central Bureau of Investigation & Anr.* (2000) 3 SCC 262 *and Rajendra Singh v. State of U.P. & Anr.* (2007) 7 SCC 378.

7. On behalf of the respondents, Mr. A.M. Singhvi, Senior Advocate, argued that the vacation or modification of the stay granted by this Court would have the effect of splitting the trial of those who have been accused in the charge-sheet and the petitioner Babubhai Bhimabhai Bokhiria the newly added accused which was legally impermissible. Mr. Singhvi made a strenuous effort to distinguish the decisions relied upon by Mr. Lalit and argued that they were different fact situations and could not be said to be laying down a binding principle of law that splitting of the trial, was permissible. Reliance was, in that regard, placed by learned counsel to the expression "*could be tried together*" appearing in Section 319 of the Cr.P.C. It was also submitted by Mr. Singhvi that the applicant could have approached the trial Court for grant of bail, if so advised, and that the present application seeking enlargement on bail pending disposal of the reference before the Constitution Bench was incompetent.

8. Learned Counsel for the petitioner in the special leave petition argued that the petitioners had not asked for stay of the trial. All that his application prayed for was a stay of the operation of the impugned judgment of the High Court which

implied that the addition of the applicant as an accused could remain stayed pending disposal of the special leave petition by this Court.

9. In CRLMP No.20502 of 2008 filed by the petitioners, the petitioners had made the following prayer :

"1. That this Hon'ble Court be pleased to stay the impugned judgment and final order dated 11.12.2008 passed by the High Court of Gujarat at Ahmedabad in Special Criminal Application No.638 of 2008 during the pendency of the Special Leave petition; and

2. Pass any other order (s) and or directions as this Hon'ble Court may deem fit and proper."

10. This Court had upon consideration of the said prayer passed the following order on 17th December, 2008:

"List on 5.1.2009.

Further steps in the case are stayed till then."

11. It is evident from the above that while the prayer was simply for stay of the operation of the High Court's order, the direction issued by this Court stayed further steps in this case. *"Further steps"* would mean not only stay of the addition of the petitioner Babubhai Bhimabhai Bokhiria but also stay of any further action in relation to the trial which had by that time concluded before the trial Court. Be that as it may, learned counsel for the petitioner had no objection to the order passed by this Court being modified so as to confine its operation to the petitioner-Babubhai Bhimabhai Bokhiria only. So long as the petitioner was not tried, pursuant to the order passed against him, he had no objection to the trial Court proceeding to conclude the proceedings against the remaining accused persons. Such being the position, we see no reason why order dated 17th December, 2008, even assuming the same was intended to suspend further proceedings before the trial Court,

should not be modified so as to limit the effect thereof to the addition of the petitioner only. We say so because if the petitioner as *dominus litis* has no objection to the continuance and conclusion of the trial in his absence *qua* other accused persons and is not, therefore, asking for stay of the trial *qua* everybody; there is no justification for granting to him a relief larger than what is being prayed for by the petitioner.

12. Time now to deal with the contention urged by Mr. Singhvi, that the expression *"could be tried together*" appearing in Section 319 of the Cr.P.C. means that the newly added accused must be tried along with the accused already sent up for trial. The question is no longer *res integra* in the light of the judgment of this Court in *Shashikant Singh v. Tarkeshwar Singh and Anr.* (2002) 5 SCC 738, where this Court was examining a similar contention that failed to impress this Court and was rejected in the following words:

"9. *The intention of the provision here is that where in the course of any enquiry into, or trial of, an offence, it appears to the court from the evidence that any person not being the accused has committed any offence, the court may proceed against him for the offence which he appears to have committed. At that stage, the court would consider that such a person could be tried together with the accused who is already before the court facing the trial. The safeguard provided in respect of such person is that, the proceedings right from the beginning have mandatorily to be commenced afresh and the witnesses reheard. In short, there has to be a de novo trial against him. The provision of de novo trial is mandatory. It vitally affects the rights of a person so brought before the court. It would not be sufficient to only tender the witnesses for the cross-examination of such a person. They have to be examined afresh. Fresh examination-in-chief and not only their presentation for the purpose of the cross-examination of the newly added accused is the mandate*

of Section 319(4). The words "could be tried together with the accused" in Section 319(1), appear to be only directory. "Could be" cannot under these circumstances be held to be "must be". The provision cannot be interpreted to mean that since the trial in respect of a person who was before the court has concluded with the result that the newly added person cannot be tried together with the accused who was before the court when order under Section 319(1) was passed, the order would become ineffective and inoperative, nullifying the opinion earlier formed by the court on the basis of the evidence before it that the newly added person appears to have committed the offence resulting in an order for his being brought before the court."

13. The Court distinguished the earlier decisions rendered in *Municipal Corporation of Delhi v. Ram Kishan Rohtagi* (1983) 1 SCC 1 and *Michael Machado v. Central Bureau of Investigation* (2000) 3 SCC 262 in the following words:

"13. *Reliance by learned counsel for Respondent 1 has been placed on Municipal Corpn. of Delhi v. Ram Kishan Rohtagi in support of the contention that Respondent 1 could be tried only with Chandra Shekhar Singh and his trial having concluded, Respondent 1 cannot be now tried pursuant to order under Section 319(1) of the Code. This Court in the cited decision was not concerned with the issue which has fallen for consideration before us. The same is the position in respect of Michael Machado v. Central Bureau of Investigation. There this Court considered the scope of the provision as to the circumstances under which the court may proceed to make an order under Section 319 and not the question as to the effect of the conclusion of the trial after passing an order under Section 319(1). None of these decisions have any relevance for determining the point in issue."*

14. To the same effect is the decision of this Court in

Rajendra Singh v. State of U.P. & Anr. (2007) 7 SCC 378, where too a similar question arose for consideration. Relying upon the decision of this Court in *Shashikant Singh's* case (supra) this Court held:

"11....The mere fact that trial of co-accused Daya Singh has concluded cannot have the effect of nullifying or making the order passed by learned Sessions Judge on 26.5.2005 infructuous".

15. In the light of the above two decisions rendered by co-ordinate Benches of this Court, we have no hesitation in holding that even if the addition of the petitioner Babubhai Bhimabhai Bokhiria is held to be justified by the Constitution Bench of this Court, the mere fact that the trial of the remaining accused has already concluded, would not prevent the prosecution of the petitioner for the offences for which he has been summoned by the trial Court.

16. There is another angle from which the matter can and must be examined. The prosecution has already examined as many as 134 witnesses at the trial. In terms of the ratio of the direction of this Court in *Shashikant Singh's* case (supra) with the addition of the petitioner as accused all those witnesses shall have to be recalled for a fresh examination. If that be so, the trial would go on for a few more years having regard to the number of witnesses that have to be examined. This would in turn mean that the right of the accused to a speedy trial, that they have laboured to complete within six years or so, will be in serious jeopardy on account of the entire process being resumed *de novo*. Such a result is manifestly unjust and unfair and would be perilously close to being in violation of the fundamental rights guaranteed to the accused persons who cannot be subjected to the tyranny of a legal process, that goes on endlessly for no fault of theirs. This Court has in several pronouncements emphasised the need for speedy trials in criminal cases and recognised the same as an integral part of the right to life itself. In *Hussainara Khatoon and Ors. v. Home*

Secretary, State of Bihar, Patna (1980) 1 SCC 91, this Court held that an expeditious trial is an integral and essential part of the fundamental right to life and liberty enshrined in Article 21 of the Constitution. In *A.R. Antulay v. R.S. Nayak* (1992) 1 SCC 225, this Court declared that speedy trial is not only the right of the accused but is also in public interest and that the right to speedy trial flowing from Article 21 encompasses all the stages, namely, the stage of investigation, inquiry, trial, appeal, revision and retrial. In *Sher Singh v. State of Punjab* (1983) 2 SCC 344, this Court sounded the following note of caution against delay of criminal trials:

> *"16… The essence of the matter is that all procedure, no matter what the stage, must be fair, just and reasonable…Article 21 stands like a sentinel over human misery... It reverberates through all stages-the trial, the sentence, the incarceration and finally, the execution of the sentence."*

17. To the same effect are the decisions of this Court in *Javed Ahmed Abdul Hamid Pawala v. State of Maharashtra* (1985) 1 SCC 275 and *Triveni Ben v. State of Gujarat* (1989) 1 SCC 678. Even in cases where the accused had been enlarged on bail the right to a speedy trial was held to be a part of the fundamental right under Article 21 of the Constitution. The decisions of this Court in *Biswanath Prasad Singh v. State of Bihar* 1994 Supp. (3) SCC 97 and *Mahendra Lal Das v. State of Bihar and Ors.* (2002) 1 SCC 149 may be referred to in this regard.

18. It is in the light of the settled legal position no longer possible to question the legitimacy of the right to speedy trial as a part of the right to life under Article 21 of the Constitution. The essence of Article 21 of the Constitution lies not only in ensuring that no citizen is deprived of his life or personal liberty except according to procedure established by law, but also that such procedure ensures both fairness and an expeditious conclusion of the trial. It is in that backdrop not possible to

countenance a situation where addition of Babubhai Bhimabhai Bokhiria as an accused to the case at hand would lead to an indefinite suspension of trial and eventual recall of 134 witnesses already examined against the applicant who has been in jail for over six years now. There is, therefore, no reason for a blanket stay against the progress of the trial before the courts below *qua* other accused persons.

19. In the totality of the above circumstances, therefore, we are inclined to modify our order dated 17th December, 2008 by which further proceedings before the trial Court were brought to a halt. We make it clear that while the stay of the trial against Babubhai Bhimabhai Bokhiria the petitioner in SLP No.9184 of 2008 shall continue *qua* the said petitioner, the trial court shall be free to proceed with the trial *qua* the other accused persons. Criminal Miscellaneous Petition Nos.20502 of 2008 and 24292 of 2011 are allowed in part and to the above extent.

R.P. Criminal Misc. Petitions partly allowed.

ASST. ENGINEER, RAJASTHAN DEV. CORP. & ANR.
v.
GITAM SINGH
(Civil Appeal No. 8415 of 2009)

JANUARY 31, 2013.

[R.M. LODHA AND SUDHANSU JYOTI MUKHOPADHAYA, JJ.]

Labour Laws:

Industrial Disputes Act, 1947 – 25-F – Termination of workman – Who worked only for eight months as a daily wager – Courts below holding the termination to be in contravention of s. 25-F and directing reinstatement with continuity of service with 25% back wages – On appeal, held: In a case of wrongful termination of a daily wager, who had worked for a short period, the award of reinstatement is not proper – Award of compensation would be in consonance with the demand of justice – Compensation of Rs. 50,000/- awarded.

The question for consideration in the present appeal filed by the management was where a workman had worked only for eight months as a daily wager and his termination has been held to be in contravention of s. 25-F of Industrial disputes Act, 1947, whether the direction to the employer for reinstatement with continuity of service and 25% back wages was legally sustainable.

Partly allowing the appeal, the Court

HELD: 1. In a case of wrongful termination of a daily wager, who had worked for a short period, the award of reinstatement cannot be said to be proper relief and rather award of compensation in such cases would be in consonance with the demand of justice. Before exercising its judicial discretion, the Labour Court has to

keep in view all relevant factors, including the mode and manner of appointment, nature of employment, length of service, the ground on which the termination has been set aside and the delay in raising the industrial dispute before grant of relief in an industrial dispute. [Para 29] [695-E-G]

2. In the instant case, the workman was engaged as daily wager and he worked hardly for eight months. The labour court failed to exercise its judicial discretion appropriately. The judicial discretion exercised by the labour court suffers from serious infirmity. The Single Judge as well as the Division Bench of the High Court also erred in not considering the above aspect at all. The award directing reinstatement of the respondent with continuity of service and 25% back wages in the facts and circumstances of the case cannot be sustained and has to be set aside. Compensation of Rs. 50,000/- by the appellant to the respondent shall meet the ends of justice. [Para 31] [696-F-G; 697-A]

Assam Oil Company Limited, New Delhi v. Its Workmen **AIR 1960 SC 1264: 1960 SCR 457;** *M/s. Hindustan Steels Ltd., Rourkela v. A.K. Roy and Ors.* **(1969) 3 SCC 513: 1970 (3) SCR 343;** *M/s. Ruby General Insurance Co. Ltd. v. Shri P.P. Chopra* **(1969) 3 SCC 653;** *The Management of Panitole Tea Estate v. The Workmen* **(1971) 1 SCC 742: 1971 (3) SCR 774;** *M/s. Tulsidas Paul v. The Second Labour Court, W.B. and Ors.***(1972) 4 SCC 205;** *Manager, Reserve Bank of India, Bangalore v. S. Mani and Ors.* **(2005) 5 SCC 100: 2005 (2) SCR 797;** *Nagar Mahapalika (Now Municipal* Corpn.) *v. State of U.P. and Ors*. **(2006) 5 SCC 127: 2006 (1) Suppl. SCR 681;** *Municipal Council, Sujanpur v. Surinder Kumar* **(2006) 5 SCC 173: 2006 (1) Suppl. SCR 914 ;** *Haryana State Electronics Development Corporation Ltd.v. Mamni* **(2006) 9 SCC 434: 2006 (1) Suppl. SCR 638;** *Regional Manager, SBI v. Mahatma Mishra* **(2006) 13 SCC**

727: 2006 (8) Suppl. SCR 216; *Haryana Urban Development Authority v. Om Pal* **(2007) 5 SCC 742:s 2007 (4) SCR 1091 ;** *Uttaranchal Forest Development Corporation v. M.C.Joshi* **(2007) 9 SCC 353: 2007 (3) SCR 114;** *Madhya Pradesh Administration v. Tribhuban* **(2007) 9 SCC 748: 2007 (4) SCR 918;** *Mahboob Deepak v. Nagar Panchayat, Gajraula and Anr.* **(2008) 1 SCC 575: 2007 (13) SCR 672;** *Telecom District Manager and Ors. v. Keshab Deb* **(2008) 8 SCC 402: 2008 (7) SCR 835;** *Talwara Co-operative Credit and Service Society Limited v. Sushil Kumar* **(2008) 9 SCC 486: 2008 (14) SCR 53 ;** *Jagbir Singh v. Haryana State Agriculture Marketing Board and Anr.* **(2009)15 SCC 327:2009 (10) SCR 908;** *Uttar Pradesh State Electricity Board v. Laxmi Kant Gupta* **(2009) 16 SCC 562: 2008 (13) SCR 1051;** *Senior Superintendent Telegraph (Traffic), Bhopal v. Santosh Kumar Seal and Ors.* **(2010) 6 SCC 773;** *Bharat Sanchar Nigam Limited* v. *Man Singh* **(2012) 1 SCC 558 – relied on.**

Harjinder Singh v. Punjab State Warehousing Corporation **(2010) 3 SCC 192: 2010 (1) SCR 591;** *Devinder Singh v. Municipal Council, Sanaur* **(2011) 6 SCC 584: 2011 (4) SCR 867 – distinguished.**

*L. Robert D'Souza v. Executive Engineer, Southern Railway and Anr.***(1982) 1 SCC 645: 1982 (3) SCR 251;** *In-charge Officer and Anr. v.Shankar Shetty* **(2010) 9 SCC 126: 2010 (10) SCR 773 – referred to.**

Case Law Reference:

1982 (3) SCR 251	**Referred to**	**Para 2**
2010 (10) SCR 773	**Referred to**	**Para 3**
1960 SCR 457	**Relied on**	**Para 5**
1970 (3) SCR 343	**Relied on**	**Para 6**
(1969) 3 SCC 653	**Relied on**	**Para 7**

1971 (3) SCR 774	**Relied on**	**Para 8**
(1972) 4 SCC 205	**Relied on**	**Para 9**
2005 (2) SCR 797	**Relied on**	**Para 11**
2006 (1) Suppl. SCR 681	**Relied on**	**Para 13**
2006 (1) Suppl. SCR 914	**Relied on**	**Para 14**
2006 (1) Suppl. SCR 638	**Relied on**	**Para 15**
2006 (8) Suppl. SCR 216	**Relied on**	**Para 16**
2007 (4) SCR 1091	**Relied on**	**Para 17**
2007 (3) SCR 114	**Relied on**	**Para 18**
2007 (4) SCR 918	**Relied on**	**Para 19**
2007 (13) SCR 672	**Relied on**	**Para 20**
2008 (7) SCR 835	**Relied on**	**Para 21**
2008 (14) SCR 53	**Relied on**	**Para 22**
2009 (10) SCR 908	**Relied on**	**Para 23**
2008 (13) SCR 1051	**Relied on**	**Para 24**
(2010) 6 SCC 773	**Relied on**	**Para 25**
2010 (1) SCR 59	**Distinguished**	**Para 29**
2011 (4) SCR 867	**Distinguished**	**Para 29**
(2012) 1 SCC 558	**Relied on**	**Para 30**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 8415 of 2009.

From the Judgment & Order dated 20.08.2008 of the High Court of Judicature for Rajasthan at Jaipur in D.B. Civil Special Appeal No. 4 of 2002.

Shobha, Atul Chaubey, Ashok Singh for the Appellants.

Sushil Kumar Jain, Puneet Jain, Naushad Ahmad Khan, Nakibru Rahman (for Aftab Ali Khan) for the Respondent.

The Judgment of the Court was delivered by

R.M. LODHA, J. 1. The short question that arises for consideration in this appeal, by special leave, is where the workman had worked for only eight months as daily wager and his termination has been held to be in contravention of Section 25-F of the Industrial Disputes Act, 1947 (for short, 'ID Act'), whether the direction to the employer for reinstatement with continuity of service and 25 per cent back wages is legally sustainable.

2. We were not disposed to undertake the detailed exercise but the same has become necessary in view of very vehement contention of Mr. Sushil Kumar Jain, learned counsel for the respondent (workman), that reinstatement must follow where termination of a workman has been found to be in breach of Section 25-F of ID Act. He heavily relied upon three decisions of this Court in *L. Robert D'Souza v. Executive Engineer*, Southern *Railway and Another*[1], *Harjinder Singh v. Punjab State Warehousing Corporation*[2] *and Devinder Singh v. Municipal Council, Sanaur*[3].

3. On behalf of the appellant, Ms. Shobha, learned counsel, challenged the finding of the Labour Court that the respondent had worked for 240 days continuously in the year preceding the date of termination. Alternatively, she submitted that the award of reinstatement with continuity of service and 25 per cent back wages in the facts of the case was unjustified as the respondent was only a daily wager; he worked for a very short period from 01.03.1991 to 31.10.1991 and for last more

1. (1982) 1 SCC 645.
2. (2010) 3 SCC 192.
3. (2011) 6 SCC 584.

than 20 years he is not in the service due to interim orders. Relying upon the decisions of this Court in *Haryana State Electronics Development Corporation Ltd. v. Mamni*[4], *Mahboob Deepak v. Nagar Panchayat, Gajraula and Another*[5], *Jagbir Singh v. Haryana State Agriculture Marketing Board and Another*[6], *Senior Superintendent Telegraph (Traffic), Bhopal v. Santosh Kumar Seal and Others*[7] and *In-charge Officer and Another v. Shankar Shetty*[8], she submitted that respondent was at best entitled to some compensation for unlawful termination.

4. It is not in dispute that respondent was engaged as a daily wager. The Labour Court, Bharatpur, in its award dated 28.06.2001 has recorded the findings that the respondent had worked as technician (Mistri) under the appellant for 240 days for the period from 01.03.1991 to 31.10.1991 and the termination of his service by an oral order on 31.10.1991 was violative of Section 25-F of the ID Act. We are not inclined to disturb the findings recorded by the Labour Court; we take them to be correct. The question, as noted above, is whether direction for reinstatement of respondent with continuity in service along with 25 per cent of back wages in view of the above findings is just and proper.

5. More than five decades back, this Court in *Assam Oil Company Limited, New Delhi v. Its Workmen*[9] observed that the normal rule in cases of wrongful dismissal was reinstatement but there could be cases where it would not be expedient to follow this normal rule and to direct reinstatement. Having regard to the facts of that case, this Court set aside the order of reinstatement although dismissal of the employee was

4. (2006) 9 SCC 434.
5. (2008) 1 SCC 575
6. (2009) 15 SCC 327.
7. (2010) 6 SCC 773.
8. (2010) 9 SCC 126.
9. AIR 1960 SC 1264.

found to be wrongful and awarded compensation.

6. In *M/s. Hindustan Steels Ltd., Rourkela v. A.K. Roy and Others,*[10] this Court noted that there have been cases where reinstatement has not been considered as either desirable or expedient.

7. In *M/s. Ruby General Insurance Co. Ltd. v. Shri P.P. Chopra*[11], this Court reiterated what was stated in *Assam Oil Company Limited9*. In paragraph 6 (pgs. 655-656) of the Report, this Court said :

> "6. The normal rule is that in cases of invalid orders of dismissal industrial adjudication would direct reinstatement of a dismissed employee. Nevertheless, there would be cases where it would not be expedient to adopt such a course. Where, for instance, the office of the employer was comparatively a small one and the dismissed employee held the position of the secretary, a position of confidence and trust, and the employer had lost confidence in the concerned employee, reinstatement was held to be not fair to either party……"

8. This Court in The *Management of Panitole Tea Estate v. The Workmen*[12], while dealing with the judicial discretion of the Labour Court or the Tribunal under ID Act in directing appropriate relief on setting aside the wrongful dismissal of a workman, stated in paragraph 5 (pgs. 746-747) as follows:

> "…. The question whether on setting aside the wrongful dismissal of a workman he should be reinstated or directed to be paid compensation is a matter within the judicial discretion of the Labour Court or the Tribunal, dealing with the industrial dispute, the general rule in the

10. (1969) 3 SCC 513.

11. (1969) 3 SCC 653.

12. (1971) 1 SCC 742.

> absence of any special circumstances being of reinstatement. In exercising this discretion, fairplay towards the employee on the one hand and interest of the employer, including considerations of discipline in the establishment, on the other, require to be duly safeguarded. This is necessary in the interest both of security of tenure of the employee and of smooth and harmonious working of the establishment. Legitimate interests of both of them have to be kept in view if the order is expected to promote the desired objective of industrial peace and maximum possible production. The past record of the employer, the nature of the alleged conduct for which action was taken against him, the grounds on which the order of the employer is set aside, the nature of the duties performed by the employee concerned and the nature of the industrial establishment are some of the broad relevant factors which require to be taken into consideration. The factors just stated are merely illustrative and it is not possible to exhaustively enumerate them. Each case has to be decided on its own facts and no hard and fast rule can be laid down to cover generally all conceivable contingencies……"

9. In *M/s. Tulsidas Paul v. The Second Labour Court, W.B. and Others,*[13] this Court relied upon *M/s. Hindustan Steels Ltd.10* and held as under:

> "9. In *Hindustan Steels Ltd. v. Roy [(1969) 3 SCC 513]* we recently held, after considering the previous case-law, that though the normal rule, in cases where dismissal or removal from service is found to be unjustified, is reinstatement, Industrial Tribunals have the discretion to award compensation in unusual or exceptional circumstances where the tribunal considers, on consideration of the conflicting claims of the employer on

13. (1972) 4 SCC 205.

the one hand and of the workmen on the other, reinstatement inexpedient or not desirable. We also held that no hard and fast rule as to which circumstances would constitute an exception to the general rule can be laid down as the tribunal in each case must, in a spirit of fairness and justice and in keeping with the objectives of industrial adjudication, decide whether it should, in the interest of justice, depart from the general rule."

10. In *L. Robert D'Souza*[1], this Court in paragraph 27 (pg. 664) held as under :

"27. …….Therefore, assuming that he was a daily-rated worker, once he has rendered continuous uninterrupted service for a period of one year or more, within the meaning of Section 25-F of the Act and his service is terminated for any reason whatsoever and the case does not fall in any of the excepted categories, notwithstanding the fact that Rule 2505 would be attracted, it would have to be read subject to the provisions of the Act. Accordingly the termination of service in this case would constitute retrenchment and for not complying with pre-conditions to valid retrenchment, the order of termination would be illegal and invalid."

11. What has been held by this Court in *L. Robert D'Souza*[1] is that Section 25-F of the ID Act is applicable to a daily-rated worker. We do not think that there is any dispute on this proposition.

12. In *Manager, Reserve Bank of India, Bangalore v. S. Mani and Others*[14], this Court in paragraph 54 (pg. 120) of the Report held as under:

"54. Mr. Phadke, as noticed hereinbefore, has referred to a large number of decisions for demonstrating that this

14. (2005) 5 SCC 100.

Court had directed reinstatement even if the workmen concerned were daily-wagers or were employed intermittently. No proposition of law was laid down in the aforementioned judgments. The said judgments of this Court, moreover, do not lay down any principle having universal application so that the Tribunals, or for that matter the High Court, or this Court, may feel compelled to direct reinstatement with continuity of service and back wages. The Tribunal has some discretion in this matter. Grant of relief must depend on the fact situation obtaining in a particular case. The industrial adjudicator cannot be held to be bound to grant some relief only because it will be lawful to do so."

13. In *Nagar Mahapalika (Now Municipal Corpn.) v. State of U.P. and Others*[15], this Court, while dealing with the non-compliance with the provisions of Section 6-N (which is *pari materia to* Section 25-F) of U.P. Industrial Disputes Act held that the grant of relief of reinstatement with full back wages and continuity of service in favour of retrenched workmen would not automatically follow or as a matter of course. Instead, this Court modified the award of reinstatement with compensation of Rs. 30,000/- per workman.

14. In *Municipal Council, Sujanpur v. Surinder Kumar*[16], this Court after having accepted the finding that there was violation of Section 25-F of the ID Act, set aside the award of reinstatement with back wages and directed the workman to be paid monetary compensation in the sum of Rs. 50,000/-.

15. In *Mamni*[4], this Court modified the award of reinstatement passed by the Labour Court, though the termination of the workman was in violation of Section 25-F of the ID Act, by directing that the workman should be compensated by payment of a sum of Rs. 25,000/-.

15. (2006) 5 SCC 127.

16. (2006) 5 SCC 173.

16. In *Regional Manager, SBI v. Mahatma Mishra*[17], this Court observed that it was one thing to say that services of a workman were terminated in violation of mandatory provisions of law but it was another thing to say that relief of reinstatement in service with full back wages would be granted automatically.

17. In *Haryana Urban Development Authority v. Om Pal*[18], this Court in paragraphs 7 and 8 (pg. 745) of the Report held as under :

> "7. Moreover, it is also now well settled that despite a wide discretionary power conferred upon the Industrial Courts under Section 11-A of the 1947 Act, the relief of reinstatement with full back wages should not be granted automatically only because it would be lawful to do so. Grant of relief would depend on the fact situation obtaining in each case. It will depend upon several factors, one of which would be as to whether the recruitment was effected in terms of the statutory provisions operating in the field, if any.
>
> 8. The respondent worked for a very short period. He only worked, as noticed hereinbefore, in 1994-95. The Industrial Tribunal-cum-Labour Court, therefore, in our opinion committed an illegality, while passing an award in the year 2003, directing the reinstatement of the respondent with full back wages. Although we are of the opinion that the respondent was not entitled to any relief, whatsoever, we direct the appellant to pay him a sum of Rs. 25,000."

18. In *Uttaranchal Forest Development Corporation v. M.C.Joshi*[19], the Court was concerned with a daily wager who had worked with Uttaranchal Forest Development Corporation from 01.08.1989 to 24.11.1991 and whose services were held

17. (2006) 13 SCC 727.

18. (2007) 5 SCC 353.

19. (2007) 9 SCC 353.

to be terminated in violation of Section 6-N of the U.P. Industrial Disputes Act. The Labour Court had directed the reinstatement of the workman with 50 per cent back wages from the date the industrial dispute was raised. Setting aside the order of reinstatement and back wages, this Court awarded compensation in a sum of Rs. 75,000/- in favour of the workman keeping in view the nature and period of service rendered by the workman and the fact that industrial dispute was raised after six years.

19. In *Madhya Pradesh Administration v. Tribhuban*[20], this Court upheld the order of the Industrial Court passed in its jurisdiction under Section 11A of the ID Act awarding compensation and set aside the judgment of the Single Judge and the Division Bench that ordered the reinstatement of the workman with full back wages. The Court in paragraph 12 (pg. 755) of the Report held as under:

> "12. In this case, the Industrial Court exercised its discretionary jurisdiction under Section 11-A of the Industrial Disputes Act. It merely directed the amount of compensation to which the respondent was entitled had the provisions of Section 25-F been complied with should be sufficient to meet the ends of justice. We are not suggesting that the High Court could not interfere with the said order, but the discretionary jurisdiction exercised by the Industrial Court, in our opinion, should have been taken into consideration for determination of the question as to what relief should be granted in the peculiar facts and circumstances of this case. Each case is required to be dealt with in the fact situation obtaining therein."

20. In *Mahboob Deepak*[5], this Court stated that an order of retrenchment passed in violation of Section 6-N of the U.P. Industrial Disputes Act may be set aside but an order of reinstatement should not however be automatically passed. The Court observed in paragraphs 11 and 12 (pg. 578) of the Report as follows:-

"11. The High Court, on the other hand, did not consider the effect of non-compliance with the provisions of Section 6-N of the U.P. Industrial Disputes Act, 1947. The appellant was entitled to compensation, notice and notice pay.

12. It is now well settled by a catena of decisions of this Court that in a situation of this nature instead and in place of directing reinstatement with full back wages, the workmen should be granted adequate monetary compensation. (See *M.P. Admn. v. Tribhuban*[20])."

21. In *Telecom District Manager and Others v. Keshab Deb*[21], this Court said that even if the provisions of Section 25-F of the I.D. Act had not been complied with, the workman was only entitled to just compensation.

22. In *Talwara Co-operative Credit and Service Society Limited v. Sushil Kumar*[22], this Court in paragraph 8 (pg. 489) of the Report held as under :

"8. Grant of a relief of reinstatement, it is trite, is not automatic. Grant of back wages is also not automatic. The Industrial Courts while exercising their power under Section 11-A of the Industrial Disputes Act, 1947 are required to strike a balance in a situation of this nature. For the said purpose, certain relevant factors, as for example, nature of service, the mode and manner of recruitment viz. whether the appointment had been made in accordance with the statutory rules so far as a public sector undertaking is concerned, etc., should be taken into consideration."

23. In *Jagbir Singh*[6], this Court, speaking through one of us (R.M. Lodha, J.) while dealing with the question of

20. (2007) 9 SCC 748.

21. (2008) 8 SCC 402.

22. (2008) 9 SCC 486.

consequential relief arising from the facts quite similar to the present case, ordered compensation of Rs. 50,000/- to be paid by the employer to the workman instead of reinstatement. In paragraph 14 (pg.335) of the Report, this Court held as under:

"14. It would be, thus, seen that by a catena of decisions in recent time, this Court has clearly laid down that an order of retrenchment passed in violation of Section 25-F although may be set aside but an award of reinstatement should not, however, be automatically passed. The award of reinstatement with full back wages in a case where the workman has completed 240 days of work in a year preceding the date of termination, particularly, daily wagers has not been found to be proper by this Court and instead compensation has been awarded. This Court has distinguished between a daily wager who does not hold a post and a permanent employee."

24. In *Uttar Pradesh State Electricity Board v. Laxmi Kant Gupta*[23], this Court stated, "…. now there is no such principle that for an illegal termination of service the normal rule is reinstatement with back wages, and instead the Labour Court can award compensation".

25. In *Santosh Kumar Seal*[7], while dealing with a case of workmen who were engaged as daily wagers about 25 years back and had hardly worked for two or three years, this Court speaking through one of us (R.M. Lodha, J.) held that reinstatement with back wages could not be said to be justified and instead monetary compensation would subserve the ends of justice. It was held that compensation of Rs. 40,000/- to each of the workmen would meet the ends of justice.

26. From the long line of cases indicated above, it can be said without any fear of contradiction that this Court has not held

23. (2009) 16 SCC 562.

as an absolute proposition that in cases of wrongful dismissal, the dismissed employee is entitled to reinstatement in all situations. It has always been the view of this Court that there could be circumstance(s) in a case which may make it inexpedient to order reinstatement. Therefore, the normal rule that dismissed employee is entitled to reinstatement in cases of wrongful dismissal has been held to be not without exception. Insofar as wrongful termination of daily-rated workers is concerned, this Court has laid down that consequential relief would depend on host of factors, namely, manner and method of appointment, nature of employment and length of service. Where the length of engagement as daily wager has not been long, award of reinstatement should not follow and rather compensation should be directed to be paid. A distinction has been drawn between a daily wager and an employee holding the regular post for the purposes of consequential relief.

27. We shall now consider two decisions of this Court in *Harjinder Singh*[2] and *Devinder Singh*[3] upon which heavy reliance has been placed by the learned counsel for the respondent. In *Harjinder Singh*[2], this Court did interfere with the order of the High Court which awarded compensation to the workman by modifying the award of reinstatement passed by the Labour Court. However, on close scrutiny of facts it transpires that that was a case where a workman was initially employed by Punjab State Warehousing Corporation as work-charge motor mate but after few months he was appointed as work munshi in the regular pay-scale for three months. His service was extended from time to time and later on by one month's notice given by the Managing Director of the Corporation his service was brought to end on 05.07.1988. The workman challenged the implementation of the notice in a writ petition and by an interim order the High Court stayed the implementation of that notice but later on the writ petition was withdrawn with liberty to the workman to avail his remedy under the ID Act. After two months, the Managing Director of the Corporation issued notice dated 26.11.1992 for retrenchment

of the workman along with few others by giving them one month's pay and allowances in lieu of notice as per the requirement of Section 25-F(a) of the ID Act. On industrial dispute being raised, the Labour Court found that there was compliance of Section 25-F but it was found that the termination was violative of Section 25-G of the ID Act and, accordingly, Labour Court passed an award for reinstatement of the workman with 50 per cent back wages. The Single Judge of that High Court did not approve the award of reinstatement on the premise that the initial appointment of the workman was not in consonance with the statutory regulations and Articles 14 and 16 of the Constitution and accordingly, substituted the award of reinstatement with 50 per cent back wages by directing that the workman shall be paid a sum of Rs. 87,582/- by way of compensation. It is this order of the Single Judge that was set aside by this Court and order of the Labour Court restored. We are afraid the facts in *Harjinder Singh*[2] are quite distinct. That was not a case of a daily-rated worker. It was held that Single Judge was wrong in entertaining an unfounded plea that workman was employed in violation of Articles 14 and 16. *Harjinder Singh*[2] turned on its own facts and is not applicable to the facts of the present case at all.

28. In *Devinder Singh*[3], the workman was engaged by Municipal Council, Sanaur on 01.08.1994 for doing the work of clerical nature. He continued in service till 29.09.1996. His service was discontinued with effect from 30.09.1996 in violation of Section 25-F of ID Act. On industrial dispute being referred for adjudication, the Labour Court held that the workman had worked for more than 240 days in a calendar year preceding the termination of his service and his service was terminated without complying with the provisions of Section 25-F. Accordingly, Labour Court passed an award for reinstatement of the workman but without back wages. Upon challenge being laid to the award of the Labour Court, the Division Bench set aside the order of the Labour Court by holding that Labour Court should not have ordered

reinstatement of the workman because his appointment was contrary to the Recruitment Rules and Articles 14 and 16 of the Constitution. In the appeal before this Court from the order of the Division Bench, this Court held that the High Court had neither found any jurisdictional infirmity in the award of the Labour Court nor it came to the conclusion that the award was vitiated by an error of law apparent on the face of the record and notwithstanding these the High Court set aside the direction given by the Labour Court for reinstatement of the workman by assuming that his initial appointment was contrary to law. The approach of the High Court was found to be erroneous by this Court. This Court, accordingly, set aside the order of the High Court and restored the award of the Labour Court. In *Devinder Singh*[3], the Court had not dealt with the question about the consequential relief to be granted to the workman whose termination was held to be illegal being in violation of Section 25-F.

29. In our view, *Harjinder Singh*[2] and *Devinder Singh*[3] do not lay down the proposition that in all cases of wrongful termination, reinstatement must follow. This Court found in those cases that judicial discretion exercised by the Labour Court was disturbed by the High Court on wrong assumption that the initial employment of the employee was illegal. As noted above, with regard to the wrongful termination of a daily wager, who had worked for a short period, this Court in long line of cases has held that the award of reinstatement cannot be said to be proper relief and rather award of compensation in such cases would be in consonance with the demand of justice. Before exercising its judicial discretion, the Labour Court has to keep in view all relevant factors, including the mode and manner of appointment, nature of employment, length of service, the ground on which the termination has been set aside and the delay in raising the industrial dispute before grant of relief in an industrial dispute.

30. We may also refer to a recent decision of this Court in

Bharat Sanchar Nigam Limited v. Man Singh[24]. That was a case where the workmen, who were daily wagers during the year 1984-85, were terminated without following Section 25-F. The industrial dispute was raised after five years and although the Labour Court had awarded reinstatement of the workmen which was not interfered by the High Court, this Court set aside the award of reinstatement and ordered payment of compensation. In paragraphs 4 and 5 (pg.559) of the Report this Court held as under:

> "4. This Court in a catena of decisions has clearly laid down that although an order of retrenchment passed in violation of Section 25-F of the Industrial Disputes Act may be set aside but an award of reinstatement should not be passed. This Court has distinguished between a daily wager who does not hold a post and a permanent employee.
>
> 5. In view of the aforementioned legal position and the fact that the respondent workmen were engaged as "daily wagers" and they had merely worked for more than 240 days, in our considered view, relief of reinstatement cannot be said to be justified and instead, monetary compensation would meet the ends of justice."

31. In light of the above legal position and having regard to the facts of the present case, namely, the workman was engaged as daily wager on 01.03.1991 and he worked hardly for eight months from 01.03.1991 to 31.10.1991, in our view, the Labour Court failed to exercise its judicial discretion appropriately. The judicial discretion exercised by the Labour Court suffers from serious infirmity. The Single Judge as well as the Division Bench of the High Court also erred in not considering the above aspect at all. The award dated 28.06.2001 directing reinstatement of the respondent with continuity of service and 25% back wages in the facts and circumstances of the case cannot be sustained and has to be

24. (2012) 1 SCC 558.

set aside and is set aside. In our view, compensation of Rs. 50,000/- by the appellant to the respondent shall meet the ends of justice. We order accordingly. Such payment shall be made to the respondent within six weeks from today failing which the same will carry interest @ 9 per cent per annum.

32. The appeal is partly allowed to the above extent with no order as to costs.

K.K.T. Appeal partly allowed.

GITA RAM & ANR.

v.

STATE OF H.P.

(Criminal Appeal No. 227 of 2013)

FEBRUARY 1, 2013

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

Penal Code, 1860:

s.292 read with s. 34 IPC and s.7 of Cinematograph Act – Display of obscene films to young viewers – Conviction – Plea of accused for release u/s 4 of the Probation of Offenders Act – Held: In view of the dichotomy of punishments introduced by Legislature in s.292 IPC for first offenders and subsequent offenders, sentence of one month's simple imprisonment with fine, needs no interference – Probation of Offenders Act, 1958 – s.4 – Cinematograph Act, 1952 – s.7.

The allegations against the appellants of showing blue films to young viewers on CD player were found to have been proved. They were convicted u/s 292 read with s. 34 IPC and s.7 of Cinematograph Act. The sentence of six months simple imprisonment was reduced by the appellate court to one month each. The High Court dismissed appellants' revision petition.

In the instant appeal, the appellants pleaded for their release on probation u/s 4 of the Probation of Offenders Act.

Dismissing the appeal, the Court

HELD: Section 292, IPC was amended in 1969 whereby a dichotomy of penal treatment was introduced for dealing with the first offenders and the subsequent offenders. The intention of the Legislature while

amending the provision, is to deal with this type of offences which corrupt the mind of the people to whom objectionable things can easily reach, and such corrupting influence is more likely to be upon the younger generation who has got to be protected from being easy prey. In the facts and circumstances of the case and also considering the nature of the activities and the offence committed by the appellants, this Court is unable to show any leniency and to modify the sentence any further. [para 9 and 11] [702-G-H; 704-E]

Uttam Singh vs. The State (Delhi Administration **1974 (3) SCR 722 = 1974 (4) SCC 590;** *Bharat Bhushan vs. State of Punjab* **1999 (2) RCR (Criminal) 148 – relied on**

Case Law Reference:

1974 (3) SCR 722	**relied on**	**para 9**
1999 (2) RCR (Criminal) 148	**relied on**	**para 10**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 227 of 2013.

From the Judgment & Order dated 21.11.2011 of the High Court of Himachal Pradesh at Shimla in Criminal Revision No. 36 of 2006.

Shweta Garg, Rakesh Garg, A.G. Garg for the Appellants.

Naresh K. Sharma for the Respondent.

The Judgment of the Court was delivered by

M.Y. EQBAL, J. 1. Leave granted.

2. This appeal by special leave arises out of the judgment and order dated 21.11.2011 of the High Court of Himachal Pradesh at Shimla in CRLR No. 36/2006. Notice was issued on the limited question of sentence in a conviction of the

appellants under Section 292 read with Section 34 of the IPC and Section 7 of Cinematograph Act.

3. The prosecution case was that on 07.12.2001 on the basis of secret information the patrolling party raided the premises in Dhawan Video Hall, Sai Road and found that the appellants were showing blue film to young men and about 15 viewers were there in the hall. It was alleged that CD of blue film, namely "Size Matter" was displayed by the appellants to the viewers on Videocon TV Sony C.D. player, one CD namely "Size Matter", two C.Ds. of "Jawani Ka Khel", remote, ticket book, T.V. and poster were taken into possession in the presence of the witnesses.

4. The appellants were charged for offences punishable under Section 292 read with Section 34 IPC and Section 7 of Cinematograph Act.

5. After the statements of the appellants were recorded under Section 313 Cr.P.C. the trial began and, finally on completion of trial the Sub Divisional Judicial Magistrate convicted and sentenced the appellants to undergo simple imprisonment for 6 months under Section 292 of the IPC and fine of Rs.1,000/- under Section 7 of Cinematograph Act.

6. On appeal filed by the appellants, the Additional Sessions Judge Fast Track Court, Solan Camp at Nalagarh affirmed the judgment passed by the Trial Court. However, the appellants being first offenders Sessions Judge showed some leniency in sentence of imprisonment and instead of imprisonment of 6 months the appellants were sentenced to simple imprisonment for one month each. The sentence awarded by the Trial Court was modified to that extent. The imposition of fine of Rs.1,000/- by the trial court for the offence under Section 292 IPC and further fine of Rs.1000/- was imposed on them for offence under Section 7 of the Cinematograph Act, were maintained. The appellants then preferred revision before the High Court of Himachal Pradesh.

The High Court examined all the materials available on record as also the evidence, both oral and documentary and finally came to the conclusion that there is no perversity in the impugned judgment. Accordingly, the revision was dismissed.

7. Ms. Sweta Garg, learned counsel appearing for the appellants submitted that the appellants are not habitual offenders and having regard to the fact that the appellants, for the first time, were found to be indulged in the commission of offence they deserved to be released on probation under Section 4 of the Probation of Offenders Act. Learned counsel submitted that the ends of the justice would be sub-served if the sentence is modified only by imposing of fine and they may be asked to furnish bond in terms of Section 4 of the Probation of Offenders Act.

8. We are unable to appreciate the submissions made by the learned counsel. Section 292 IPC reads as under:

> "Sale, etc. of obscene books, etc.- [(1) For the purposes of sub-section(2), a book, pamphlet, paper, writing, drawing, painting, representation, figure or any other object, shall be deemed to be obscene if it is lascivious or appeals to the prurient interest or if its effect, or (where it comprises two or more distinct items) the effect of any one of its items, is, if taken as a whole, such as to tend to deprave and corrupt person, who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.]
>
> [(2)] Whoever –
>
> (a) sells, lets to hire, distributes, publicly exhibits or in any manner puts into circulation, or for purposes of sale, hire distribution, public exhibition or circulation, makes produces or has in his possession any obscene book, pamphlet, paper, drawing, painting, representation or figure or any other obscene object whatsoever, or

> (b) imports, exports or conveys any obscene object for any of the purposes aforesaid, or knowing or having reason to believe that such object will be sold, let to hire, distributed or publicly exhibited or in any manner put into circulation, or
>
> (c) takes part in or receives profits from any business in the course of which he knows or has reason to believe that any such obscene objects are for any of the purposes aforesaid, made, produced, purchased, kept, imported, exported, conveyed, publicly exhibited or in any manner put into circulation, or
>
> (d) advertises or makes known by any means whatsoever that any person is engaged or is ready to engage in any act which is an offence under this section, or that any such obscene object can be procured from or through any person, or
>
> (e) offers or attempts to do any act which is an offence under this section,
>
> shall be punished [on first conviction with imprisonment of either description for a term which may extend to two years, and with fine which may extend to two thousand rupees, and, in the event of a second or subsequent conviction, with imprisonment of either description for a term which may extend to five years, and also with fine which may extend to five thousand rupees].
>
> [Exception ……."

9. The aforesaid provision was amended in 1969 whereby a dichotomy of penal treatment was introduced for dealing with the first offenders and the subsequent offenders. The intention of the Legislature while amending the provision is to deal with this type of offences which corrupt the mind of the people to whom objectionable things can easily reach and need not be

emphasized that corrupting influence is more likely to be upon the younger generation who has got to be protected from being easy prey. Exactly, a similar question was considered by this Court in the case of *Uttam Singh vs. The State (Delhi Administration)* 1974 (4) SCC 590. In that case the accused was convicted under Section 292 IPC on the charge of selling a packet of playing cards portraying on the reverse luridly obscene naked pictures of men and women in pornographic sexual postures. A similar argument was advanced by the counsel to give benefit of Section 4 of the Probation of Offenders Act. The Court rejecting the submission observed:

> "There are certain exceptions to this section with which we are not concerned. This section was amended by Act XXXVI when apart from enlarging the scope of the exceptions, the penalty was enhanced which was earlier up to three months or with fine or with both. By the amendment a dichotomy of penal treatment was introduced for dealing with the first offenders and the subsequent offenders. In the case of even a first conviction the accused shall be punished with imprisonment of either description for a term which may extend to two years and with fine which may extend to two thousand rupees. The intention of the legislature is, therefore, made clear by the amendment in 1969 in dealing with this type of offences which corrupt the minds of people to whom these objectionable things can easily reach and it needs not be emphasized that the corrupting influence of these pictures is more likely to be upon the younger generation who has got to be protected from being easy prey to these libidinous appeals upon which this illicit trade is based. We are, therefore, not prepared to accept the submission of the learned counsel to deal with the accused leniently in this case."

10. A similar view was taken by Punjab and Haryana High Court in the case of *Bharat Bhushan vs. State of Punjab*

reported in 1999 (2) RCR (Criminal) 148 refusing to give benefit of probation for exhibiting blue film punishable under Sections 292 and 293 of the IPC. The Court held that:

> "exhibiting blue film in which man and woman were shown in the act of sexual intercourse to young boys would definitely deprave and corrupt their morals. Their minds are impressionable. On their impressionable minds anything can be imprinted. Things would have been different if that blue film had been exhibited to mature minds. Showing a man and a woman in the act of sexual intercourse tends to appealing to the carnal side of the human nature. Petitioner is the first offender and is a petty shopkeeper, maintaining a family and as such the High Court feel that he should be dealt with leniently in the matter of sentence. He cannot be released on probation of good conduct as the act imputed to him tended to corrupt and deprave the minds of immature and adolescent boys."

11. In the facts and circumstances of the case and also considering the nature of the activities and the offence committed by the appellants, we are unable to show any leniency and to modify the sentence any further.

12. For the aforesaid reasons, we do not find any merit in the appeal which is accordingly dismissed.

R.P. Appeal dismissed.

RAJKUMAR S/O ROHITLAL MISHRA
v.
JALAGAON MUNICIPAL CORPORATION
(Civil Appeal No. 855 of 2013 etc.)

FEBRUARY 01, 2013

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

Labour Laws – Termination – Of temporary daily wagers – Delay of 8-10 years on part of four workmen and delay of 2-3 years on the part of one workman in approaching the Labour Commissioner for conciliation – On failure of conciliation, disputes referred to Labour Court – Award by Labour Court holding that termination was illegal and reinstatement directed – Writ Petition – Single Judge holding that dispute could not have been referred to Labour Court due to inordinate delay in approaching the Labour Commissioner – However, direction to Management to pay Rs. 10,000/- each to the workmen – Order upheld by Division Bench of High Court – On appeal, held: Orders passed by Single Judge as well as Division Bench of High Court was correct – However, Rs. 10,000/- not sufficient to compensate the workmen – The workmen who approached the Commissioner after 8-10 years entitled to Rs. 50,000/- each and who approached after 2-3 years entitled to Rs. 1,00,000/-.

The five appellants were temporarily employed with the respondent-Corporation on different dates on daily wages as and when work was available. They were terminated from their services on different dates. Appellant Nos. 1 to 4 approached the Labour Commissioner for conciliation after 8 to 10 years from the date of their termination. Appellant No. 5 approached the Labour Commissioner for conciliation after 2 to 3 years from the date of his termination. When the conciliation failed, the disputes were referred to Labour Court.

Labour Court passed the award holding that the termination was illegal and directed reinstatement of the appellants.

Respondent-Corporation filed Writ Petition against the order of Labour Court. Single Judge of High Court allowed the petition and quashed the award holding that the dispute could not have been referred to the Labour Court for adjudication as there was inordinate delay in approaching the Labour Commissioner. However, the Court directed the respondent-Corporation to pay Rs. 10,000/- each to the appellants by way of compensation. In writ appeals, Division Bench of High Court upheld the order of Single Judge. Hence the present appeals.

Disposing of the appeals, the Court

HELD: In view of the concurrent finding recorded by the High Court that the appellants were temporarily appointed on daily wages as and when work was available and they were not posted on regular basis against sanctioned post, there is no reason and justification to interfere with the same. However, the direction for payment of Rs.10,000/- each to the appellants will not compensate the appellants. Hence, the appellants who approached for the conciliation after 8 to 10 years from the date of termination are entitled to a sum of Rs.50,000/- each whereas one of the appellants who has approached the Conciliation Officer within 2 to 3 years shall be entitled to get a sum of Rs. 1,00,000/-. [Para 6] [709-F-H; 710-A]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 855 of 2013.

From the Judgment & Order dated 13.09.2007 of the High Court of Judicature of Bombay, Bench at Aurangabad in LPA No. 142 of 2007 in Writ Petition No. 2410 of 2005.

WITH

C.A. No. 861-864 of 2013

Anish R. Shah, Sunil Kumar Verma for the Appellant.

Shivaji M. Jadhav for the Respondent.

The Judgment of the Court was delivered by

M.Y. EQBAL, J. 1. Leave granted.

2. The appellants have preferred these appeals against the common judgment and order passed by the Division Bench of the Bombay High Court at Aurangabad in Letters Patent Appeals arising out of Writ Petitions whereby the order passed by the Learned Single Judge quashing the award passed by the Labour Court, Jalagaon, has been affirmed.

3. The facts of the case lie in a narrow compass. All the appellants were employed with the Respondent Corporation on daily wages or on temporary basis. One of the appellant was engaged as daily coolie in Construction Department of the Corporation, some time in 1989 and his services were terminated after two years in 1991. Second appellant was appointed as casual labour in Building Department of the Corporation in March 1980 and his services were terminated in 1992. The 3rd appellant was appointed as a labourer in Water Supply Department of Respondent Corporation, some time in July 1996 and was terminated in May, 1997. Similarly, the 4th appellant was engaged as casual labourer in Building Department of the Respondent in January 1989 and was terminated in December, 1991. The 5th appellant was appointed as supervisor in March 1989 and his services were terminated in 1991. Four of the appellants approached the Labour Commissioner (Conciliation officer) some time in 2001 and the 5th appellant approached the conciliation officer some time in 2000. When the conciliation failed the dispute was referred to Labour Court for adjudication as to whether the

termination of services was illegal. The Labour Court passed an award holding the termination as illegal and directed reinstatement of the appellants. Aggrieved by the said order the Respondent-Corporation moved the High Court by filing writ petitions. The learned Single Judge, after hearing the parties, allowed the writ petitions and quashed the award passed by the Labour Court. However, the Respondent – Corporation was directed to pay Rs.10,000/- each to the appellants by way of compensation. The learned Single Judge noticed that out of five, four appellants approached the Labour Commissioner for conciliation after 8 to 10 years from the date of termination of service. Only the 5th appellant approached the Labour Commissioner after three years and ten months from the date of termination of service. The learned Single Judge, following the earlier decisions of this Court held that there had been gross and inordinate delay in approaching the Labour Commissioner and, therefore, the dispute could not have been referred to the Labour Court for adjudication.

4. It was held by the learned Single Judge that the Labour Court had committed serious error of law in passing the award of reinstatement. Accordingly, the award was quashed with a direction to the Respondent Corporation to pay Rs.10,000/- each to the appellants by way of compensation. All the five appellants dissatisfied with the judgment and order passed by the learned Single Judge filed Letters Patent Appeals which were numbered as 140-144 of 2007. The Division Bench noticed the undisputed facts that all the appellants were temporarily employed on daily wages or temporary basis, and that their services were terminated after they worked for five years. It was further noticed that delay in approaching the conciliation officer was totally unexplained and there is nothing on record to infer that the appellants were continuously approaching the Corporation for their reinstatement in service. The Division Bench, therefore, while dismissing the appeals observed:

"We also agree with the learned Single Judge that

there is another stumbling block in the path of workers/ appellants. Admittedly, they were temporary workers doing the job on daily wages, as and when work was available. It is not their case that they were posted on any regular vacant posts, nor it is their case that they had gone through due process of selection. In the light of ratio laid down by the Constitution Bench of the Hon'ble the Supreme Court in the matter of Secretary, State of Karnataka and others vs. Umadevi and others, reported in 2006 AIR SCW 1991, the learned Single Judge was justified in holding that no remedy is available to the workers since they were not the workers appointed on regular vacant posts by due process of selection."

5. We have heard Mr. Anish R. Shah and Shivaji M. Jadhav, learned counsel for the appearing parties. Mr. Shah, counsel for the appellant contended that the courts below have erred in holding that the Labour Court ought not to have passed an award of reinstatement in a case where the appellants approached for conciliation about 8-10 years of the termination. It is submitted that while making the aforesaid observation the courts below failed to appreciate that the appellants were continuously making representation to the Respondent-Corporation and only on the basis of the assurance given by the Respondent Corporation the appellant had not taken any steps to enforce their right through the process of the court.

6. In view of the concurrent finding recorded by both the learned Single Judge and Division Bench in appeal that the appellants were temporarily appointed on daily wages as and when work was available and they were not posted on regular basis against sanctioned post, we do not find any reason and justification to interfere with the orders passed by the two courts. However, we are of the view that the direction for payment of Rs.10,000/- each to the appellants will not compensate the appellants. Hence, the appellants who approached for the conciliation after 8 to 10 years from the date of termination are

entitled to a sum of Rs.50,000/- each whereas one of the appellants namely Rajkumar Rohitlal who has approached the Conciliation Officer within 2 to 3 years shall be entitled to get a sum of Rs. 1,00,000/-.

7. The impugned judgment passed by the learned Single Judge is modified to that extent. These appeals are, accordingly disposed of.

K.K.T. Appeals disposed of.

M. MANOHAR REDDY & ANR.
v.
UNION OF INDIA & ORS.
(Writ Petiton (Civil) No. 174 of 2012)

FEBRUARY 4, 2013

[AFTAB ALAM AND RANJANA PRAKASH DESAI, JJ.]

Constitution of India, 1950:

Art. 32 read with Art. 217 – Petition for a writ of quo warranto seeking to quash appointment of Judge of High Court – Consultation process leading to appointment alleged to have been vitiated for failure of consideration of a criminal case pending against the incumbent – Held: 'Eligibility' of the incumbent is not in issue – As regards 'lack of effective consultation', a fact that is unknown to anyone cannot be said to be not taken into consideration and the consultative process cannot be faulted as incomplete for that reason – At the time the incumbent was being considered for appointment as a judge of High Court, he was unaware of any case being pending in which he was named as an accused –It is not a case of suppression of any material fact by the incumbent or at his behest – From the record, it is evident that none of the members of High Court or Supreme Court Collegia was aware of the fact – State Government and Central Government were equally unaware of the fact – No case is made out for issuing a writ of quo warranto quashing the appointment of respondent No. 3 as the judge of High Court.

Public Interest Litigation:

Writ petition filed in 2012 seeking to quash appointment of a Judge of High Court made in 2000 – Held: Writ petition is based on incorrect facts – It is not a sincere and honest endeavour to correct something which the petitioners truly

perceive to be wrong but the real intent of this petition is to malign respondent No.3 – Writ petition is not only without merit but also wanting in bona fides.

Respondent no. 3 was appointed as Judge of the High Court as per Notification dated 19.6.2000 and he took oath on 27.6.2000. Two advocates of the said High Court filed the instant writ petition seeking a writ in the nature of quo warranto quashing the appointment of respondent no. 3 as a Judge of the High Court and a writ of mandamus commanding the State Bar Council to cancel his enrolment as an advocate. It was stated that the consultation process leading to appointment of respondent no. 3 was vitiated as both the High Court and the Supreme Court Collegia as well as the Central Government failed to consider that at the time of such appointment a criminal trial was pending in which respondent no. 3 was an accused and a proclaimed offender and even at the time of his enrolment as an advocate he had concealed the factum of criminal proceedings in his application for enrolment. The Attorney General submitted that the writ petition was not maintainable and the same was only a camouflage as the petitioners aimed at removal of the Judge who had been in office for over 12 years, which would be violative of the Constitutional scheme.

Dismissing the writ petition, the Court

HELD: 1.1. In *Mahesh Chandra Gupta,* **this Court brought out the distinction between "eligibility" and "suitability" and pointed out that eligibility was based on objective facts and it was, therefore, liable to judicial review. But, suitability pertained to the realm of opinion and was, therefore, not amenable to any judicial review. The Court concluded that judicial review may be called for on two grounds, namely, (i) "lack of eligibility" and (ii)**

"lack of effective consultation". In the case in hand admittedly, the eligibility of respondent No.3 is not an issue. [para 13 and 15] [724-B, E-F; 726-F]

Mahesh Chandra Gupta v. Union of India **2009 (10) SCR 921= 2009 (8) SCC 273 – referred to.**

1.2. As regards the 'lack of effective consultation', owing to pendency of the criminal case against respondent no. 3, the case related to an incident alleged to have taken place at 8.30 P.M. on 13.2.1981 during an agitation by a large number of University students, in which a State Road Transport bus was damaged. Respondent no. 3 was a student of the said University at the relevant time. An FIR was lodged against unknown persons and the accused were described as "University Students". Subsequently, five student leaders were identified and respondent no. 3 figured among them at sl. No. 4. Case of accused-1 resulted in acquittal. Accused 2 to 5 were simply shown as absconders without observing the required procedure. However, it was shown as a long pending case and by order dated 31.1.2002 permission was granted to withdraw the case and, accordingly, all the accused were discharged. From the record, it cannot be said that respondent no. 3 was even aware that in some record buried in the courts he was named as an accused and he was required to appear in the court in connection with that case. Apart from the record of the case, from the resume of respondent no. 3, it may be seen that before his appointment as a judge of the High Court, he was the Additional Advocate General of the State. If the case would have been within his knowledge it is unimaginable that he would not have attended to it and got it concluded one way or the other. [para 5, 6, 28, 30 and 31] [719-B-D, E-F; 720-A-D-E; 733-A, F-H]

1.3. Besides in 1995, the respondent no. 3 was

selected and was issued an appointment letter for the post of the Judicial Member in the Income Tax Appellate Tribunal. The appointment letter was undoubtedly issued to him only after police verification and nothing was mentioned even at that stage about any criminal case pending against him. [para 37] [735-G-H; 736-A]

1.4. It may also be noted that before filing the instant writ petition, the petitioners had made a representation, both before the Chief Justice of India and the Law Minister, asking for removal of respondent No. 3 as a judge of the High Court on the same allegations. The Chief Justice of India called for a report on the matter from the Chief Justice of the High Court and the latter made a detailed enquiry and came to the same conclusion as this Court has arrived at on an independent appraisal of the record of the case. [para 32] [734-A-D]

1.5. Therefore, this Court holds that at the time respondent No.3 was being considered for appointment as a judge of the High Court, he was unaware of any case being pending in which he was named as an accused and it is quite wrong to refer to him as "an absconder and a proclaimed offender" in the case. This finding leads to another and that is, it is not a case of suppression of any material fact by respondent No.3 or at his behest. [para 33] [734-F-H]

1.6. Further, from the record relating to the appointment of respondent No. 3 as a judge of the High Court, it is evident that none of the members of the High Court or the Supreme Court Collegia was aware of the fact. The State Government was equally unaware of the fact and so was the Central Government as is evident from the resume prepared by the Law Ministry as also the IB Report. [para 36] [735-E-F]

1.7. A fact that is unknown to anyone cannot be said to be not taken into consideration and the consultative process cannot be faulted as incomplete for that reason. To fault the consultative process for not taking into account a fact that was not known at that time would put an impossible burden on the Constitutional authorities engaged in the consultative process and would introduce a dangerous element of uncertainty in the appointments. [para 39] [736-C-D]

1.8. Therefore, this Court is clearly of the view that no case is made out for issuing a writ of *quo warranto* quashing the appointment of respondent No. 3 as the judge of High Court. [para 41] [736-H]

1.9. The instant writ petition professed to have been filed in public interest is, but a ruse to malign respondent No.3. The writ petition owes its origin to a news report published in a Telugu daily newspaper on 27.12.2011. The report is based on incorrect facts and is full of statements and innuendos that might easily constitute the offence of defamation leave alone contempt of court. It, therefore, appears that this writ petition is not a sincere and honest endeavour to correct something which the petitioners truly perceive to be wrong but the real intent of this petition is to malign respondent No.3. It is indeed very important to uphold the "institutional integrity" of the court system as pointed out in the CVC judgment* but it is equally important to protect the court from uncalled for attacks and the individual judges from unjust infliction of injuries. The writ petition is not only without merit but also wanting in bona fides. [para 44-46] [737-E-F; 738-A-D]

Centre for PIL and Another v. Union of India and Another* **2011 (4) SCR 445 = 2011 (4) SCC 1 – referred to.

Supreme Court Advocates-on–Record Association vs. Union of India **1993 (2) Suppl. SCR 659 = 1993 (4) SCC 441;** *Special Reference No. 1 of 1998* **1998 (2) Suppl. SCR 400 = 1998 (7) SCC 739;** *Shri Kumar Padma Prasad v. Union of India* **1992 (2) SCR 109 = 1992 (2) SCC 428,** *Shanti Bhushan v. Union of India* **2008 (17) SCR 791 = 2009 (1) SCC 657 - cited**

Case Law Reference:

1993 (2) Suppl. SCR 659	**cited**	**para 7**
1998 (2) Suppl. SCR 400	**cited**	**para 7**
1992 (2) SCR 109	**cited**	**para 9**
2008 (17) SCR 791	**cited**	**para 9**
2009 (10) SCR 921	**referred to**	**para 9**
2011 (4) SCR 445	**referred to**	**para 16**

CIVIL ORIGINAL JURISDICTION : Writ Petition (Civil) No. 174 of 2012.

Under Article 32 of the Constitution of India.

Shanti Bhusan, Gopal Sankaranarayan, Senthil Jagadeesan, Karthik Seth for the Petitioners.

G.E. Vahanvati AG, Vipin Kumar Jai for the Respondents.

The Judgment of the Court was delivered by

AFTAB ALAM, J. 1. The two petitioners, who are advocates of the High Court of Andhra Pradesh, have filed this petition under Article 32 of the Constitution of India, purportedly in public interest. This writ petition seeks a writ in the nature of *quo warranto,* quashing the appointment of respondent No.3 as a judge of the High Court of Andhra Pradesh and a writ in the nature of *mandamus* commanding the Bar Council of Andhra Pradesh to cancel his enrolment as an advocate. The quashing of the appointment of respondent No.3 as a judge of the High

Court is sought on the ground that the consultation process leading to his appointment was vitiated as both the High Court and the Supreme Court Collegia as well as the Central Government failed to consider two essential facts; one, at the time of his appointment, a criminal trial was pending in which respondent No.3 was not only an accused but a proclaimed offender and the other that even at the time of his enrolment as an advocate he had concealed the criminal proceedings and in the relevant column of the application for enrolment with the Bar Council, he falsely stated that there was no pending proceeding against him.

2. In order to put the petitioners' challenge to the appointment of respondent No.3 as a judge of the High Court in the proper perspective, it will be useful to give here a brief outline of the relevant facts.

3. The name of respondent No.3 was recommended for appointment as a judge of the Andhra Pradesh High Court on November 14, 1998 by the Chief Justice of the High Court with the other two Collegium members agreeing with the recommendation. The recommendation made by the High Court was received in the Supreme Court on February 15, 1999. At that time the age of respondent No.3 was 41 years and six months and he had completed over 15 years of legal practice. In the resume prepared by the Ministry of Law and Justice that came to be put up before the Supreme Court Collegium, respondent No.3 was described as under:

"Shri N.V. Ramana, Advocate:

BIO-DATA

He was enrolled as an Advocate on February 10, 1983. He has practiced in the High Court of Andhra Pradesh, Central and Andhra Pradesh Administrative Tribunals and the Supreme Court of India in Civil, Criminal, Constitutional, Labour, Service and Election matters. He

has specialized in Constitutional, Criminal, Service and Inter-State River laws. He has handled about 800 cases during the last three years. He has functioned as Panel Counsel for Andhra Bank, Vysa Bank, United India Insurance Co. and Food Corporation of India. He has also functioned as Additional Standing Counsel for Central Government and Standing Counsel for Railways in the Central Administrative Tribunal at Hyderabad. At present he is functioning as Additional Advocate General of Andhra Pradesh. His professional income during the last three years was as tabulated below:

Year	Gross Income	Taxable Income
1996-97	7,87,210	2,21,200
1997-98	10,31,465	3,68,950
1998-99	38,95,973	16,94,928"

And the Intelligence Bureau report about him stated as under:

"I.B. REPORT:

He enjoys good personal/professional image. Nothing adverse against his character, reputation and integrity has come to notice, so far. He has also not come to notice for links with any political party/communal organization.

None of his relatives is either serving or has served earlier as judge in any High Court or Supreme Court."

4. Following the consultative process between the different constitutional functionaries, a notification was issued on June 19, 2000 appointing respondent No.3 as a judge of the Andhra Pradesh High Court and respondent No.3 took the oath and assumed the office as a judge of the Andhra Pradesh High

Court on June 27, 2000. Since then he is continuously working in that capacity.

5. It now comes to light that all through the period when the recommendation was made for his appointment as a judge and the notification was issued and he assumed the office as a judge, a criminal case was pending in which respondent No.3 was an accused. It is, therefore, necessary to look into the criminal case and its proceedings. The criminal case in question dates back to the year 1981 when respondent No.3 was a student of Nagarjuna University. The students of the University, it appears, complained of inadequate public transport facilities for commuting from their homes to the University as only a few buses plying between Guntur and Vijayawada stopped at the University. They demanded that more buses should stop at the University. As is not uncommon with the youth in this country, some of the students of the University took to agitation in connection with the demand and at about 8.30 p.m. on February 13, 1981, a group of about 30 students put road blocks on the GNT road, opposite Nagarjuna University, causing stoppage of all vehicles on the road. At about 9.15 p.m., a bus of the State Transport Corporation, on its way from Guntur to Vijayawada, arrived there when there was already a heavy jam and pulled up at the road flank. In such situations, unfortunately a State bus is the softest and the most vulnerable target. In this case also the State bus became the target of the agitating students' ire. The driver of the bus was pulled down and the door to the driver's seat was damaged. Some miscreants pelted stones on the bus and smashed its windscreen and glass windows with iron rods. One of the passengers also received some injuries. By this time a police party also came to the spot. At this stage, an attempt was made to set fire to the bus by throwing a burning oil cloth tied to a rod inside the bus. But, a policeman put out the burning cloth and the bus was saved from any further damage. Shortly thereafter the police dispersed the agitating students and restored normalcy. On the same day at 11.00 p.m. the driver

of the bus lodged a first information report in connection with the incident at Mangalagiri Police Station where it was registered as Crime No. 55 of 1981 under Sections 147, 342, 427 and 324 of the Penal Code. The FIR was against unknown persons and the accused were described as "Nagarjuna University students".

6. The police after investigation drew up a charge sheet dated October 10, 1983 and on October 19, 1983 submitted it in the court of the Munsif Magistrate, Mangalagiri where it was registered as C.C. No.229/1983. From the charge sheet it appears that in their statements recorded under Section 161 of the Code of Criminal Procedure, the Driver and the Conductor of the bus (apart from some other witnesses) identified and named five persons as the student- leaders who were leading the agitation on February 13, 1981. The charge sheet, accordingly, cited five persons as accused and respondent No.3 figured among them at serial No. 4. All the accused were shown as absconders. The charge sheet, however, does not disclose what steps were taken by the investigating officer to secure the presence of the accused. There is no mention that the investigating officer ever tried to obtain from the court warrants of arrest or processes under Sections 82 and 83 of the Code of Criminal Procedure for apprehending the accused. They were simply shown as absconders without observing the procedure sanctioned by law before an accused can be called an absconder.

7. The fact of the matter, however, is that this Crime Case No.229/83 (later re-numbered as CC No.75/87 and then CC No.167/91) was undeniably pending at the time of appointment of respondent No.3 as a judge of the High Court and it is contended on behalf of the petitioners that the failure to take into account the pendency of the criminal case while his name was recommended by the High Court Collegium and approval and consent was accorded by the Supreme Court Colllegium and the Central Government for his appointment as a judge of the High Court deeply flawed the participatory consultative

process as envisaged in Article 217(1) of the Constitution and as developed by the decisions of this Court in *Supreme Court Advocates-on–Record Association*[1] and later on in *Special Reference No. 1*[2] *of 1998*. It is submitted the appointment of the respondent resulting from a consultation process that failed to take into account an important and relevant fact was completely illegal and was, therefore, liable to be quashed by a writ of *quo warranto*. The respondent had no right to hold the office of a High Court judge and this Court must step in to correct the grave error committed by his appointment.

8. It needs to be noted here that the learned Attorney General was requested to address the Court on the question of maintainability of this writ petition that seeks a writ, quashing the appointment of a judge of the High Court. The Attorney General submitted that the writ petition was not maintainable and was liable to be dismissed summarily. He submitted that the prayer for a writ of *quo warranto* quashing the appointment of respondent No.3 was only a camouflage and what the petitioners really aimed at was the removal of the judge who had been in office for over twelve years. The removal of a judge in office, the Attorney maintained, was an issue directly related to the independence of judiciary that is fundamental to the Constitutional scheme. The Attorney pointed out that in order to make the judiciary independent and to make it possible for the judges to discharge their duties without fear or favour the Constitution firmly secured the tenure of a judge and granted that a judge of any of the superior courts could only be removed from office on the basis of an impeachment motion passed by the Parliament as provided under Article 124(4) (in the case of a judge of the Supreme Court) and Article 217 read with Article 124(4) (in the case of a judge of the High Court). The Constitution did not recognize any other mode for the removal of a judge. Any deviation from the Constitutional process in the garb of quashing the appointment by a writ of *quo warranto*

1. (1993) 4 SCC 441.
2. (1998) 7 SCC 739.

would be violative of the scheme of the Constitution and deleterious for the independence of the judiciary. He further submitted that if the petitioners thought that the appointment of respondent No.3 as a judge of the Andhra Pradesh High Court was wrong and there were grounds for his removal from the office, they could always bring the matter to the notice of the Parliament which alone was the Constitutional forum competent to remove a judge of the High Court from his office from any misbehaviour committed either before or after his appointment as a judge. He added that in case the Parliament declined to take any action for the removal of the judge on the petitioner's complaint the Court was powerless in the matter and the removal of the judge could not be brought about by the device of quashing his appointment. He went so far as to say that in entertaining this writ petition on merits the Court would be overstepping its Constitutional limits.

9. Mr. Shanti Bhushan, learned senior advocate appearing for the petitioners, on the other hand, submitted that writ petition raised the issue of inviolability and credibility of appointment to the high office of the High Court judge. He further submitted that the Court must not be seen as protecting someone wrongly appointed as a judge of the High Court for, the people's faith and trust and confidence in the courts and the judges presiding over the courts was as much necessary to support the independence of judiciary as the guarantees under the Constitution and the laws. Mr. Shanti Bhushan further submitted that in the past also similar issues came before the Court and the Court never declined to examine the merits of the case and passed appropriate orders. In support of the submission, he relied upon the decisions of this Court in (i) *Shri Kumar Padma Prasad v. Union of India*[3]*, (ii) Shanti Bhushan v. Union of India*[4] and (iii) *Mahesh Chandra Gupta v. Union of India*[5]*.*

3. (1992) 2 SCC 428.
4. (2009) 1 SCC 657.
5.. (2009) 8 SCC 273.

10. The second case cited by Mr. Shanti Bhushan is one which he himself had filed as public interest litigation, assailing the extension granted to respondent No.2 in that case as an Additional Judge of the Madras High Court. He relied upon paragraph 25 of the judgment in that case but, we fail to see anything in that decision that may serve as an authority on the question of maintainability of a writ petition for quashing the appointment of a judge after many years of his assuming the office.

11. However, the first and the third case relied upon by Mr. Shanti Bhushan deserve consideration.

12. In *Shri Kumar Padma Prasad*, the Court dealt with a writ petition that was filed originally before the Gauhati High Court but was later transferred and brought to this Court. The writ petition was filed at the stage where though the warrant had been issued under the hand and seal of the President of India, appointing one of the respondents in that case, namely, K.N. Srivastava as a judge of the Gauhati High Court, he was still to make and subscribe the oath/affirmation under Article 219 of the Constitution. This means that he had not entered upon the office of the judge and the writ petition was filed before the matter had reached the stage of Article 217 as the person whose appointment was under challenge was yet to assume the office of the judge. In that case this Court indeed stepped in to interfere and to stop the appointment from materializing. This Court found and held that on the date of issue of the warrant by the President of India K.N. Srivastava was not **qualified** to be appointed as a judge of the High Court. It, accordingly, quashed his appointment as a judge of the Gauhati High Court and directed the Union of India and the other concerned respondents not to administer the oath or affirmation under Article 219 of the Constitution to K.N. Srivastava. K.N. Srivastava was similarly restrained from making and subscribing the oath or affirmation in terms of Article 219 of the Constitution of India. It is, thus, to be noted

that the Court intervened in the matter before the person concerned had assumed the office of the judge on the ground that he was not **qualified** to be appointed as a judge or, in other words, was not eligible to be appointed as a judge.

13. The concepts of "eligibility" and "suitability" were later examined by this Court in the decision in *Mahesh Chandra Gupta* (to which one of us Aftab Alam, J. was also a Member). In *Mahesh Chandra Gupta*, challenge was made to the appointment of a judge of the Allahabad High Court after the incumbent had assumed his office. In the writ petition, as it was originally filed, the appointment was questioned only on the ground that the incumbent did not possess the basic eligibility for being appointed as a judge of the High Court. Later on, the appointment was also challenged on grounds of suitability and want of effective consultation process by taking additional pleas in supplementary affidavits. Kapadia, J. (as His Lordship then was), speaking for the Court brought out the distinction between "eligibility" and "suitability" and pointed out that eligibility was based on objective facts and it was, therefore, liable to judicial review. But, suitability pertained to the realm of opinion and was, therefore, not amenable to any judicial review. The Court also examined the class of cases relating to appointment of High Court judges that might fall under judicial scrutiny and concluded that judicial review may be called for on two grounds namely, (i) "lack of eligibility" and (ii) "lack of effective consultation". In paragraphs 39, 43 and 44 of the judgment the Court said:

> "**39.** At this stage, we may state that, there is a basic difference between "eligibility" and "suitability". The process of judging the fitness of a person to be appointed as a High Court Judge falls in the realm of suitability. Similarly, the process of consultation falls in the realm of suitability. On the other hand, eligibility at the threshold stage comes under Article 217(2)(*b*). This dichotomy between suitability and eligibility finds place in Article

217(1) in juxtaposition to Article 217(2). The word "consultation" finds place in Article 217(1) whereas the word "qualify" finds place in Article 217(2).

43. One more aspect needs to be highlighted. "Eligibility" is an objective factor. Who could be elevated is specifically answered by Article 217(2). **When "eligibility" is put in question, it could fall within the scope of judicial review.** However, the question as to who should be elevated, which essentially involves the aspect of "suitability", stands excluded from the purview of judicial review.

44. At this stage, we may highlight the fact that there is a vital difference between judicial review and merit review. Consultation, as stated above, forms part of the procedure to test the fitness of a person to be appointed a High Court Judge under Article 217(1). Once there is consultation, the content of that consultation is beyond the scope of judicial review, **though lack of effective consultation could fall within the scope of judicial review.** This is the basic ratio of the judgment of the Constitutional Bench of this Court in *Supreme Court Advocates-on-Record Assn*. and *Special Reference No. 1 of 1998*.

(emphasis added)

14. In paragraphs 71 and 74 of the judgment again the Court observed as under:

Justiciability of appointments under Article 217(1)

71. In the present case, we are concerned with the mechanism for giving effect to the constitutional justification for judicial review. As stated above, "eligibility" is a matter of fact whereas "suitability" is a matter of opinion. In cases involving lack of "eligibility" writ of quo warranto would certainly lie. One reason being that "eligibility" is not a

matter of subjectivity. However, "suitability" or "fitness" of a person to be appointed a High Court Judge: his character, his integrity, his competence and the like are matters of opinion.

74. It is important to note that each constitutional functionary involved in the participatory consultative process is given the task of discharging a participatory constitutional function; there is no question of hierarchy between these constitutional functionaries. Ultimately, the object of reading such participatory consultative process into the constitutional scheme is to limit judicial review restricting it to specified areas by introducing a judicial process in making of appointment(s) to the higher judiciary. These are the norms, apart from modalities, laid down in *Supreme Court Advocates-on-Record Assn.* and also in the judgment in *Special Reference No. 1 of 1998, Re*. **Consequently, judicial review lies only in two cases, namely, "lack of eligibility" and "lack of effective consultation". It will not lie on the *content* of consultation.**

(emphasis added)

15. In view of the decision in *Mahesh Chandra Gupta,* the question arises whether or not the case in hand falls in any of the two categories that are open to judicial review. Admittedly, the eligibility of respondent No.3 is not an issue. Then, can the case be said to raise the issue of "lack of effective consultation".

16. Mr. Shanti Bhushan strongly argued that the consultation that led to the appointment of respondent No.3 as the judge of the Andhra Pradesh High Court was completely deficient for not taking into consideration that he was accused in a pending criminal case and as a result, the appointment of respondent No.3 was wholly vitiated and it was fit to be quashed by this Court. In support of the submission Mr. Shanti Bhushan

heavily relied upon the decision of this Court in *Centre for PIL and Another v. Union of India and Another*[6] (commonly called as the CVC case). Mr. Shanti Bhushan submitted that in that case this Court had made institutional integrity as part of eligibility criteria and had, thus, highly raised the standards of qualification for appointment to a public office.

17. In the CVC case a three judge Bench of this Court held that the recommendation for appointment of Shri P.J. Thomas as the Central Vigilance Commissioner was non-est in law and, consequently, quashed his appointment to that post. The recommendation for appointment of Shri P.J. Thomas was made, by a majority of 2:1, by a committee consisting of (i) the Prime Minister, (ii) the Minister of Home Affairs and (iii) The Leader of Opposition in the House of the People (referred to in the judgment as the High-Powered Committee or the HPC). The Court held that the recommendation was non-est because the HPC had failed to take into consideration the pendency of case No. 6 of 2003 (relating to the import of Palmolein oil by the Kerala Government), in which the Government of Kerala had accorded sanction for the prosecution of Shri P.J. Thomas (among others) for committing offences punishable under Section 120-B of the Penal Code read with Sections 13 (i) (d) of the Prevention of Corruption Act and had based its recommendation entirely on the blanket clearance given to Shri P.J. Thomas by the CVC (then in office) and the fact that during the pendency of the criminal case Shri P.J. Thomas was appointed as Chief Secretary of Kerala, then as the Secretary of Parliamentary Affairs and subsequently as the Secretary, Telecom.

18. At the first glance the CVC case appears to have some parallels with the case in hand and in order to apply the decision in the CVC case to the present case Mr. Shanti Bhushan extensively cited from the judgment the passages where this Court identified the CVC as an institution and an

6. (2011) 4 SCC 1.

"integrity institution", stressed the imperative to uphold and preserve the integrity of that institution and observed that the recommendation for appointment as CVC should be not only with reference to the candidate but the overarching consideration should be the institutional integrity of the office. (See paragraphs 34-37, 42, 43, 47, 59 and 89 of the judgment).

19. We have given the most careful consideration to the CVC decision and the submissions made by Mr. Shanti Bhushan on the basis of that decision, all the time bearing in mind that the Court must not overlook or condone something that may have the effect of lowering down the people's faith or trust in the judges or in courts. But we find that though there are some superficial similarity between the CVC case and the case in hand, the two cases are quite different in their core issues and we find it impossible to justly apply the CVC decision to the facts of the case in hand.

20. In the CVC case the HPC was **not unaware** of Shri P.J. Thomas being an accused in a pending case for offences punishable under Sections 120-B of the Penal Code read with Section 13(1)(d) of the Prevention of Corruption Act. The recommendation that the HPC made in exercise of the statutory power under the proviso to Section 4 of the Central Vigilance Commission Act, 2003 was in a sense in defiance of the pending trial before the criminal court. The genesis and the developments taking place in the criminal case are discussed in paragraph 8 to 21 of the judgment in the CVC case from which it appears that the institution of the case was preceded by the report of the Comptroller and Auditor General, followed by the report by the Public Undertaking Committee of the Kerala Assembly. On the basis of the reports, at least two writ petitions were filed (unsuccessfully) seeking direction of the High Court for institution of a criminal case. The criminal case was finally filed after the new government came to power in the State following the election on May 20, 1996. Even after the

institution of the case the matter had repeatedly gone to the High Court and traveled up to this Court. The Government of Kerala had made repeated requests to the Central Government in the Department of Personnel and Training for grant of sanction for prosecution of Shri P.J. Thomas. The matter had gone to the Central Vigilance Commission and there were its recommendations on record for initiation of disciplinary proceedings against Shri P.J. Thomas. In paragraph 44 of the judgment, the Court pointed out that between 2000 and 2004 there were at least six noting of the DoPT suggesting that penalty proceedings may be initiated against Shri P.J. Thomas.

21. In short, the fact about the pendency of the criminal case and Shri P.J. Thomas being one of the accused in the case was writ large all over the record before the HPC. The fact was not only within the personal knowledge of each of the three members of the HPC but it was in public domain. Hence, the recommendation of the HPC was not in ignorance of the criminal case. The recommendation was for appointment of Shri P.J. Thomas as the Central Vigilance Commissioner **notwithstanding** his being an accused in the criminal case and the HPC appeared not to see the criminal case as any impediment in the way of his appointment as the Chief Vigilance Commissioner.

22. Let us now examine how far the facts of the present case bear similarity to the CVC case.

23. In the writ petition and in course of hearing of the case respondent No.3 has been repeatedly called, a little loosely and rather uncharitably, an "absconder" and a "proclaimed offender" in a case of robbery and burning down of a bus. It is seen above that the criminal case in question had no element of robbery or bus burning. We may now examine how far it is correct to call respondent No.3 as an "absconder" and a "proclaimed offender".

24. It is noted above that the charge sheet was filed in the

court of the Munsif Magistrate, Mangalagiri on October 19, 1983. On October 25, the Magistrate directed for issuance of summonses, fixing November 25, 1983 as the date for hearing. The summonses, issued in pursuance of the order, are on file marked as paper nos. 25 to 30, but they bear no endorsement about service. At the reverse of summonses to accused 3 and 4, it is mentioned that they were studying in B.L., First Year, Nagarjuna University. On November 25, 1983, the accused were not present in court. Their absence was recorded in the order-sheet and fresh summonses were directed to be issued, fixing December 23, 1983 as the date of hearing. Whether or not summonses were issued in pursuance of the order is not known because those summonses are not on the record. On December 23, 1983, the accused were again not present and summonses were again directed to be issued, fixing January 25, 1984 for hearing. On January 25, 1984, the accused were once again not present and fresh summonses were issued fixing February 15, 1984 for hearing. The summonses are on the file marked as paper Nos. 31 to 36. The case was then listed on a number of dates but the accused did not appear. Finally on November 27, 1985, accused 1 appeared in court but accused 2 to 5 were still not present. On January 9, 1987, the court ordered to separate the case of accused 2 to 5 and proceeded with the trial of accused 1. On June 2, 1987, statement of accused 1 was recorded under Section 251 of the Code of Criminal Procedure. On March 1, 1988, the statements of PW1 and PW2, namely, S. Satyanarayanaraju and P. Peda Sivaiah (being the driver and conductor of the bus in question) were recorded. It is significant to note that neither the driver nor the conductor of the bus (PW1 and PW2 respectively), named or identified the accused who had attacked the bus. The driver said that around 50 or 60 students had charged at them in a group. The conductor said that when the driver stopped the bus, the students came shouting and blocked the bus. He became afraid and ran away with the cash bag. The prosecution did not examine any more witnesses and on May 12, 1988, accused 1 was examined under Section 313 of the Code of Criminal

Procedure. Finally by judgment and order dated July 4, 1988, the trial court found accused 1 not guilty of the offences alleged against him and acquitted him of the charges. While acquitting him, the trial judge noted that the prosecution witnesses were not able to identify the accused. It was also noted that as per the FIR the incident occurred at night and the bus was attacked by more than 50 persons and there was no material with regard to the identity of the culprits who attacked the bus and caused damage. It was noted that the FIR does not mention the names of the persons who participated in the offence. It was also noted that in his deposition before the trial court PW2 (the bus conductor) denied having identified the accused in his statement under Section 161 of the Code of Criminal Procedure.

25. Let us now see the case relating to the other four accused, including accused 4, that is respondent No.3.

26. It is noted above that on November 27, 1985 accused 1 alone appeared before the court. On March 5, 1986 the court ordered for issuance of non-bailable warrants against accused 2 to accused 5. The warrants are not on record and it is not known whether any warrants were in fact issued in pursuance of the order. On January 9, 1987 the court ordered to separate the case of accused 2 to accused 5. After the case was separated, the record pertaining to accused 2 to accused 5 was registered as CC No. 75/87 and was later renumbered as CC No. 167/91. From the order sheet it appears that from May 1987 to August 1991, the court passed orders on about twenty four dates directing for issuance of non-bailable warrants of arrest against the accused but no compliance is noted against any order, excepting the one passed on August 30, 1991. However, no warrants, even of that date, are on the file. Mechanical orders continued to be passed in the same fashion till April 2000 and then suddenly on May 8, 2000 the order was passed for issuance of non-bailable warrants and processes under Sections 82 & 83 of Code of Criminal

Procedure against the accused, fixing July 18, 2000 as the next date in the case. The compliance of the order is noted on May 11, 2000 on the order sheet. From the record it, however, appears that process under Sections 82 & 83 was issued on May 11, 2000 only against accused 3, P.R. Muruthy son of P.B. Subbarao. Thereafter, the case was listed on several dates, awaiting execution of warrants and proclamation. On June 20, 2001 the court took steps for recording evidence in absence of the accused under Section 299 of the Code of Criminal Procedure and then, after the case was listed on three different dates, on November 5, 2011, the examination-in-chief of the bus driver (PW1) was recorded under Section 299 of the Code of Criminal Procedure. On the same date, the examination-in-chief of the bus conductor (PW2) was recorded. In their depositions neither PW1 nor PW2 (the bus driver and the bus conductor) named anyone as accused and both of them said that they did not know the leaders of the group of students that had attacked the bus. Again on the same day, that is November 5, 2011, the Assistant Public Prosecutor made an application to the effect that the other witnesses mentioned in the charge-sheet were passengers in the bus and their whereabouts are not known in view of the passage of time. Accordingly, it was prayed that the evidence of the prosecution may be closed.

27. Thereafter, the Magistrate submitted the record to the Sessions Judge, Guntur with the request to issue proceedings to treat the case as long pending case. The Sessions Judge on December 26, 2011 gave permission to the trial judge to declare the case being CC No. 167/1991 as a long pending case.

28. However, soon thereafter on January 31, 2002, the Assistant Public Prosecutor moved an application under Section 321 of the Code of Criminal Procedure, seeking permission to withdraw the case in the interest of justice. A reference was made in the application to GO Rt No. 1961, dated December 11, 2001 whereby the Government had

decided to withdraw the prosecution against the accused persons. On a consideration of the materials on record, by an order dated January 31, 2002, the trial judge granted permission to the prosecution to withdraw the case and, accordingly, all the accused were discharged.

29. A perusal of the court record shows that during the entire period, service of summonses in the ordinary course were not effected on the four accused persons. Although a proclamation under Section 82 and 83 of the Code of Criminal Procedure was ordered to be issued, the record does not show any publication having been made. However, the record does show that service was sought to be effected by beat of drum only on accused 3. There is nothing on the record to show that any attempt, let alone any serious attempt, was made to serve the summons or the non-bailable warrants on any of the accused persons.

30. The purpose in adverting to the proceedings of the criminal case in detail is not to point out the irregularities in the proceeding. Anyone even with a passing acquaintance with the Code of Criminal Procedure can see that gross irregularities were committed practically at every step in the proceeding. We have referred to the proceedings to judge whether respondent No. 3 could be said to have any knowledge of the case in which he was cited as accused 4. From the record of the case which we have discussed in detail above, we find it very difficult to hold that respondent No. 3 was even aware that in some record buried in the courts at Mangalagiri he was named as an accused and he was required to appear in the court in connection with that case.

31. Apart from the record of the case, there are external circumstances that strengthen this view. From the resume of respondent No. 3, as noted at the beginning of the judgment, it may be seen that before his appointment as a judge of the High Court, he was the Additional Advocate General of Andhra Pradesh. If the case would have been within his knowledge it

is unimaginable that he would not have attended to it and got it concluded one way or the other.

32. Here it may also be noted that before filing this writ petition before this Court the petitioners had made a representation, both before the Chief Justice of India and the Law Minister, asking for the removal of respondent No. 3 as a judge of the Andhra Pradesh High Court on the same allegations. The representation that came to the office of the Chief Justice of India received full consideration and the Chief Justice of India called for a report on the matter from the Chief Justice of the Andhra Pradesh High Court *vide* his letter dated January 18, 2012. The Chief Justice, Andhra Pradesh High Court made a detailed enquiry and submitted his report dated February 7, 2012. In his report the Chief Justice, Andhra Pradesh High Court came to the same conclusion as we have arrived at on an independent appraisal of the record of the case. In paragraphs 29 and 32 of the report, the Chief Justice stated as under:

> "29. It does appear that Justice XXX was unaware of the pendency of the criminal case. I say this from the record of the case, which speaks for itself, and the contents of which need not be repeated. I also say this for another reason.
>
> 32. In my opinion Justice XXX was truly unaware of the criminal case against him and he deserves to be believed when he says so."

33. In light of the discussion made above, we have no hesitation in holding that at the time respondent No.3 was being considered for appointment as a judge of the High Court, he was unaware of any case being pending in which he was named as an accused and it is quite wrong to refer to him as "an absconder and a proclaimed offender" in the case. This finding leads to another and that is, it is not a case of suppression of any material fact by respondent No.3 or at his behest. Here we

wish to make it clear that had it been a case of deliberate and conscious suppression of material fact by respondent No.3 the position would have been entirely different. But that is not the case here.

34. Now we propose to examine whether apart from respondent No. 3, anyone else, who could be in the position to bring the fact to the knowledge of the High Court Collegium or the State Government or the Supreme Court Collegium or the Central Government, was aware of the pendency of the case.

35. Mr. Shanti Bhushan submitted that the State Police had submitted the charge-sheet against respondent No. 3 and hence, the State Government must be deemed to be aware of the fact. The submission plainly overlooks that the State Government is not a monolith and it does not function as a single person. The State Government functions in different departments manned by different people and simply because a charge-sheet was submitted by the State Police no conscious knowledge of the fact can be attributed to the State Government.

36. We have carefully gone through the record relating to the appointment of respondent No. 3 as a judge of the Andhra Pradesh High Court. From the record it is evident that none of the members of the High Court or the Supreme Court Collegia was aware of the fact. The State Government was equally unaware of the fact and so was the Central Government as is evident from the resume prepared by the Law Ministry as also the IB Report.

37. This is not all. In 1993, respondent No. 3 was a candidate for the post of the Member of the Income Tax Appellate Tribunal and in that connection he was interviewed by a Selection Committee headed by a sitting judge of the Supreme Court. He was selected for appointment and was issued an appointment letter dated September 8, 1995 as judicial member in the ITAT. The appointment letter was

undoubtedly issued to him only after police verification and nothing was mentioned even at that stage about any criminal case pending against him. He did not accept the appointment is another matter altogether.

38. From all the attending circumstances, it is clear beyond doubt that not only respondent No. 3 himself but practically no one was aware of the pendency of the case in which he was named as an accused.

39. The question, therefore, arises can a fact that is unknown to anyone be said to be not taken into consideration and can the consultative process faulted as incomplete for that reason. To our mind, the answer can only be in the negative. To fault the consultative process for not taking into account a fact that was not known at that time would put an impossible burden on the Constitutional Authorities engaged in the consultative process and would introduce a dangerous element of uncertainty in the appointments.

40. In case it comes to light that some material facts were withheld by the person under consideration or suppressed at his behest then that may be a case of fraud that would vitiate the consultative process and consequently the appointment resulting from it. But in case there was no suppression and the fact comes to light a long time after the person appointed has assumed the office of a judge and if the Members of the two Houses of the Parliament consider the discovered fact sufficiently serious to constitute misbehaviour and to warrant his removal, then he may still be removed from office by taking recourse to the provisions of Article 124(4) or Article 217 read with Article 124(4) as the case may be. In case, however, the fact was unknown and there was no suppression of that fact, a writ of *quo warranto* would certainly not lie on the plea that the consultative process was faulty.

41. In light of the discussion made above, we are clearly of the view that no case is made out for issuing a writ of *quo*

warranto quashing the appointment of respondent No. 3 as the judge of Andhra Pradesh High Court.

42. The legal issue raised by Mr. Shanti Bhushan is answered but this matter cannot be given a proper closure unless we also say that this writ petition professed to have been filed in public interest is, in our view, but a ruse to malign respondent No.3.

43. In his report to the Chief Justice of India the Chief Justice, Andhra Pradesh High Court has made the following comment:

> "27. The incident occurred almost 30 years ago. The case against Justice Ramana was withdrawn almost 10 years ago. That it should be raked up now is a little inexplicable. The case does not seem to have been sensational in any manner whatsoever so that someone would be following it up. Therefore, it is a little odd that it should have suddenly surfaced now. It is possible that there is some reason behind digging up this case, but I am unable to fathom the motive."

44. What the Chief Justice said, in a highly restrained manner, about the representation addressed to the Chief Justice of India, applies more to this writ petition. The writ petition owes its origin to a news report published in a Telugu daily newspaper called 'Sakshi' on December 27, 2011. A translated copy of the report is enclosed as Annexure P-11 to the writ petition. The report is based on incorrect facts and is full of statements and innuendos that might easily constitute the offence of defamation leave alone contempt of court. After the news broke out, the petitioners seem to have collected the record of the criminal case and filed this writ petition on that basis. The writ petition is drafted with some skill and it presents the facts of the criminal case in a rather twisted way in an attempt to portray respondent No.3 in bad light. The way the writ petition is drafted shows that the petitioners are competent

and experienced counsel. Had they examined the records of the criminal case objectively and honestly, there was no reason for them not to come to the same conclusion as arrived at in this judgment or as appearing from the report of the Chief Justice, Andhra Pradesh High Court. It, therefore, appears to us that this writ petition is not a sincere and honest endeavour to correct something which the petitioners truly perceive to be wrong but the real intent of this petition is to malign respondent No.3.

45. It is indeed very important to uphold the "institutional integrity" of the court system as pointed out in the CVC judgment and as strongly advocated by Mr. Shanti Bhushan, but it is equally important to protect the court from uncalled for attacks and the individual judges from unjust infliction of injuries.

46. In light of the discussions made above, we find this writ petition not only without merit but also wanting in bona fides. It is, accordingly, dismissed with costs of Rs.50,000/- payable by each of the two petitioners. The cost amount must be deposited in a fund for the welfare of the employees of the Andhra Pradesh High Court within four weeks from today.

R.P. Writ Petition Dismissed.

ORIENTAL INSURANCE CO. LTD.
v.
DYAMAVVA & ORS.
(Civil Appeal No. 937 of 2013)

FEBRUARY 5, 2013

[DR. B.S. CHAUHAN AND JAGDISH SINGH KHEHAR, JJ.]

Motor Vehicles Act, 1988:

s. 167 read with s.166 of the Act and s.8 of 1923 Act – Death of an employee in a motor accident while in employment of the employer – Motor Accident Claims Tribunal awarding compensation and directing deduction of the amount already paid to claimant under 1923 Act – Held: Dependents having opted to file claim petition u/s 166 of the Act first, and being disbursed the amount under 1923 Act subsequently, the order of Tribunal directing deduction of the amount paid under the1923 Act from the compensation determined under Motor Vehicles Act, gives full effect to s.167 of the said Act, and the claimants are, thus, not allowed dual benefit under the two enactments – Workmen's Compensation Act, 1923 – ss. 8 and 10.

The husband of respondent no. 1 lost his life in a motor accident while working in the employment of the Port Trust. The dependents filed a claim petition u/s 166 of the Motor Vehicles Act, 1988. Subsequently, the employer-Port Trust intimated the Workmen's Compensation Commissioner of the motor accident and deposited an amount of Rs. 3,26,140/-, which was paid to the dependants. The Motor Accident Claims Tribunal independently determined the claim and awarded the claimants a compensation of Rs.11,44,440/-, out of which the amount of Rs. 3,26,140/- disbursed under Workmen's

Compensation Act, 1923 was directed to be deducted. The High Court affirmed the order.

In the instant appeal filed by the Insurance Company, it was contended for the appellant that the claimants having received the compensation under the Workmen's Compensation Act, were, in view of s. 167 of the Motor Vehicles Act, 1988, precluded from raising a claim under the Motor Vehicles Act, 1988.

Dismissing the appeal, the Court

HELD: 1.1. Sub-s. (1) to (3) of s. 8 of the Workmen's Compensation, 1923 (the 1923 Act) envisages that when a workman during the course of his employment suffers injuries resulting in his death, the employer has to deposit the compensation payable, with the Workmen's Compensation Commissioner. Where an employer has not suo-motu initiated action u/ss 8 for payment of compensation to an employee or his/her dependants, it is open to the dependants of the deceased employee to raise a claim for compensation u/s 10 of the Workmen's Compensation Act, 1923. The procedure u/s 8 is initiated at the behest of the employer "suo motu", and as such, cannot be considered as an exercise of option by the dependants/claimants to seek compensation under the provisions of the Workmen's Compensation Act, 1923. If the claimants had moved an application u/s 10 of the 1923 Act, they would have been deemed to have exercised their option to seek compensation under the provisions of the said Act. In the instant case, no such application was ever filed by the respondents-claimants u/s 10. Therefore, the respondents-claimants having never exercised their option to seek compensation u/s 10 of the 1923 Act could not be deemed to be precluded from seeking compensation u/s 166 of the Motor Vehicles Act, 1988. [para 9 and 12] [754-D-E; 756-A-D]

National Insurance Company Ltd. v. Mastan & Anr. **2005 (5) Suppl. SCR 704 = (2006) 2 SCC 641 - relied on.**

1.2. Even otherwise, the first act at the behest of the respondents-claimants for seeking compensation on account of the death of the bread winner was by way of filing a claim petition u/s 166 of the Motor Vehicles Act, 1988 on 30.5.2003. The said claim petition was the first claim for compensation raised at the hands of the respondents-claimants. If the question raised by the appellant has to be determined with reference to s. 167 of the Motor Vehicles Act, the same is liable to be determined on the basis of the said claim application filed by the respondents-claimants on 30.5.2003. The compensation deposited by the Port Trust under the 1923 Act was much later, on 4.11.2003. The said deposit was not at the behest of the respondents-claimants, but was based on a unilateral "suo motu" determination of the employer (the Port Trust) u/s 8 of the 1923 Act. Filing of the claim application u/s 166 aforesaid, constitutes her (as well as, that of the other dependants of the deceased) option, to seek compensation under the Motor Vehicles Act. [para 13] [756-F-H; 757-A-B, C-D]

1.3. This Court, therefore, affirms the determination rendered by the Motor Accidents Claims Tribunal and the High Court in awarding compensation quantified at Rs.11,44,440/- to the claimant. The Motor Accidents Claims Tribunal as also the High Court rightly ordered a deduction therefrom of a sum of Rs.3,26,140/- (paid to the claimants under the 1923 Act), which gives full effect to s.167 of the Motor Vehicles Act, inasmuch as it awards compensation to the respondents-claimants under the enactment based on the option first exercised, and also ensures that, the respondents-claimants are not allowed dual benefit under the two enactments. [para 14] [757-E-G]

Case Law Reference:

2005 (5) Suppl. SCR 704 relied on para 6

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 937 of 2013.

From the Judgment & Order dated 14.9.2011 of the High Court of Karnataka, Circuit Bench at Dharwad, in MFA No. 20108 of 2009 (MV).

M.K. Dua, Kishore Rawal for the Appellant.

D.P. Chaturvedi, S.N. Bhat for the Respondents.

The Judgment of the Court was delivered by

JAGDISH SINGH KHEHAR, J. 1. Yalgurdappa B. Goudar was employed as a Pump Operator in the Mechanical Engineering Department, and posted in the Old Power House, of the Mormugao Port Trust, Mormugao (for short, 'the Port Trust'). While discharging his duties in his aforesaid capacity during the course of the second shift on 19.4.2003, while pillion riding on a motorcycle bearing registration mo.GA 02 L 8479, he was hit by a tipper bearing registration no.TM 07 V 4548. Consequent upon the injury suffered by Yalgurdappa B. Goudar in the said accident, Yalgurdappa B. Goudar died on the spot. The aforesaid tipper was insured with the Oriental Insurance Company, i.e., the appellant herein.

2. The most important factual aspect in the present controversy is, that Dayamavva Yalgurdappa the widow, and the dependants of Yalgurdappa B. Goudar, filed a claim petition under Section 166 of the Motor Vehicles Act, 1988 on 30.5.2003. Through the aforesaid claim petition, the widow and the children of the deceased Yalgurdappa B. Goudar sought compensation on account of the motor accident in the course whereof, the husband/father of the claimants had lost his life.

3. It is not a matter of dispute, that the Port Trust addressed

a communication dated 4.11.2003 to the Workmen's Compensation Commissioner, Goa intimating him of the motor accident referred to hereinabove. Simultaneously, with the aforesaid intimation, the Port Trust deposited an amount of Rs.3,26,140/- with the Workmen's Compensation Commissioner, as compensation payable to the dependants of the deceased Yalgurdappa B. Goudar under the Workmen's Compensation Act, 1923. Consequent upon the receipt of the aforesaid intimation (as also, the deposit of compensation), the Workmen's Compensation Commissioner issued a notice to the dependants of the deceased Yalgurdappa B. Goudar. Consequent upon the service of notice on the dependants of the deceased, hearing in the matter pertaining to disbursement of compensation to the dependants of Yalgurdappa B. Goudar, was fixed for 20.4.2004. On 20.4.2004 Dyamavva Yalgurdappa, the widow of the deceased Yalgurdappa B. Goudar, appeared before the Workmen's Compensation Commissioner and her statement was recorded by the Commissioner. In her statement she acknowledged the demise of her husband in a motor accident, while working in the employment of the Port Trust, in the second shift on 19.4.2003. She also placed on record the fact, that she had two sons and a daughter who were also dependents of the deceased. Based on her statement, she prayed for the release of the compensation deposited by the Port Trust, with the Workmen's Compensation Commissioner. Since the claim raised by Dyamavva Yalgurdappa, widow of Yalgurdappa B. Goudar was not contested by the employer, the amount of Rs.3,26,140/- deposited by the Port Trust with the Workmen's Compensation Commissioner, was ordered to be mainly released to the Dyamavva Yalgurdappa, widow of Yalgurdappa B. Goudar, and partly to the daughter of the deceased Yalgurdappa B. Goudar. Out of the aforesaid amount, the daughter was held to be entitled to a sum of Rs.50,000/-. The order dated 29.4.2004 is available on the record of this case. A elevant extract of the same is reproduced hereunder, which fully substantiates the factual position narrated hereinabove :

"The opp. Party Mormugao Port Trust vide their letter dated 04.11.2003 had informed that Shri Gowder Yellagurdappa, ex-Pump Operator who was posted at the Old Power House while working on the second shift on 19.04.2003 met with an accident with a tipper truck and succumbed to the injuries sustained. The management further mentioned the date of birth of the deceased employee was 01.04.1956 and his monthly salary was Rs.9,276/- at the time of his death and in terms of Workmen's Compensation Act, 1923, they deposited an amount of Rs.3,26,140/- in this office towards compensation to be paid to the dependants of the deceased employee.

Notice was served on the parties and the hearing was fixed on 20.04.2004. During the course of hearing on 20.04.2004 the applicant stated that she is the wife of late Yellagurdappa Goudar. Her husband was working for Mormugao Port Trust in Mechanical Engineering Department as a Pump Operator. On 19.04.2003 her husband met with an accident. He was hit by a truck and succumbed to the injuries. He did on the spot. Besides her, she has got two sons viz., Shri Balappa Y. Goudar and Shri Basavraj Y. Goudar aged 21 years and 19 years respectively and one daughter Miss Yallava Y. Goudar, daughter aged 20 years who were dependants on the earning of her husband. She further stated that she is aware that the Opp. Party has deposited an amount of Rs.3,26,140/- with this Authority which according to her the amount has been properly worked out as per Workmen's Compensation Act. She prayed that the said amount may be awarded to her and children as per the Workmen's Compensation Act.

The representatives of the Opp. Party Mr. S.V. Verekar, Labour Officer, who was present during the course of hearing on 20.04.2004 did not desire to cross the Applicant.

After having verified the records produced in the course of hearing and the fact that the Opp.Party deposited the amount accepting the liability to pay the compensation, I hereby order to pay the compensation to the dependants of late Yellagurdappa Goudar in the following manner:

….."

Consequently, the aforesaid compensation under the Workmen's Compensation Act, 1923 came to be released to the widow and daughter of Yalgurdappa B. Goudar.

4. Besides the compensation determined under the Workmen's Compensation Act, 1923, the claim raised by Dyamavva Yalgurdappa under Section 166 of the Motor Vehicles Act, 1988 was independently determined by the Motor Accident Claims Tribunal, Bagalkot. Vide an award dated 15.7.2008, the said Motor Accident Claims Tribunal awarded the claimants compensation of Rs.11,44,440/-. Out of the aforesaid compensation, the Motor Accident Tribunal ordered a deduction of Rs.3,26,140/-, (i.e., the amount which had been disbursed to the claimants by the Workmen's Compensation Commissioner, vide order dated 29.4.2004). In the aforesaid view of the matter, a sum of Rs.8,18,300/- was ordered to be released to the claimants.

5. The order passed by the Motor Accident Claims Tribunal, Bagalkot, dated 15.7.2008 was assailed by the Oriental Insurance Company Ltd, i.e., the appellant herein, before the High Court of Karnataka Circuit Bench at Dharwad (hereinafter referred to as the 'High Court'). By its order dated 14.9.2011, the High Court affirmed the compensation awarded to the claimants by the Motor Accident Claims Tribunal, Bagalkot. Through the instant appeal, the Oriental Insurance Company Ltd. has assailed the orders dated 15.7.2008 and 14.9.2011 passed by the Motor Accidental Claims Tribunal, Bagalkot, and the High Court respectively, awarding

compensation to the dependants of Yalgurdappa B. Goudar under Section 166 of the Motor Vehicles Act, 1988.

6. The challenge raised by the appellant-Insurance Company is based on Section 167 of the Motor Vehicles Act, 1988, which is being extracted hereinunder:

> **"167. Option regarding claims for compensation in certain cases.**—Notwithstanding anything contained in the Workmen's Compensation Act, 1923 (8 of 1923) where the death of, or bodily injury to, any person gives rise to a claim for compensation under this Act and also under the Workmen's Compensation Act, 1923, the person entitled to compensation may without prejudice to the provisions of Chapter X claim such compensation under either of those Acts but not under both."

It is the vehement contention of the learned counsel for the appellant, that the respondents had been awarded compensation under the Workmen's Compensation Act, 1923, and as such, they were precluded from raising a claim for compensation under the Motor Vehicles Act, 1988. Relying on Section 167, extracted above., it was pointed out, that an option was available to the claimants to seek compensation either under the Workmen's Compensation Act, 1923, or the Motor Vehicles Act, 1988. The claimants, according to learned counsel, had exercised the said option to seek compensation under the Workmen's Compensation Act, 1923. In this behalf it was pointed out, that the claimants having accepted compensation under the Workmen's Compensation Act, 1923, were precluded by Section 167 of the Motor Vehicles Act, 1988, to seek compensation (on account of the same accident), under the Motor Vehicles Act, 1988. In order to buttress the aforesaid submission, learned counsel for the appellant-Insurance Company has placed reliance on a decision rendered by this Court in *National Insurance Company Ltd. v. Mastan & Anr.*, (2006) 2 SCC 641. Pointed reliance was placed on the following observations recorded therein:

"33. On the establishment of a Claims Tribunal in terms of Section 165 of the Motor Vehicles Act, 1988, the victim of a motor accident has a right to apply for compensation in terms of Section 166 of that Act before that Tribunal. On the establishment of the Claims Tribunal, the jurisdiction of the Civil Court to entertain a claim for compensation arising out of a motor accident, stands ousted by Section 175 of that Act. Until the establishment of the Tribunal, the claim had to be enforced through the Civil Court as a claim in tort. The exclusiveness of the jurisdiction of the Motor Accidents Claims Tribunal is taken away by Section 167 of the Motor Vehicles Act in one instance, when the claim could also fall under the Workmen's Compensation Act, 1923. That Section provides that death or bodily injury arising out of a motor accident which may also give rise to a claim for compensation under the Workmen's Compensation Act, can be enforced through the authorities under that Act, the option in that behalf being with the victim or his representative. But Section 167 makes it clear that a claim could not be maintained under both the Acts. In other words, a claimant who becomes entitled to claim compensation both under the Motor Vehicles Act 1988 and under the Workmen's Compensation Act because of a motor vehicle accident has the choice of proceeding under either of the Acts before the concerned forum. By confining the claim- to the authority or Tribunal under either of the Acts, the legislature has incorporated the concept of election of remedies, insofar as the claimant is concerned. In other words, he has to elect whether to make his claim under the Motor Vehicles Act 1988 or under the Workmen's Compensation Act 1923. The emphasis in die Section that a claim cannot be made under both the enactments, is a further reiteration of the doctrine of election incorporated in the scheme for claiming compensation. The principle "where, either of two alternative tribunals are open to a litigant, each having jurisdiction over the matters in dispute, and he resorts for

his remedy to one of such tribunals in preference to the other, he is precluded, as against his opponent, from any subsequent recourse to the latter" [see R.V. Evans (1854) 3 E & B 363] is fully incorporated in the scheme of Section 167 of the Motor Vehicles Act, precluding the claimant who has invoked the Workmen's Compensation Act from having resort to the provisions of the Motor Vehicles Act, except to the limited extent permitted therein. The claimant having resorted to the Workmen's Compensation Act, is controlled by the provisions of that Act subject only to the exception recognized in Section 167 of the Motor Vehicles Act.

34. On the language of Section 167 of the Motor Vehicles Act, and going by the principle of election of remedies, a claimant opting to proceed under the Workmen's Compensation Act cannot take recourse to or draw inspiration from any of the provisions of the Motor Vehicles Act 1988 other than what is specifically saved by Section 167 of the Act. Section 167 of the Act gives a claimant even under the Workmen's Compensation Act, the right to invoke the provisions of Chapter X of the Motor Vehicles Act 1988. Chapter X of the Motor Vehicles Act 1988 deals with what is known as 'no fault" liability in case of an accident. Section 140 of the Motor Vehicles Act, 1988 imposes a liability on the owner of the vehicle to pay the compensation fixed therein, even if no fault is established against the driver or owner of the of the vehicle. Sections 141 and 142 deal with particular claims on the basis of no fault liability and Section 143 re-emphasizes what is emphasized by Section 167 of the Act that the provisions of Chapter X of the Motor Vehicles Act, 1988, would apply even if the claim is made under the Workmen's Compensation Act. Section 144 of the Act gives the provisions of Chapter X of the Motor Vehicles Act 1988 overriding effect."

Based on the observations extracted hereinabove, it was the vehement contention of the learned counsel for the appellant, that the respondents-claimants, having accepted compensation under the Workmen's Compensation Act, 1923, must be deemed to have exercised their option to seek compensation under the Workmen's Compensation Act, 1923. As such, they could not once again seek compensation under Section 166 of the Motor Vehicles Act, 1988.

7. In order to succeed before this Court, it would be necessary for the appellant to establish, that the respondents-claimants had exercised their option to seek compensation under the Workmen's Compensation Act, 1923, and therefore, were precluded from seeking compensation yet again under the provisions of the Motor Vehicles Act, 1988. For, it is only when such an option has been exercised, that the provisions of Section 167 of the Motor Vehicles Act, 1988, would disentitle the claimant(s) from seeking compensation under the Motor Vehicles Act, 1988.

8. For determining the legal as well as the factual position emerging out of the issue canvassed at the hands of the learned counsel for the appellant, it is necessary for us to determine the ambit and scope of Sections 8 and 10 of the Workmen's Compensation Act, 1923. The aforesaid provisions are accordingly being extracted hereunder :

> **"8. Distribution of compensation.**—(1) No payment of compensation in respect of a workman whose injury has resulted in death, and no payment of a lump sum as compensation to a woman or a person under a legal disability, shall be made otherwise than by deposit with the Commissioner, and no such payment made directly by an employer shall be deemed to be a payment of compensation:
>
> Provided that, in the case of a deceased workman, an employer may make to any dependant advances on account of compensation of an amount equal to three months' wages of such workman and so much of such amount as does not exceed the compensation payable to that dependant shall be deducted by the Commissioner from such compensation and repaid to the employer.
>
> (2) Any other sum amounting to not less than ten rupees which is payable as compensation may be deposited with the Commissioner on behalf of the person entitled thereto.
>
> (3) The receipt of the Commissioner shall be a sufficient discharge in respect of any compensation deposited with him.
>
> (4) On the deposit of any money under sub-section (1), as compensation in respect of a deceased workman] the Commissioner shall, if he thinks necessary, cause notice to be published or to be served on each dependant in such manner as he thinks fit, calling upon the dependants to appear before him on such date as he may fix for determining the distribution of the compensation. If the Commissioner is satisfied after any inquiry which he may deem necessary, that no dependant exists, he shall repay the balance of the money to the employer by whom it was paid. The Commissioner shall, on application by the employer, furnish a statement showing in detail all disbursements made.
>
> (5) Compensation deposited in respect of a deceased workman shall, subject to any deduction made under sub-section (4), be apportioned among the dependant of the deceased workman or any of them in such proportion as the Commissioner thinks fit, or may, in the discretion of the Commissioner, be allotted to any one dependant.
>
> (6) Where any compensation deposited with the Commissioner is payable to any person, the Commissioner shall, if the person to whom the

compensation is payable is not a woman or a person under a legal disability, and may, in other cases, pay the money to the person entitled thereto.

(7) Where any lump sum deposited with the Commissioner is payable to a woman or a person under a legal disability, such sum may be invested, applied or otherwise dealt with for the benefit of the woman, or of such person during his disability, in such manner as the Commissioner may direct; and where a half-monthly payment is payable to any person under a legal disability, the Commissioner may, of his own motion or on an application made to him in this behalf, order that the payment be made during the disability to any dependant of the workman or to any other person, whom the Commissioner thinks best fitted to provide for the welfare of the workman.

(8) Where an application made to him in this behalf or otherwise, the Commissioner is satisfied that, on account of neglect of children on the part of a parent or on account of the variation of the circumstances of any dependant or for any other sufficient cause, an order of the Commissioner as to the distribution of any sum paid as compensation to as to the manner in which any sum payable to any such dependant is to be invested, applied or otherwise dealt with, ought to be varied, the Commissioner may make such orders for the variation of the former order as he thinks just in the circumstances of the case:

Provided that no such order prejudicial to any person shall be made unless such person has been given an opportunity of showing cause why the order should not be made or shall be made in any case in which it would involve the repayment by a dependant of any sum already paid to him.

(9) Where the Commissioner varies any order under sub-

section (8) by reason of the fact that payment of compensation to any person has been obtained by fraud, impersonation or other improper means, any amount so paid to or on behalf of such person may be recovered in the manner hereinafter provided in section 31."

xxx xxx xxx

10. Notice and Claim.—(1) No claim for compensation shall be entertained by a Commissioner unless notice of the accident has been given in the manner hereinafter provided as soon as practicable after the happening thereof and unless the claim is preferred before him within two years] of the occurrence of the accident or in case of death within two years] from the date of death:

Provided that where the accident is the contracting of a disease in respect of which the provisions of sub-section (2) of section 3 are applicable the accident shall be deemed to have occurred on the first of the days during which the workman was continuously absent from work in consequence of the disablement caused by the disease:

Provided further that in case of partial disablement due to the contracting of any such disease and which does not force the workman to absent himself from work the period of two years shall be counted from the day the workman gives notice of the disablement to his employer:

Provided further that if a workman who, having been employed in an employment for a continuous period, specified under sub-section (2) of section 3 in respect of that employment, ceases to be so employed and develops symptoms of an occupational disease peculiar to that employment within two years of the cessation of employment, the accident shall be deemed to have occurred on the day on which the symptoms were first detected:

Provided further that the want of or any defect or irregularity in a notice shall not be a bar to the entertainment of a claim—

(a) if the claim is preferred in respect of the death of a workman resulting from an accident which occurred on the premises of the employer, or at any place where the workman at the time of the accident was working under the control of the employer or of any person employed by him, and the workman died on such premises or at such place, or on any premises belonging to the employer, or died without having left the vicinity of the premises or place were the accident occurred, or

(b) if the employer or any one of several employers or any person responsible to the employer for the management of any branch of the trade or business in which the injured workman was employed] had knowledge of the accident from any other source at or about the time when it occurred:

Provided further that the Commissioner may entertain and decide any claim to compensation in any case notwithstanding that the notice has not been given, or the claim has not been preferred, in due time as provided in this sub-section, if he is satisfied that the failure so to give the notice or prefer the claim, as the case may be, was due to sufficient cause.

(2) Every such notice shall give the name and address of the person injured and shall state in ordinary language the cause of the injury and the date on which the accident happened, and shall be served on the employer or upon any one of several employers, or upon any person responsible to the employer for the management of any

branch of the trade or business in which the injured workman was employed.

(3) The State Government may require that any prescribed class of employers shall maintain at these premises at which workmen are employed a notice book, in the prescribed form, which shall be readily accessible at all reasonable times to any injured workman employed on the premises and to any person acting bona fide on his behalf.

(4) A notice under this section may be served by delivering it at, or sending it by registered post addressed to, the residence or any office or place of business of the person on whom it is to be served, or, where a notice book is maintained, by entry in the notice book."

9. Sub-sections (1) to (3) of Section 8 extracted above, leave no room for any doubt, that when a workman during the course of his employment suffers injuries resulting in his death, the employer has to deposit the compensation payable, with the Workmen's Compensation Commissioner. Payment made by the employer directly to the dependants is not recognized as a valid disbursement of compensation. The procedure envisaged in Section 8 of the Workmen's Compensation Act, 1923, can be invoked only by the employer for depositing compensation with the Workmen's Compensation Commissioner. Consequent upon such "suo motu" deposit of compensation (by the employer) with the Workman's Compensation Commissioner, the Commissioner may (or may not) summon the dependants of the concerned employee, to appear before him under sub-section (4) of Section 8 aforesaid. Having satisfied himself about the entitlement (or otherwise) of the dependants to such compensation, the Commissioner is then required to order the rightful apportionment thereof amongst the dependants, under sub-sections (5) to (9) of Section 8 of the Workmen's Compensation Act, 1923. Surplus, if any, has to be returned to the employer.

10. As against the aforesaid, where an employer has not suo-motu initiated action for payment of compensation to an employee or his/her dependants, inspite of an employee having suffered injuries leading to the death, it is open to the dependants of such employee, to raise a claim for compensation under Section 10 of the Workmen's Compensation Act, 1923. Sub-section (1) of Section 10 prescribes the period of limitation for making such a claim as two years, from the date of occurrence (or death). The remaining sub-sections of Section 10 of the Workmen's Compensation Act, 1923 delineate the other procedural requirements for raising such a claim.

11. Having perused the aforesaid provisions and determined their effect, it cleanly emerges, that the Port Trust had initiated proceedings for paying compensation to the dependants of the deceased Yalgurdappa B. Goudar "suo motu" under Section 8 of the Workmen's Compensation Act, 1923. For the aforesaid purpose, the Port Trust had deposited a sum of Rs.3,26,140/- with the Workmen's Compensation Commissioner on 4.11.2003. Thereupon, the Workmen's Compensation Commissioner, having issued noticed to the claimants (dependants of the deceased Yalgurdappa B. Goudar), fixed 20.4.2004 as the date of hearing. On the aforesaid date, the statement of the widow of Yalgurdappa B. Goudar, namely, Dyamavva Yalgurdappa was recorded, and thereafter, the Workmen's Compensation Commissioner by an order dated 29.4.2004 directed the release of a sum of Rs.3,26,140/- to be shared by the widow of the deceased and his daughter in definite proportions.

12. The issue to be determined by us is, whether the acceptance of the aforesaid compensation would amount to the claimants having exercised their option, to seek compensation under the Workmen's Compensation Act, 1923. The procedure under Section 8 aforesaid (as noticed above) is initiated at the behest of the employer "suo motu", and as such, in our view

cannot be considered as an exercise of option by the dependants/claimants to seek compensation under the provisions of the Workmen's Compensation Act, 1923. The position would have been otherwise, if the dependants had raised a claim for compensation under Section 10 of the Workmen's Compensation Act, 1923. In the said eventuality, certainly compensation would be paid to the dependants at the instance (and option) of the claimants. In other words, if the claimants had moved an application under Section 10 of the Workmen's Compensation Act, 1923, they would have been deemed to have exercised their option to seek compensation under the provisions of the Workmen's compensation Act. Suffice it to state that no such application was ever filed by the respondents-claimants herein under Section 10 aforesaid. In the above view of the matter, it can be stated that the respondents-claimants having never exercised their option to seek compensation under Section 10 of the Workmen's Compensation Act, 1923, could not be deemed to be precluded from seeking compensation under Section 166 of the Motor Vehicles Act, 1988.

13. Even though the aforesaid determination, concludes the issue in hand, ambiguity if at all, can also be resolved in the present case, on the basis of the admitted factual position. The first act at the behest of the respondents-claimants for seeking compensation on account of the death of Yalgurdappa B. Goudar, was by way of filing a claim petition under Section 166 of the Motor Vehicles Act, 1988 on 30.5.2003. The aforesaid claim petition was the first claim for compensation raised at the hands of the respondents-claimants. If the question raised by the appellant has to be determined with reference to Section 167 of the Motor Vehicles Act, 1988, the same is liable to be determined on the basis of the aforesaid claim application filed by the respondents-claimants on 30.5.2003. The compensation deposited by the Port Trust with the Workmen's Compensation Commissioner for payment to the respondents-claimants was much later, on 4.11.2003. The

aforesaid deposit, as already noticed above, was not at the behest of the respondents-claimants, but was based on a unilateral "suo motu" determination of the employer (the Port Trust) under Section 8 of the Workmen's Compensation Act, 1923. The first participation of Dayamavva Yalgurdappa, in the proceedings initiated by the Port Trust under the Workmen's Compensation Act, 1923, was on 20.4.2004. Having been summoned by the Workmen's Commissioner, she got her statement recorded before the Commissioner on 20.4.2004. But well before that date, she (as well as the other claimants) had already filed a claim petition under Section 166 of the Motor Vehicles Act, 1988, on 30.5.2003. Filing of the aforesaid claim application under Section 166 aforesaid, in our view constitutes her (as well as, that of the other dependants of the deceased) option, to seek compensation under the Motor Vehicles Act, 1988. The instant conclusion would yet again answer the question raised by the appellant herein, under Section 167 of the Motor Vehicles Act, 1988, in the same manner, as has already been determined above.

14. In the aforesaid view of the matter, we hereby affirm the determination rendered by the Motor Accidents Claims Tribunal, Bagalkot, and the High Court in awarding compensation quantified at Rs.11,44,440/- to the claimant. The Motor Accidents Claims Tribunal, Bagalkot, as also, the High Court, ordered a deduction therefrom of a sum of Rs.3,26,140/- (paid to the claimants under the Workmen's Compensation Act, 1923). The said deduction gives full effect to Section 167 of the Motor Vehicles Act, 1988, inasmuch as, it awards compensation to the respondents-claimants under the enactment based on the option first exercised, and also ensures that, the respondents-claimants are not allowed dual benefit under the two enactments.

15. For the reasons recorded hereinabove, we find no merit in the instant appeal. The judgment rendered by the High Court is affirmed. The instant appeal is accordingly dismissed.

R.P. Appeal dismissed.

UNIVERSITY OF RAJASTHAN AND ANOTHER

v.

PREM LATA AGARWAL

(Civil Appeal No. 919 of 2013)

FEBRUARY 05, 2013

[K.S. RADHAKRISHNAN AND DIPAK MISRA, JJ.]

SERVICE LAW:

ss. 3(2) and (3) – Pension – Ad hoc Professors/Lecturers – Continued in service – Claim for pensionary benefits – Allowed by High Court – Held: The initial appointment would only protect the period fixed therein – There could not have been continuance of the service after the fixed duration as provided u/s 3(3) and such continuance is to be treated as null and void regard being had to the language employed in s.3(2) – Regulations do not take in their sweep an employee who is not regularly appointed – High Court has applied the doctrine of deemed confirmation which is impermissible – Orders of High Court are set aside – Rajasthan Universities' Teachers And Officers (Selection For Appointment) Act, 1974 – University Pension Regulations, 1990 – Regulations 2(i), 22 and 23 – Service law – Pension.

The respondents in the instant appeals were appointed as ad hoc Assistant Professors/Lecturers in terms of s. 3(3) of the Rajasthan Universities Teachers and Officers (Selection for Appointment) Act, 1974. Their services were terminated every year and fresh appointment orders were issued and, as such, they continued till the age of superannuation. Thereafter they filed writ petitions claiming pensionary benefits stating that with the coming into force of the University Pension Regulations, 1990, deductions for the purpose were made from their salaries. The single Judge of the High

Court allowed the writ petitions. The special appeals filed by the University were dismissed by the Division Bench of the High Court.

Allowing the appeals, the Court

HELD: 1.1. The provisions of the Rajasthan Universities' Teachers and Officers (Selection for Appointment) Act, 1974, when read in a conjoint manner, make it crystal clear that the legislature had imposed restrictions on the appointment, provided for the constitution of Selection Committees and also laid down the procedure of the said committees. The intention of the legislature is to have teachers appointed on the basis of merit, regard being had to transparency, fairness, impartiality and total objectivity. Sub-s. (3) of s. 3 permits stop-gap arrangements and only covers ad hoc or part-time teachers with a small duration. It is intended to serve the purpose of meeting the situation where an emergency occurs. A proper schematic analysis of the provisions do not envisage any kind of ad hoc appointment or part-time appointment to remain in continuance. Some of the respondents continued with certain breaks and also due to intervention of the court. That apart, this Court had not acceded to their prayer of regularization. A distinction has to be made because of the language employed in the provisions between regular teachers and ad hoc teachers or part-time teachers who continue to work on the post sometimes due to fortuitous circumstances and sometimes due to the interdiction by the court. Their initial appointment could be regarded as legal for the limited purposes of s. 3(3) of the Act. That would only protect the period fixed therein. There could not have been continuance of the service after the fixed duration as provided u/s 3(3) of the Act and such continuance is to be treated as null and void regard being had to the language employed in s.3(2) of the Act. That is how the Act operates in the field. That apart, regular

selection was required to be made by a High Powered Committee as provided u/s 4. [para 22 and 33] [773-F-H; 774-A-F; 779-G]

University of Kashmir and Others v. Dr. Mohd. Yasin and Others **1974 (2) SCR 154 = 1974 (3) SCC 546;** *Anuradha Mukherjee (Smt) and Others v. Union of India and Others* **1996 (3) SCR 276 = 1996 (9) SCC 59;** *State of Haryana v. Haryana Veterinary & AHTS Association and Another* **2000 (3) Suppl. SCR 322 = 2000 (8) SCC 4;** *R.S. Garg v. State of U.P. and Others* **2006 (4) Suppl. SCR 120 = 2006 (6) SCC 430 – relied on**

1.2. The Constitution Bench in Uma Devis's case made a distinction between an illegal appointment and an irregular appointment. Protection carved out in paragraph 53 in Uma Devi could not be extended to the respondents basically for three reasons, namely, (i) the continuance of appointment after the fixed duration was null and void by operation of law; (ii) the respondents continued in the post by intervention of the court; and (iii) this Court had declined to regularize their services in 1998. [para 32 and 34] [779-D-E; 780-D-E]

Secretary, State of Karnataka and Others v. Uma Devi (3) and Others* **2006 (3) SCR 953 = 2006 (4) SCC 1 – relied on

1.3. The University Pension Regulations, 1990 do not take in their sweep an employee who is not regularly appointed. Regulation 2(i) clearly provides "regularly appointed to the service of the University" which has been reiterated in Regulation 22 stipulating conditions of qualifying service for pension. Regulation 23 fundamentally deals with computation of the period of service of an employee. That apart, Regulation 23(b) uses the words "if he is confirmed". It is a conditional one and it relates to officiating services. Both the concepts have

their own significance in service jurisprudence. The respondents were not in the officiating service and by no stretch of imagination, they could have been treated to be confirmed because the words "if he is confirmed" required an affirmative fact to be done by the University. The High Court has applied the doctrine of deemed confirmation to the case at hand which is impermissible. Consequently, the orders passed by the High Court are set aside. [para 36-38] [781-E-F, G-H; 782-A-C]

Head Master, Lawrence School, Lovedale v. Jayanthi Raghu and another **2012 (2) SCR 492 = 2012 (4) SCC 793 - relied on.**

S.B. Patwardhan and Another v. State of Maharashtra and Others **1977 (3) SCR 775 =1977 AIR 2051;** *D.S. Nakara and Others v. Union of India and Others* **1983 (2) SCR 165 = 1983 (1) SCC 305 – cited.**

Case Law Reference:

1977 (3) SCR 775	**cited**	**para 9**
1983 (2) SCR 165	**cited**	**para 9**
2006 (3) SCR 953	**relied on**	**para 9**
1974 (2) SCR 154	**relied on**	**para 24**
1996 (3) SCR 276	**relied on**	**para 25**
2000 (3) Suppl. SCR 322	**relied on**	**para 26**
2006 (4) Suppl. SCR 120	**relied on**	**para 27**
2012 (2) SCR 492	**relied on**	**para 37**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 919 of 2013.

From the Judgment & Order dated 15.09.2011 of the High

Court of Judicature for Rajasthan at Jaipur Bench Jaipur in D.B. Special Appeal (Writ) No. 292 of 2011.

WITH

C.A. Nos. 920, 921, 922 & 923 of 2013

Manoj Swarup, Lalita Kohli, Abhishek Swarup (for Manoj Swarup & Co.) for the Appellants.

S.K. Keshote, Dr. Manish Singhvi, AAG, Rashmi Singhania, Sarad Kumar Singhania, Amit Lubhaya, Pragati Neekhra, Ajay Choudhary, Sushil Kumar Jain for the Respondent.

The Judgment of the Court was delivered by

DIPAK MISRA, J. 1. Leave granted in all the special leave petitions.

2. The controversy that arises for consideration in this batch of appeals is whether the respondents, who were appointed to the teaching post, namely, Assistant Professors/Lecturers in different subjects and continued as such for more than two decades, would be entitled to get the benefit of pension under the University Pension Regulations, 1990 (for short "the Regulations") framed by the University of Rajasthan which came into force with effect from 1.1.1990, regard being had to the language employed in Regulation 2 that deals with the scope and application of the Regulations read with Regulations 22 and 23 that stipulates the conditions of qualifying service and the period that is to be counted towards pension in addition to the fact that the University had accepted the contribution to the Pension Fund as defined in Regulation 3(5), despite the stand and stance put forth by the University that the respondents were not regularly appointed to the posts in question in accordance with the provisions contained in Section 3(3) of the Rajasthan Universities' Teachers and Officers (Selection for Appointment)

Act, 1974 (for brevity "the Act") and, hence, are not entitled to the benefit provided under the Regulations.

3. Be it noted, as the main judgment was rendered in the case of Prem Lata Agarwal, we shall refer to the facts adumbrated therein. However, the initial dates of appointment and the dates of superannuation in case of every respondent as the same would be relevant in the course of delineation of the lis in question are stated herein. Prem Lata Agarwal, Vijaya Kabra, Janki D. Moorjani, B.K. Joshi and M.C. Goyal, the respondents herein, were appointed on 5.1.1981, 22.8.1984, 20.8.1985, 16.5.1978 and 5.8.1983 and stood superannuated on 31.3.2001, 31.8.2007, 30.6.2007, 31.1.2002 and 30.11.2007 respectively. Respondent-Prem Lata Agarwal and some others were appointed vide Office Order dated 5.1.1981 by the Vice-Chancellor in exercise of power vested in him for making the stop gap arrangement under Section 3(3) of the Act as Assistant Professors (Lecturers) in the subject of Chemistry. It was clearly mentioned in the letter of appointment that it was ad hoc in nature and it would continue upto the last working day of the current academic session or till further orders, whichever was earlier. The respondent and others were allowed to continue on the basis of the appointment letters issued from time to time. It may be noted that their services were terminated every year and fresh appointment orders were issued. In this manner, the respondent was allowed to continue upto 31.7.1988.

4. At that juncture, the ad hoc teachers had invoked the jurisdiction of the High Court seeking a mandamus for the regularization of the services but such a relief was declined. S.L.P. No. 18993 of 1991 was preferred wherein two questions were raised, namely, (i) whether a lecturer duly selected by the selection committee for being appointed temporarily should automatically be confirmed on the post which he was holding for the past 7 years on temporary basis after being selected by a duly constituted selection committee under the provisions

of the Act and approved by the syndicate of the university; and (ii) whether apart from the considerations of selection by the selection committee, did a lecturer teaching for the past 7 years acquire a right to continue on that post. This Court vide order dated 20th April, 1992, dismissed the said special leave petition. Though the special leave petition was dismissed and their right to be regularized was not accepted by this Court, yet they continued in service as the orders of termination could not be implemented. It is worth noticing that another petition by ad hoc appointees was filed in 1985 before the High Court wherein they claimed equal pay on the foundation of parity with the regularly appointed Assistant Lecturers. The High Court, vide order dated 1.3.1986, passed the following order:-

> "Consequently, this special appeal is allowed and the order dated 8.03.1995 passed by the learned Single Judge is hereby set aside and accordingly it is declared that the appellants who have been appointed on honorarium basis to cover the uncovered load of the respective departments are entitled to the salary equivalent to the minimum of the pay scale of the regularly appointed lecturer of the Rajasthan University from today. The respondents are also restrained from discontinuing services of the appellants till regular appointments to the post of lecturers are made in accordance with law. The respondents shall be at liberty to assign the work to the appellants, which is assigned to the regularly appointed lecturers."

5. The university, being grieved by the aforesaid order, preferred Special Leave Petition No. 13 of 1998 and number of S.L.Ps. wherein this Court passed the following order:-

> "The special leave petitions are dismissed. It is clarified that the continuation of the respondents shall be only till regular selections are made and it is upto the University to take expeditious steps for making regular selections."

6. In view of the aforesaid order, the teachers were paid salary equivalent to the minimum pay scale of regularly appointed teachers and continued in service due to various orders of the High Court passed from time to time. The university, despite its best efforts, could not obtain the permission of the State Government to fill up the vacant posts on regular basis as various litigations were continuing in the Court at various stages as a consequence of which the respondent and her likes continued in service.

7. It is apt to note here that the university brought the regulations which came into force with effect from 1.1.1990. After the regulations came into force, the respondent gave her option for the purpose of availing the benefit of pension and, thereafter, there was deduction from her salary in view of the postulates in the regulations till her date of retirement, i.e., 31.3.2001.

8. It is pertinent to mention here that the Rajasthan Universities' Teachers (Absorption of Temporary Teachers) Ordinance, 2008 (3 of 2008) was made and promulgated by the Governor with a purpose of providing absorption of temporary teachers of long standing, working in the universities of Rajasthan. After the said regulations came into existence on 12th June, 2008, the respondent preferred Writ Petition No. 2740 of 2010 putting forth the grievance that pensionary benefits had been denied to her after retirement. The learned Single Judge referred to the regulations and took note of the fact that she had continued in service for a period of 20 years and her option for grant of pension was accepted by the university and pursuant to such acceptance they deposited their contribution and, hence, the university was estopped to take a somersault the stand that she was not entitled to receive pension under the Regulations of 1990. That apart, the learned single Judge opined that the nature of her appointment could not be treated as ad hoc and temporary, regard being had to the length of service. Being of this view, he allowed the writ

petition and directed the pensionary benefits be extended to her within a period of three months after completing the formalities.

9. Being grieved by the aforesaid order, the university preferred Special Appeal (Writ) No. 292 of 2011. The Division Bench, after adverting to the facts and referring to various regulations and the provisions of the Act, came to hold that the action of the university was wholly unjustified and arbitrary. The said conclusion of the Division Bench was founded on the base that there was default on the part of the university in not appointing even a single person in the service of the universities of Rajasthan in a regular manner for a long period; that the university had invited the teachers to give their option and they deposited their contribution in the C.P.F. in the pension scheme; that the appointments of the teachers were not in contravention of the provisions of the Act; and that they were deemed to be confirmed in view of the provisions contained in Regulation 23 of the Regulations. After arriving at the said conclusions, the Division Bench adverted to the issue whether the teachers were entitled for the pensionary benefits in terms of the regulations and eventually, interpreting the regulations and placing reliance on the authorities in *S.B. Patwardhan and Another v. State of Maharashtra and Others*[1], *D.S. Nakara and Others v. Union of India and Others*[2] and paragraph 53 of the pronouncement in *Secretary, State of Karnataka and others v. Uma Devi (3) and Others*[3], came to hold that the appointments were made following due procedure of law and further the teachers, having been appointed in the cadre of substantive posts, could not be denied the pensionary benefits under the regulations. Being grieved, the University is in appeal by way of Special Leave Petitions.

10. We have heard Mr. Manoj Swarup, learned counsel for

1. AIR 1977 SC 2051.
2. (1983) 1 SCC 305.
3. (2006) 4 SCC 1.

the appellants, Mr. S.K. Keshote, learned senior counsel for the respondents in Civil Appeals arising out Special Leave Petitions (C) Nos. 35974 of 2011 and 18020 of 2012, Dr. Manish Singhvi, learned Additional Advocate General for the State, and Mr. Sushil Kumar Jain, learned counsel for the respondents in Civil Appeals arising out Special Leave Petitions (C) Nos. 33969 of 2011 and 20637 of 2012.

11. Before we proceed to scrutinize the defensibility of the judgment of the High Court, it is apposite to survey the scheme of the Act and the regulations. Section 3(3) of the Act, as it stood at the relevant time, being of immense signification, is reproduced in entirety hereinbelow: -

"**3. Restrictions on appointments of teachers and officers**. – (1) Notwithstanding any thing contained in the relevant law, as from the commencement of this Act, no teacher and no officer in any university in Rajasthan shall be appointed except on the recommendations of the Selection Committee constituted under Section 4.

2. Save as otherwise provided in sub-section (3), every appointment of a teacher or of an officer in any University made in contravention of sub-section (1) shall be null and void.

3. Nothing herein contained shall apply to the appointment of a teacher or an officer as a stop-gap arrangement for a period not exceeding one year or to the appointment of a part-time teacher or of a teacher or officer in the pay scale lower than that of Lecturer or Assistant Registrar respectively.

Explanation: The expression "appointed" in sub-section (1) shall mean appointed initially and not appointed by way of promotion."

12. Section 4 at the relevant time pertained to the constitution of Selection Committees. It read as follows:-

"**4. Constitution of selection committees**. – (1) For every selection of a teacher or of an officer in a University, there shall be constituted a committee consisting of the following: -

(i) Vice-Chancellor of the University concerned, who shall be the Chairman of the committee;

(ii) an eminent educationist to be nominated by the Chancellor for a period of one year;

(iii) an eminent educationist to be nominated by the State Government for a period of one year;

(iv) one member of the Syndicate to be nominated by the State Government for a period of one year; and

(v) such other persons as members specified in column 2 of the Schedule for the selection of the teachers and officers mentioned in column 1 thereof:

Provided that where the appointment of a teacher is to be made in the faculty of agriculture in any University or in any University-College imparting instruction of guiding research in agriculture there shall be one more expert to be nominated by the Syndicate out of a panel of names recommended by the Indian Council of Agriculture Research:

Provided further that the Selection Committee for teaching posts in the faculty of engineering and technology shall also include an expert to be nominated by the Syndicate out of a panel of names recommended by the All India Council of Technical Education.

(2) The eminent educationists nominated under clause (ii) and clause (iii) of sub-section (1) and the member of the Syndicate nominated under clause (iv) of the said sub-

section shall be members of every Selection Committee constituted during the course of one year from the date of his nomination:

Provided that the member for a Selection Committee nominated under clauses (ii), (iii) or (iv) of sub-section (1) shall continue to be the member of every Selection Committee even after the expiry of his term until a fresh nomination is made by the Chancellor or, as the case may be, by the State Government subject, however, that fresh nomination of such member for Selection Committee shall be made within a period not exceeding three months from the date of expiry of his term.

(3) No person shall be eligible to be nominated as an expert on any Selection Committee in any one year if he has been a member of any two Selection Committees during the course of the same year."

13. Section 5 of the Act at the time of appointment dealt with the procedure of Selection Committee. It was as follows:-

"5. *Procedure of Selection Committee* – (1) The Syndicate of the University concerned shall prescribe, by rules, the quorum required for the meeting of a selection committee required to be constituted under section 4 which shall not be less than one-half of the members of each selection committee.

(2). The selection committee shall make its recommendations to the Syndicate. If the Syndicate disapproves the recommendations of the selection committee, the Vice-Chancellor of the University concerned shall submit such recommendations alongwith reasons for disapproval given by the syndicate to the Chancellor for his consideration and the decision of the chancellor thereon shall be final.

(3) Every selection committee shall be bound by the qualifications laid down in the relevant law of the University concerned for the post of a teacher or, as the case may be, of an officer."

14. We may note with profit that the 1974 Act was amended by Act No. 24 of 1976 and Act No. 18 of 1984 and afterwards, many insertions were made. We have reproduced the provisions after the 1976 Act was brought into existence. Section 4 which dealt with the constitution of selection committee was renumbered by Act No. 18 of 1984 as Section 5 and Section 5 which dealt with the procedure of selection committee was amended by Act No. 9 of 1977 and Act No. 18 of 1984 and was renumbered as Section 6. Certain amendments were carried out in the said provision by which the quorum required for the selection committee was changed and sub-section (4) was added on 15.11.1984. For proper appreciation, we reproduce the said sub-section (4): -

"(4) The Selection Committee, while making its recommendations to the Syndicate under sub-section (2) shall prepare a list of candidates selected by it in order of merit and shall further prepare a reserve list in the same order and to the extent of 50% of the vacancies in the posts of teachers or officers for which the Selection Committee was constituted under sub-section (1) of Section 5 and shall forward the main list in the reserve list along with its recommendations to the Syndicate."

15. Presently, we shall refer to the relevant regulations. Regulation 2 that deals with the scope and application reads as follows:-

"***Reg. 2*** **: Scope and Application :**

(i) These regulations shall apply to all persons regularly appointed to the service of the University of Rajasthan on or after 1.1.1990.

(ii) These regulations shall also apply to all existing employees – both teaching and non-teaching- who opt for pension scheme under these regulations within the period specified in Reg. 4 for exercising option. In case of employees who do not exercise option within the specified period, it will be deemed that the concerned employee has opted for the pension scheme under these regulations.

Provided that these regulations shall not apply to :

(a) Persons employed on contract or part-time basis,

(b) Persons on deputation to the University.

(c) Purely temporary and daily wages staff.

(d) Re-employed pensioners."

Thus, from the aforesaid, it is quite clear that the regulations are only applicable to the persons who have been regularly appointed and do not take in its sweep the persons employed on contract or part-time basis and purely temporary and daily wages staff.

16. Regulation 3(5) defines 'pension fund'. It is as follows:-

"Reg. 3(5) "*Pension Fund*" means the fund created for the purpose of transferring the total accumulated amount of University contribution in C.P.F. (including the amount of loan taken out of it) and interest thereon as on date of commencement of these regulations and monthly contribution made thereafter in respect of such employees who opted or are deemed to have opted the pension scheme under these regulations. The pension paid to the retired employees shall be charged to this Fund."

17. Regulation 4 deals with the exercise of option. The relevant part of the said regulation is reproduced below:-

"Reg. 4 : Exercise of Option :

All existing employees who were in service on 1.1.1990 shall have to exercise their option in writing, either for the pension scheme under these regulations or for continuance under the existing C.P.F. Scheme, within 3 months from the date of notification of these regulations and shall submit the same to the Comptroller of Finance/ Finance Officer in the prescribed form."

18. Be it noted, though there are three provisos to regulation 4, yet the same need not be referred to as they are not necessary for the adjudication of the present case.

19. Regulation 22 provides for calculation of qualifying service. It reads as follows:-

"Reg. 22 : Conditions of Qualifying Service:

The service of an employee does not qualify for pension unless it conforms to the following conditions:

(1) It is a paid service of a regularly appointed employee under the University.

(2) The employment is in substantive, temporary or officiating capacity."

20. Regulation 23 which has been taken aid of by the High Court to confer the benefit of pension on the respondent is as follows: -

"Reg. 23:

(a) The service of an employee transferred from a temporary to permanent post shall be counted, if the post was at first created experimentally or temporarily.

(b) The officiating services of an employee, without a

substantive appointment, in a post which is vacant or the permanent incumbent of which does not draw any part of the pay or count service, shall be counted if he is confirmed without interruption in his service."

21. Regulation 47 provides for creation of the pension fund. It is as under:-

***"Reg 47* : Creation of the Pension Fund :**

In case of all such employees who opt for the pension scheme and are governed under these regulations, the total accumulated amount of University contribution in C.P.F. (including the amount of loan taken out of it) and interest there on as on 1st January 1990 will be transferred to the pension fund created under these regulations. Thereafter, the University's share of monthly contribution in respect of all such employees, as aforesaid will be deposited in the pension fund every month latest by 10th of the next month."

22. On a studied scrutiny, it is found that the High Court has placed reliance on Section 3(3) of the Act and the regulations which we have reproduced hereinabove to arrive at the conclusion that the respondents were entitled to be treated as regular teachers and, therefore, it was obligatory on the part of the University to extend the benefit of pension. The provisions of the Act, when read in a conjoint manner, make it crystal clear that the legislature had imposed restrictions on the appointment, provided for the constitution of Selection Committee and also laid down the procedure of the said committees. The intention of the legislature is, as it seems to us, to have teachers appointed on the basis of merit, regard being had to transparency, fairness, impartiality and total objectivity. Under sub-section (2), it has been clearly postulated that any appointment made barring the arrangement under sub-section (3) of Section 3 would be null and void. The language is clear and categorical. The exception that had been carved

out under Section 3(3) is for an extremely limited purpose. It permits stop-gap arrangements and only covers ad hoc or part-time teachers with a small duration. It is intended to serve the purpose of meeting the situation where an emergency occurs. It was never intended to clothe any authority with the power to make any appointment beyond what is prescribed therein. The scheme of the aforesaid provisions go a long way to show that the legislature, in fact, had taken immense care to see that no one gets a back door entry and the selections are made in a seemly manner. A proper schematic analysis of the provisions enumerated hereinabove do not envisage any kind of ad hoc appointment or part-time appointment to remain in continuance. As is demonstrable from the factual depiction in the present batch of cases, some of the respondents continued with certain breaks and also due to intervention of the court. That apart, this Court had not acceded to their prayer of regularization. The only direction that was issued in Special Leave Petition (c) No. 3238 of 1997 and other connected matters, was that they would continue in service till the regular selections were made. It is noteworthy that a distinction has to be made and we are obliged to do so because of the language employed in the provisions between a regular teacher and an ad hoc teacher or a part-time teacher who continues to work in the post sometimes due to fortuitous circumstances and sometimes due to the interdiction by the court. Their initial appointment could be regarded as legal for the limited purposes of Section 3(3) of the Act. That would only protect the period fixed therein. Thereafter, they could not have been allowed to continue, as it was only a stop gap arrangement and was bound to be so under the statutory scheme. Their continuance thereafter by operation of law has to be regarded as null and void regard being had to the language employed in Section 3(2) of the Act.

23. Be it stated, the High Court has placed reliance on Section 3(3) to come to the conclusion that as they were appointed legally, they are entitled to be regularized in terms of paragraph 53 of the pronouncement in *Uma Devi* (supra).

Before we proceed to deal with the question whether the protection granted to certain employees in paragraph 53 in *Uma Devi* (supra) would be applicable to the present case or not, we think it appropriate to refer to certain authorities in the field.

24. In *University of Kashmir and Others v. Dr. Mohd. Yasin and Others*[4], the question arose whether the continuance of a lecturer made in violation of the ordinance of the university would confer any right on him solely on the ground that he had *de facto* continued subsequent to the statutory cessation of office and whether the principle of implied employment could be attracted. The Court, after referring to the powers and duties and the canalisation by the statutory body like the University, came to hold that when the selection committee had not considered or recommended the respondent therein for appointment and there was no suggestion that the university council appointed the respondent to the post of Professor, regard being had to the said fact situation, the ad hoc arrangement by which the respondent therein remained to teach did not acquire any legal validity because the Vice-Chancellor went through the irregular exercise of extending his period of probation. We think it apt to quote an instructive passage from the said judgment: -

> "When a statute creates a body and vests it with authority and circumscribes its powers by specifying limitations, the doctrine of implied engagement *de hors* the provisions and powers under the Act would be subversive of the statutory scheme regarding appointments of officers and cannot be countenanced by the Court. Power in this case has been vested in the University Council only and the manner of its exercise has been carefully regulated. Therefore, the appointment of the respondent could be made only by the Council and only in the mode prescribed by the statute. If a Vice-Chancellor by administrative drift allows such employment it cannot be validated on any theory of *factum valet*. We cannot countenance the alleged continuance of the respondent in the University campus as tantamount to regular service under the University with the sanction of law. In short, the respondent has no presentable case against the direction to quit."

4. (1974) 3 SCC 546.

25. In *Anuradha Mukherjee (Smt) and Others v. Union of India and Others*[5], this Court, while dealing with the issue of seniority, opined that when an employee is appointed *de hors* the Rules, he cannot get seniority from the date of his initial appointment but from the date on which he is actually selected and appointed in accordance with the Rules.

26. In *State of Haryana v. Haryana Veterinary & AHTS Association and Another*[6], while dealing with the issue of regular service under the Haryana Service of Engineers, Class II, Public Works Department (Irrigation Branch) Rules, 1970, a three-Judge Bench observed that under the Scheme of the said Rules, the service rendered on ad hoc basis or stop-gap arrangement could not be held to be regular service for grant of revised scale of pay.

27. In *R.S. Garg v. State of U.P. and Others*[7], while dealing with the concept of recruitment, this Court has categorically laid down that the expression "recruitment" would mean recruitment in accordance with the Rules and not *dehors* the same and if an appointment is made *dehors* the Rules, it is not an appointment in the eye of law.

28. Coming back to the decision in *Uma Devi* (supra), the Constitution Bench, after survey of all the decisions in the field relating to recruitment process and the claim for regularization, in paragraph 43, has held that consistent with the scheme for

5. (19960 9 SCC 59.
6. (2000) 8 SCC 4.
7. (2006) 6 SCC 430

public employment, it is the duty of the court to necessarily hold that unless the appointment is in terms of the relevant rules, the same would not confer any right on the appointee. The Bench further proceeded to state that merely because a temporary employee or a casual wage worker is continued for a time beyond the term of his appointment, he would not be entitled to be absorbed in regular service or made permanent, merely on the strength of such continuance, if the original appointment was not made by following a due process of selection as envisaged by the relevant rules. After so stating, it has been further ruled that merely because an employee had continued under cover of an order of the court, he would not be entitled to any right to be absorbed or made permanent in service.

29. It is worthy to note that while repelling the contention pertaining to the legitimate expectation of a person to be regularized, the Court held that when a person enters a temporary employment or gets engagement as a contractual or casual worker and the engagement is not based on a proper selection as recognized by the relevant rules or procedure, he is aware of the consequences of the appointment being temporary, casual or contractual in nature. Such a person cannot invoke the theory of legitimate expectation for being confirmed in the post when an appointment to the post could be made only by following a proper procedure.

30. The Court, eventually, in paragraph 53, issued certain directions relating to regularization of irregular appointments. We think it apt to reproduce the relevant part from the said paragraph: -

> "One aspect needs to be clarified. There may be cases where irregular appointments (not illegal appointments) as explained in *State of Mysore v. S.V. Narayanappa*[8], *R.N. Nanjundappa v. T. Thimmiah*[9] *and B.N. Nagarajan v. State of Karnataka*[10] and referred to in para 15 above, of duly qualified persons in duly sanctioned vacant posts might have been made and the employees have continued to work for ten years or more but without the intervention of orders of the courts or of tribunals. The question of regularisation of the services of such employees may have to be considered on merits in the light of the principles settled by this Court in the cases abovereferred to and in the light of this judgment. In that context, the Union of India, the State Governments and their instrumentalities should take steps to regularise as a one-time measure, the services of such *irregularly* appointed, who have worked for ten years or more in duly sanctioned posts but not under cover of orders of the courts or of tribunals and should further ensure that regular recruitments are undertaken to fill those vacant sanctioned posts that require to be filled up, in cases where temporary employees or daily wagers are being now employed."

8. (1967) 1 SCR 128.

9. (1972) 1 SCC 409.

31. To appreciate what has been stated in the said paragraph, it is imperative to refer to paragraph 15 of the judgment wherein it has been held thus: -

> "Even at the threshold, it is necessary to keep in mind the distinction between regularisation and conferment of permanence in service jurisprudence. In *State of Mysore v. S.V. Narayanappa* this Court stated that it was a misconception to consider that regularisation meant permanence. In *R.N. Nanjundappa v. T. Thimmiah* this Court dealt with an argument that regularisation would mean conferring the quality of permanence on the appointment. This Court stated: (SCC pp. 416-17, para 26)
>
> > "Counsel on behalf of the respondent contended that regularisation would mean conferring the quality

10. (1979) 4 SCC 507.

of permanence on the appointment whereas counsel on behalf of the State contended that regularisation did not mean permanence but that it was a case of regularisation of the rules under Article 309. Both the contentions are fallacious. If the appointment itself is in infraction of the rules or if it is in violation of the provisions of the Constitution illegality cannot be regularised. Ratification or regularisation is possible of an act which is within the power and province of the authority but there has been some non-compliance with procedure or manner which does not go to the root of the appointment. Regularisation cannot be said to be a mode of recruitment. To accede to such a proposition would be to introduce a new head of appointment in defiance of rules or it may have the effect of setting at naught the rules"."

32. From the aforesaid delineation, it is quite vivid that the Constitution Bench made a distinction between an illegal appointment and an irregular appointment and for the said purpose, as noted above, reliance was placed on the earlier decision in *T. Thimmiah* (supra) which makes a distinction between the power of ratification which is possible within the power of the authority and some non-compliance with the procedure or the manner which does not go to the root of the appointment.

33. We have already analysed the scheme of Section 3 and stated that there could not have been continuance of the service after the fixed duration as provided under Section 3(3) of the Act and such continuance is to be treated as null and void. That is how the Act operates in the field. That apart, regular selection was required to be made by a High Powered Committee as provided under Section 4. It is also pertinent to state that the Act lays down the procedure of the selection committee not leaving it to any authority to provide the same by rules or regulations.

34. In view of the aforesaid, the irresistible conclusion is that the continuance after the fixed duration goes to the root of the matter. That apart, the teachers were allowed to continue under certain compelling circumstances and by interdiction by courts. Quite apart from the above, this Court had categorically declined to accede to the prayer for regularization. In such a situation, we are afraid that the reliance placed by the High Court on paragraph 53 of the pronouncement in *Uma Devi* (supra) can be said to be justified. In this regard, another aspect, though an ancillary one, may be worth noting. Prem Lata Agarwal and B.K. Joshi had retired on 31.3.2001 and 31.1.2002, and by no stretch of imagination, *Uma Devi* (supra) lays down that the cases of any category of appointees who had retired could be regularized. We may repeat at the cost of repetition that the protection carved out in paragraph 53 in *Uma Devi* (supra) could not be extended to the respondents basically for three reasons, namely, (i) that the continuance of appointment after the fixed duration was null and void by operation of law; (ii) that the respondent continued in the post by intervention of the court; and (iii) that this Court had declined to regularize their services in 1998.

35. Though we have dealt with the statutory scheme, yet as the High Court has heavily relied on various regulations to extend the benefit, we think it seemly to advert to the approach of the High Court to find out whether it has appositely appreciated the purpose and purport of the regulations. The High Court, as is manifest from the orders, has made a distinction between a permanent employee and purely temporary appointee and observed that the services of the respondent could not be termed to be purely temporary or daily wages. In that context, it has referred to Regulation 22 which uses the words "regularly appointed employee". We may reproduce the said part of the ratiocination:-

"Regulation 2(ii) is applicable to all existing employees except the persons appointed on contract or part time basis; persons on deputation; purely temporary and daily

wages staff; and re-employed pensioners. The case of the petitioners is not covered under any of the aforesaid four categories. Even otherwise, it cannot be said that appointments of the petitioners were made as stop gap arrangements. They have continued for more than two decades and therefore, they cannot in any manner be termed as "purely temporary". Also the word "purely temporary" contained in regulation 2(ii)(c) is used in company with daily wages staff and there is distinction in concept of purely temporary and temporary as provided in regulation 2 and 22 of the pension scheme purely temporary is not covered whereas temporary or officiating appointment is covered under the purview of the pension regulation."

36. The aforesaid analysis, according to us, is not correct inasmuch as the regulations do not take in their sweep an employee who is not regularly appointed. The distinction between temporary and purely temporary, as made by the High Court, does not commend acceptance as there is an inherent fallacy in the same inasmuch as Regulation 2(i) clearly provides "regularly appointed to the service of the University" which has been reiterated in Regulation 22. In fact, as we perceive, the High Court has proceeded on the basis that their services have to be treated as regular. Once it is not regular service, the infrastructure collapses as a consequence of which the superstructure is bound to founder and, hence, the distinction made by the High Court is flawed.

37. The High Court, as has been stated earlier, has pressed into service Regulation 23 and relying on the same, it has held that the services of the respondents shall be deemed to have been confirmed as in the instant cases the University has never opined that their services were not satisfactory. The language of Regulation 23 is couched in a different manner. It fundamentally deals with the computation of the period of service of an employee. That apart, Regulation 23(b) uses the

words "if he is confirmed". It is a conditional one and it relates to officiating services. Both the concepts have their own significance in service jurisprudence. The respondents were not in the officiating service and by no stretch of imagination, they could have been treated to be confirmed because the words "if he is confirmed" required an affirmative fact to be done by the University. The High Court, as we find, has applied the doctrine of deemed confirmation to the case at hand which is impermissible. In this context, we may, with profit, refer to the decision in *Head Master, Lawrence School, Lovedale v. Jayanthi Raghu and Another*[11] wherein it has been ruled thus:-

> "A confirmation, as is demonstrable from the language employed in the Rule, does not occur with efflux of time. As it is hedged by a condition, an affirmative or positive act is the requisite by the employer. In our considered opinion, an order of confirmation is required to be passed."

Thus analyzed, the conclusion of the High Court which also rests on the interpretation of the regulations does not commend acceptation.

38. Consequently, the appeals are allowed and the orders passed by the High Court are set aside. However, if any amount has been paid on any count to any of the respondents in the appeals pursuant to the orders passed by the High Court, the same shall not be recovered on any count. There shall be no order as to costs.

R.P. Appeals allowed.

11. (2012) 4 SCC 793.

GURVAIL SINGH @ GALA & ANOTHER
v.
STATE OF PUNJAB
(Criminal Appeal No. 1055 of 2006)

FEBRUARY 07, 2013

[K.S. RADHAKRISHNAN AND DIPAK MISRA, JJ.]

Sentence/Sentencing – Death sentence – Propriety of – Conviction u/s. 302/34 IPC of 3 accused – Death sentence to two of the accused – Confirmed by High Court – On appeal, held: Death sentence is not warranted – But in view of the fact that they caused death of 4 persons and nature of injuries inflicted, they deserve no sympathy – Death sentence is modified to life imprisonment for a minimum period of thirty years without remission – Penal Code, 1860 – s. 302/34.

Death Sentence – Award of – Principles to be followed – Held: To award death sentence, aggravating circumstances (crime test) have to be fully satisfied and there should be no mitigating circumstance (criminal test) favouring the accused – Even thereafter test of rarest of rare case has to be applied.

Death sentence – Rarest of rare case test – Criteria – Held: Test of rarest of rare case depends on the perception of the society and not 'judge-centric'.

Appellants-accused, along with 2 other accused were prosecuted for causing death of 4 people of a family. Trial court convicted the appellants and one other accused u/s. 302/34 IPC. Fourth accused was below 18 years of age and hence was sent to Juvenile Board. Appellants were sentenced to death and the other accused was awarded file imprisonment. High Court confirmed their conviction and sentence. Hence the present appeal by the appellants.

The accused confined their contention on the question of sentence and stated that death sentence was not justified as in view of their age i.e. 34 and 22 years, there is possibility of their reform and rehabilitation; that antecedents of the appellants were unblemished and that since they had already undergone number of years in jail they may be set free.

Partly allowing the appeal, the Court

HELD: 1. To award death sentence, the aggravating circumstances (crime test) have to be fully satisfied and there should be no mitigating circumstance (criminal test) favouring the accused. Even if both the tests are satisfied as against the accused, even then the Court has to finally apply the Rarest of Rare Cases test which depends on the perception of the society and not 'judge-centric', that is whether the society will approve the awarding of death sentence to certain types of crime or not. While applying this test, the Court has to look into variety of factors like society's abhorrence, extreme indignation and antipathy to certain types of crimes like rape and murder of minor girls, especially intellectually challenged minor girls, minor girls with physical disability, old and infirm women with those disabilities etc. Courts award death sentence, because situation demands, due to constitutional compulsion, reflected by the will of the people, and not Judge centric. [Para 13] [792-E-H; 793-A]

2. In the instant case, the appellants do not deserve death sentence. Some of the mitigating circumstances, as enunciated in **Machhi Singh* case, come to the rescue of the appellants. Age definitely is a factor which cannot be ignored, though not determinative factor in all fact situations. The probability that the accused persons could be reformed and rehabilitated is also a factor to be borne in mind. Due to the fact that the appellants are instrumental for the death of four persons and nature of

injuries they have inflicted, in front of PW1, whose son, daughter-in-law and two grand children were murdered, the appellants deserve no sympathy. Considering the totality of facts and circumstances of the present case, imposition of death sentence on the appellants was not warranted but while awarding life imprisonment to the appellants, it is held that they must serve a minimum of thirty years in jail without remission. The sentence awarded by the trial court and confirmed by the High Court is modified from death to life imprisonment. [Paras 13 and 14] [792-D-E; 793-B-D]

Machhi Singh v. State of Punjab* **(1983) 3 SCC 470: 1983 (3) SCR 413; *Sangeet and Anr. v. State of Haryana* **(2012) 11 SCALE 140 – relied on.**

Bachitar Singh and Anr. v. State of Punjab **(2002) 8 SCC 125: 2002(2) Suppl. SCR 621;** *Prakash Dhawal Khairner (Patel) v. State ofMaharashtra* **(2002) 2 SCC 35: 2001 (5) Suppl. SCR 612;** *Ramesh and Ors. v. State of Rajasthan* **(2011) 3 SCC 685: 2011 (4) SCR 585;** *Sandeep v. State of U.P.* **(2012) 6 SCC 107;** *Sangeet and Anr. v. State of Haryana* **(2012) 11 SCALE 140 – cited.**

Bachan Singh v. State of Punjab **(1980) 2 SCC 684;** *Santosh KumarSatishbhushan Bariyar v. State of Maharashtra* **(2009) 6 SCC 498:2009 (9) SCR 90;** *Jagmohan Singh v. State of U.P.* **(1973) 1 SCC 20; 1973 (2) SCR 541;** *Swami Shraddananda (2) v. State of Karnataka* **(2008) 13 SCC767: 2008 (11) SCR 93 – referred to.**

Case Law Reference:

(1980) 2 SCC 684	**Referred to**	**Para 9**
2002 (2) Suppl. SCR 621	**Cited**	**Para 9**
2001 (5) Suppl. SCR 612	**Cited**	**Para 9**
2009 (9) SCR 90	**Referred to**	**Para 9**

2011 (4) SCR 585	**Cited**	**Para 9**
(2012) 6 SCC 107	**Cited**	**Para 9**
1983 (3) SCR 413	**Relied on**	**Para 10**
(2012) 11 SCALE 140	**Relied on**	**Para 11**
1973 (2) SCR 541	**Referred to**	**Para 11**
2008 (11) SCR 93	**Referred to**	**Para 11**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1055 of 2006.

From the Judgment & Order dated 22.09.2006 of the High Court of Punjab & Haryana at Chandigarh in Criminal Appeal No. 890-DB of 2005 and M.R. No. 10 of 2005.

Rishi Malhotra, Tara Chandra Sharma, Uma Datta, Neelam Sharma for the Appellants.

Jayant K. Sud, AAG, Vishal Dabas, Chirag Khurana and Kuldip Singh for the Respondent.

The Judgment of the Court was delivered by

K.S. RADHAKRISHNAN, J. 1. This criminal appeal arises out of the judgment dated 22.9.2006 passed by the High Court of Punjab and Haryana in Criminal Appeal No. 890-DB of 2005 and Murder Reference No. 10 of 2005. The High Court dismissed the appeal of the accused persons and also reference was confirmed.

2. The appellants, along with two others, were tried for an offence under Section 302 read with Section 34 IPC for murder of one Kulwant Singh, his two sons – Gurwinder Singh and Davinder Singh and his wife – Sarabjit Kaur on 21.8.2000 at about 1.30 am and were convicted for murder and awarded death sentence.

3. The prosecution case, briefly stated, is as follows:

Balwant Singh and Jaswant Singh are two sons of Sharam Singh (PW 1). Both Balwant Singh and Jaswant Singh died prior to the date of the incident on 21.8.2000. Sharam Singh's third son Kulwant Singh had two sons – Gurwinder Singh and Davinder Singh. Sarabjit Kaur was his wife. PW1 (Sharam Singh) had 8 acres of land at Village Bhittewad, District Amritsar, which was mutated in his name. In the family partition, that 8 acres of land was divided into four shares, i.e. PW1 gave 2 acres of land each to his sons and wife and 2 acres of land was retained by him. 2nd appellant Jaj Singh and his brother Satnam Singh – accused and his mother Amarjit Kaur – accused, were pressurising on PW1 to get the land transferred in their names in the Revenue record. PW1 wanted them to spend the money for mutation, which was not done. There were frequent quarrels between PW1, 2nd appellant and Amarjit Kaur on that. They nurtured a feeling that PW1, under the influence of his son Kulwant Singh, would not mutate their shares in their names. About 8 to 9 days prior to the incident, 2nd appellant, Satnam Singh and 1st appellant Gurvail Singh went to the house of PW1and threatened him that in case he did not give their share in the land and mutated in their names, they would kill him and his son Kulwant Singh. On 20.8.2000, the appellants and other accused persons were found sitting on a cot outside the house of PW1, threatening PW1 and Kulwant Singh that they would not be spared, since the properties were not mutated in their names.

4. PW1, on the intervening night of 20-21.8.2000, was sleeping in the drawing room of his house and Kulwant Singh, his wife Sarabjir Kaur and two sons Gurwinder Singh and Davinder Singh were sleeping in the courtyard. At about 1-1.30 a.m. on 21.8.2000, PW1 heard somebody knocking at the door of his house and he saw through the window the appellants, Satnam Singh and Amarjit Kaur. 1st appellant was carrying Toka, 2nd appellant was armed with Datar and Amarjit Kaur

was carrying Kirpan. 2nd appellant Jaj Singh opened the attack and gave Datar blow to Kulwant Singh and his brother Satnam Singh and inflicted Kirpan blows on Sarabjit Kaur. 1st appellant Gurvail Singh, who was armed with Toka, starting assaulting Gurwinder Singh and Davinder Singh. PW1 tried to intervene and avoid the incident and raised hue and cry, which attracted Dalbag Singh and he opened the door of the Baithak room in which PW1 was kept locked. Due to this incident, Kulwant Singh, his wife Sarabjit Kaur and two sons Gurwinder Singh and Davinder Singh were murdered.

5. PW1 gave the first information statement to PW7, SHO, Police at Police Station Raja Sansi. The statement was recorded in the morning at about 8.00 am. The formal FIR was recorded at about 9.00 am under Section 302 read with Section 34 IPC at Police Station Raja Sansi, Amritsar. S.I. Mandip Singh, PW7, took up the investigation. The inquest report of all the four dead bodies was prepared and the bodies were sent for post-mortem. The appellants Gurvail Singh and Jaj Singh were arrested on 25.8.2000 and 5.9.2001 respectively. Satnam Singh was arrested on 25.8.2000 and Amarjit Kaur on 26.8.2000. All the accused were charged for offence under Section 302 read with Section 34 IPC.

6. Dr. Gurmanjit Rai, PW2 conducted the autopsy on the dead body of Kulwant Singh on 21.8.2000. According to him, all the injuries were ante-mortem in nature and the cause of death of Kulwant Singh was severance of neck structure. According to him, injury no. 2 sustained by Kulwant Singh was sufficient for causing death in the ordinary course of nature. Dr. Gurmanjit Rai also conducted the post-mortem on the dead body of Sarabjit Singh on the same day and opined that the cause of death was severance of neck structure and injury no. 2 was sufficient for causing death in the ordinary course of nature. Dr. Amarjit Singh PW9 conducted the autopsy on the dead bodies of Gurwinder Singh and Davinder Singh and opined that the death was due to severance of neck structure,

which was sufficient to cause death in the ordinary course of nature. On the side of the prosecution, PW1 to PW10 were examined and for the defence DW1 to DW6 were examined.

7. The trial Court, after considering all the oral and documentary evidence, found all the accused guilty under Section 302 read with Section 34 IPC. The trial Court noticed that Satnam Singh was below 18 years of age and was Juvenile and hence he was sent to the Juvenile Justice Board for passing the necessary orders in accordance with the provisions of the Juvenile Justice (Care and Protection of Children) Act, 2000. So far as Amarjit Kaur is concerned, the Court on evidence found that she had played a prominent role and hence was awarded life imprisonment and a fine of Rs.2,000/- under Section 302 IPC for each of the murders and, in default of payment of fine, to further undergo one year RI and all the sentences were directed to run concurrently. So far as Gurvail Singh (1st appellant) and Jaj Singh (2nd appellant) are concerned, the trial Court took the view that it is they who had mercilessly murdered Kulwant Singh and also Gurwinder Singh and Davinder Singh. The trial Court found no mitigating factors in their favour and held that the case would fall in the category of "rarest of rare cases". Consequently, they were convicted and awarded death sentence.

8. Both Gurvail Singh and Satnam Singh filed appeals before the High Court of Punjab and Haryana, which were heard along Murder Reference No. 10 of 2005 and the High Court also concurred with the views of the trial Court and took the view that it was a fit case where the death sentence is the adequate punishment, since it falls within the category of "rarest of rare cases", against which this appeal has been preferred.

9. Shri Rishi Malhotra, learned counsel appearing on behalf of 1st appellant and Shri Tara Chandra Sharma, learned counsel appearing on behalf of 2nd appellant, confined their arguments more on the sentence, rather than on the findings recorded by the Courts below on conviction, in our view rightly.

We have gone through the entire evidence, oral and documentary and we are of the considered opinion, that no grounds have been made out to upset the well considered judgment of the trial court as well as that of the High Court. Learned counsel, at length, placed before us the various mitigating circumstances which, according to them, were not properly addressed either by the trial Court or the High Court and wrongly awarded the death sentence to both the appellants treating the case as "rarest of rare cases". The appellant was arrested on 25.8.2000 and, since then, he is in jail and he was about 34 years of age on the date of incident and is married and has four children. 2nd appellant was aged 22 years at the time of incident. Looking to the age of the appellants, learned counsel submitted that the possibility of their reformation and rehabilitation cannot be ruled out. Further, it is also pointed out that the antecedents of the appellants are unblemished and they had not indulged in any criminal activities and it was property dispute which culminated in the death of few persons. Learned counsels pointed out that since they had already undergone sufficient number of years in jail, they may be set free. Learned counsels also placed reliance on the judgments of this Court in *Bachan Singh v. State of Punjab* (1980) 2 SCC 684, *Bachitar Singh and Another v. State of Punjab* (2002) 8 SCC 125, *Prakash Dhawal Khairner (Patel) v. State of Maharashtra* (2002) 2 SCC 35, *Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra* (2009) 6 SCC 498, *Ramesh and Others v. State of Rajasthan* (2011) 3 SCC 685, *Sandeep v. State of U.P.* (2012) 6 SCC 107 etc.

10. Shri Jayant K. Sud, learned Additional Advocate General, State of Punjab, appearing on behalf of the State, on the other hand, submitted that the appellants deserve no sympathy, since they were instrumental for the death of four persons – Kulwant Singh, his wife Sarabjit Kaur and two sons Gurwinder Singh and Davinder Singh. Shri Sud submitted that the appellants had wiped off the entire family in the presence of PW1 and, therefore, the appellants deserve no sympathy

and the case clearly calls for extreme penalty of capital punishment. Shri Sud also submitted that the murder was committed in an extremely brutal, grotesque, diabolical, revolting or dastardly manner so as to arouse intense and extreme indication of the community, and hence appellants deserve no sympathy. Reference was also made to the judgment of this Court in *Machhi Singh v. State of Punjab* (1983) 3 SCC 470 and submitted that none of the mitigating circumstances laid down by the Court would come to the rescue of the appellants so as to escape them from capital punishment.

11. This Court has recently in *Sangeet & Another v. State of Haryana* (2012) 11 SCALE 140 (in which one of us – K. S. Radhakrishnan - was also a member) elaborately discussed the principles which have to be applied in a case when the Court is called upon to determine whether the case will fall under the category of "rarest of rare cases" or not. The issue of aggravating and mitigating circumstances has been elaborately dealt with by this Court in para 27 of that judgment. This Court noticed that the legislative change and *Bachan Singh* discarding proposition (iv)(a) of *Jagmohan Singh v. State of U.P.* (1973) 1 SCC 20, *Machhi Singh* revived the "balancing" of aggravating and mitigating circumstances through a balance sheet theory. In doing so, it sought to compare aggravating circumstances pertaining to a crime with the mitigating circumstances pertaining to a criminal. This Court held that these are completely distinct and different elements and cannot be compared with one another and a balance sheet cannot be drawn up of two distinct and different constituents of an incident. Reference was also made to the judgment of this Court in *Swami Shraddananda (2) v. State of Karnataka* (2008) 13 SCC 767, and this Court opined that not only does the aggravating and mitigating circumstances approach need a fresh look but the necessity of adopting this approach also needs a fresh look in the light of the conclusions in *Bachan Singh*. This Court held that even though *Bachan Singh* intended "principled sentencing", sentencing has now really

become judge-centric as highlighted in *Swamy Shraddananda* and *Bariyar*. The ratio of crime and criminal has also been elaborately dealt with in *Sangeet*, so also the standardization and categorization of crimes. This Court noticed that despite *Bachan Singh*, the particular crime continues to play any more important role than "crime and criminal".

12. This Court in *Sangeet* noticed that the circumstances of criminal referred to in *Bachan Singh* appear to have taken a bit of back seat in the sentencing process and took the view, as already indicated, balancing test is not the correct test in deciding whether the capital punishment be awarded or not. We may, in this case, go a little further and decide what will be the test that we can apply in a case where death sentence is proposed.

13. We notice that, so far as this case is concerned, appellants do not deserve death sentence. Some of the mitigating circumstances, as enunciated in *Machhi Singh,* come to the rescue of the appellants. Age definitely is a factor which cannot be ignored, though not determinative factor in all fact situations. The probability that the accused persons could be reformed and rehabilitated is also a factor to be borne in mind. To award death sentence, the aggravating circumstances (crime test) have to be fully satisfied and there should be no mitigating circumstance (criminal test) favouring the accused. Even if both the tests are satisfied as against the accused, even then the Court has to finally apply the Rarest of Rare Cases test (R-R Test), which depends on the perception of the society and not "judge-centric", that is whether the society will approve the awarding of death sentence to certain types of crime or not. While applying this test, the Court has to look into variety of factors like society's abhorrence, extreme indignation and antipathy to certain types of crimes like rape and murder of minor girls, especially intellectually challenged minor girls, minor girls with physical disability, old and infirm women with those disabilities etc. examples are only illustrative and not

exhaustive. Courts award death sentence, because situation demands, due to constitutional compulsion, reflected by the will of the people, and not Judge centric.

14. We are of the view, so far as this case is concerned, that the extreme sentence of capital punishment is not warranted. Due to the fact that the appellants are instrumental for the death of four persons and nature of injuries they have inflicted, in front of PW1, whose son, daughter-in-law and two grand children were murdered, we are of the view that the appellants deserve no sympathy. Considering the totality of facts and circumstances of this case we hold that imposition of death sentence on the appellants was not warranted but while awarding life imprisonment to the appellants, we hold that they must serve a minimum of thirty years in jail without remission. The sentence awarded by the trial court and confirmed by the High Court is modified as above. Under such circumstance, we modify the sentence from death to life imprisonment. Applying the principle laid down by this Court in *Sandeep* (supra), we are of the view that the minimum sentence of thirty years would be an adequate punishment, so far as the facts of this case are concerned.

Appeal is partly allowed.

K.K.T. Appeal partly allowed.

LAKSHMI ALIAS BHAGYALAKSHMI AND ANR.
v.
E.JAYARAM (D) BY LR.
(Civil Appeal No. 1004 of 2013)

FEBRUARY 7, 2013

[SURINDER SINGH NIJJAR AND M.Y. EQBAL, JJ.]

Code of Civil Procedure, 1908 – Or. 39, rr.1 and 2 – Suit for permanent injunction – Plaintiff no.1 claimed ownership rights in respect of the suit property stating that it had purchased the same from defendant no.1, and though the sale deed was not registered, the entire sale consideration had been paid to defendant no.1 – Separate application filed by plaintiffs-appellants u/Or.39, rr.1 and 2 CPC seeking ad-interim relief – Interim injunction granted by trial court – Appeal – High Court instead of considering the legality and propriety of the order of interim injunction, proceeded to decide the effect of s.53A of the Transfer of Property Act, 1882 – Further, taking note of the fact that the suit for bare injunction was filed without seeking leave u/Or.2, r.2 CPC reserving the right to sue for any other relief, the High Court held that in light of the same if the plaintiffs were barred from claiming any relief of specific performance, the incidental relief of injunction would also be unavailable to them, and thereafter set aside the order of trial court – Held: High Court completely misconstrued the provisions of Or. 39, rr.1 and 2 CPC and committed serious error in deciding the scope of s.53A of Transfer of Property Act, 1882 and Or.2, r.2 CPC – Trial court while granting ad-interim injunction very categorically observed in the order that respective rights of the parties shall be decided at the time of final disposal of the suit – The very fact that plaintiff no.2 was in possession of the property as a tenant under plaintiff no.1 and possession of plaintiff no.2 was not denied, interim protection was given to plaintiff no.2 against

the threatened action of the defendants-respondents to evict her without following the due process of law – Order passed by High Court cannot be sustained in law.

The plaintiffs-appellants filed a suit for permanent injunction restraining the defendant-respondents from interfering with their peaceful possession and enjoyment of the suit property *inter-alia* pleading that plaintiff no.1 was the absolute owner of the suit property which was purchased from defendant no.1 and that though the sale deed was not registered, the entire sale consideration had been paid to defendant no.1. The plaintiffs-appellants further filed a separate application under Order 39 Rule 1 and 2 CPC seeking ad-interim relief restraining the defendants from interfering with their peaceful possession and enjoyment.

The defendant-respondents denied the purchase of suit property by the plaintiff-appellants from defendant-respondent no.1. They pleaded that plaintiff no.1 was a stranger; that defendant no.1 was the owner of the property and plaintiff no.2 was a tenant under him.

The trial court allowed the application of the plaintiffs under Order 39 Rule 1 and 2 CPC and granted ad-interim temporary injunction restraining the defendants from interfering with the peaceful possession and enjoyment of the suit property by plaintiff no.2 till disposal of the suit. Aggrieved by the said order, the defendants preferred appeal before the High Court. The High Court instead of considering the legality and propriety of the interim injunction granted by the trial court, proceeded to decide the effect of Section 53A of the Transfer of Property Act, 1882. Further, taking note of the fact that the suit for bare injunction was filed without seeking leave u/Or.2, r.2 CPC reserving the right to sue for any other relief, the High Court held that in light of the same if the plaintiffs were barred from claiming any relief of specific performance,

the incidental relief of injunction would also be unavailable to them. The High Court thereafter set aside the order passed by the trial court holding that defendant-respondents were entitled to initiate action for ejectment of the plaintiff-appellants from the suit property. Hence the present appeal.

Allowing the appeal, the Court

HELD: The High Court completely misconstrued the provisions of Order 39 Rule 1 and 2 CPC and committed serious error in deciding the scope of Section 53A of Transfer of Property Act, 1882 and Order 2 Rule 2 of CPC. The trial court while granting ad-interim injunction very categorically observed in the order that respective rights of the parties shall be decided at the time of final disposal of the suit. The very fact that Plaintiff No.2 was in possession of the property as a tenant under Plaintiff No.1 and possession of Plaintiff No.2 was not denied, the interim protection was given to Plaintiff No.2 against the threatened action of the defendants to evict her without following the due process of law. The order passed by the High Court cannot be sustained in law. [Para 7] [800-A-D]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1004 of 2013.

From the Judgment & Orders 29.08.2005 of the High Court of Karnataka at Bangalore in M.F.A. No. 524 of 2003 (CPC).

Raghavendra S. Srivatsa, Subramonium Prasad for the Appellant.

E.C. Vidya Sagar, Kheyali Sarkar, Sanjay R. Hegde for the Respondent.

The Judgment of the Court was delivered by

M.Y. EQBAL, J. 1. Leave granted.

2. This appeal is directed against the order dated 29.08.2005 passed by a single Judge of the Karnataka High Court in M.F.A. No. 524 of 2003, whereby the Learned Single Judge set aside the order passed by the VII Addl. City Civil Judge, Bangalore and held that defendant-respondent is entitled to initiate action for ejectment of the plaintiff-appellants from the suit property.

3. The facts of the case lie in a narrow compass.

4. The plaintiffs who are the present appellants filed a suit for permanent injunction restraining the defendant-respondents from interfering with their peaceful possession and enjoyment of the suit property. The plaintiff-appellants case was that Plaintiff No.1 is the absolute owner of the suit property consisting of a building which was purchased from Defendant No.1 on a consideration of Rs.6,000/- However, sale deed could not be registered as the registration was suspended by the Government and the defendant-respondents could not get clearance from the Urban Land Ceiling Authority. The plaintiff-appellant's further case was that although the sale deed was not registered, the entire sale consideration was paid to Defendant No.1 by the plaintiff who was put in possession of the suit property. It was pleaded by the plaintiffs that Plaintiff No.1 leased out the suit property in favour of Defendant No.2 who is residing in the same suit property for the last 17 years. Plaintiff-appellants further case was that they approached the Bangalore Mahanagara Palike for change of kattas and, on enquiry, they learnt that Defendant No.1 with an intention to grab the property concocted a gift deed in favour of Defendant No.2, who is his wife and on that basis moved an application for change of kattas. Immediately, the plaintiffs caused a legal notice dated 09.09.2002 asking him to execute a sale deed in favour of Plaintiff No.1. The plaintiffs also caused a legal notice on Municipal authorities not to change the kattas in favour of Defendant No.2 as Defendant No.1 has no right whatsoever to

gift the suit property. The plaintiffs alleged that defendants along with their henchmen came to the suit property and threatened the plaintiff-appellants of dire consequences if they do not vacate the property within three days. On account of repeated threats from the side of defendants, the plaintiffs were compelled to file a suit for permanent injunction restraining the defendants from interfering with their peaceful possession and enjoyment of the suit property. A separate application under Order 39 Rule 1 and 2 CPC seeking an ad-interim relief restraining the defendants from interfering with their peaceful possession and enjoyment was filed.

5. The defendant-respondents filed a written statement and denied the averments made in the plaint. The defendants denied the purchase of the suit property by the plaintiff-appellants from Defendant-Respondent No.1. The defendants pleaded about their family settlement whereby the suit property was allotted to the defendants who put construction and let out the same to Plaintiff No.2. According to the defendants, Plaintiff No.1 is a stranger. In a nutshell the case of the defendants is that Defendant No.1 is the owner of the property and Plaintiff No.2 is a tenant under him and that she was paying rent per month.

6. The learned Additional City Civil Judge on consideration of the pleadings made by the parties and the documents filed by them allowed the application of the plaintiffs under Order 39 Rule 1 and 2 CPC and granted ad-interim temporary injunction restraining the defendants from interfering with the peaceful possession and enjoyment of the suit property by Plaintiff No.2 till disposal of the suit. While granting temporary injunction the Civil Judge recorded the following reasons :-

> "From the allegations and counter allegations, it can be crystallized that plaintiff no.2 is in possession of suit schedule property and as such, the documents have been produced and even defendants admit the possession of plaintiff no.2. As regards the sale deed which is alleged

to have been executed the same is seriously disputed document. Hence it need not be considered at this stage. The respective rights of the parties will have to be decided at the final disposal of the suit. At this stage, it is suffice to state that plaintiff no.2 is in possession of the property who has filed an affidavit stating that she is a tenant under plaintiff no.1 where as defendants have produced documents to show that she is tenant under them.

In view of the above, I am of the considered opinion that this controversy can be resolved at the final disposal of the suit when parties lead their respective evidence. At this stage, plaintiff no.2 is entitled for injunction. Hence the point for consideration is answered in favour of plaintiff no.2 only and I proceed to pass the following:

I.A. No.1 filed by the plaintiffs under Order 39 Rule 1 and 2 of CPC is allowed in part.

Defendants 1 and 2 are restrained by an order of ad-interim temporary injunction from interfering with the peaceful possession and enjoyment of the suit schedule property by plaintiff no.2 till disposal of the suit."

6. Aggrieved by the said order the defendants preferred an appeal before the High Court being MFA No.524 of 2003. Ld. Single Judge instead of considering the legality and propriety of the interim injunction granted by the Civil Judge proceeded to decide the effect of Section 53A of the Transfer of Property Act, 1882. The Ld. Single Judge is of the view that though the plaintiff is ready and willing to perform her part of the contract, the fact that suit for bare injunction is filed without seeking leave under Order 2 rule 2 CPC reserving their right to sue for any other relief. According to Ld. Single Judge in the light of this, if the respondent is barred from claiming any relief of specific performance, the incidental relief of injunction would be unavailable to the respondents.

7. We have heard learned counsel appearing for the parties. In our considered opinion, the learned single judge has completely misconstrued the provisions of Order 39 Rule 1 and 2 CPC and has committed serious error in deciding the scope of Section 53A of Transfer of Property Act, 1882 and Order 2 Rule 2 of CPC. As noticed above the Civil Judge while granting ad-interim injunction very categorically observed in the order that respective rights of the parties shall be decided at the time of final disposal of the suit. The very fact that Plaintiff No.2 is in possession of the property as a tenant under Plaintiff No.1 and possession of Plaintiff No.2 was not denied, the interim protection was given to Plaintiff No.2 against the threatened action of the defendants to evict her without following the due process of law. In our considered opinion, the order passed by the learned single judge cannot be sustained in law.

8. For the aforesaid reasons, we allow this appeal and set aside the order passed by the High Court in the aforesaid appeal arising out of the order of injunction.

9. However, before parting with the order we are of the view that since the suit is pending for a long time the trial court shall hear and dispose of the suit within a period of four months from the date of receipt of copy of this order. It goes without saying that the trial court shall not be influenced by any of the observation made in the order passed by the appellate court as also by this court and the suit shall be decided on its own merits.

B.B.B. Appeal allowed.

SUDISH PRASAD & ORS.
v.
BABUI JONHIA ALIAS MANORAMA DEVI & ORS.
(Civil Appeal No.1012 of 2013)

FEBRUARY 7, 2013

[SURINDER SINGH NIJJAR AND M.Y. EQBAL, JJ.]

Suit – Title suit – Plaintiff claiming title over the property left by her father – Allegation that defendant appointed as guardian of her father was in possession of the property even after the death of her father – Plea that after the mother of the plaintiff remarried after her father's death, plaintiff became the sole owner – Defendant stating that he was not in possession of the property and that some portion of the property was orally gifted to him by the father of the plaintiff – Trial court partly decreed the suit holding that she was entitled to only half share, as for half share her mother acquired the right of widow's estate and that she was not entitled to the part of property gifted by her father to the defendant – First appellate Court affirmed the decree – Division Bench of High Court set aside the decree holding that the plaintiff was entitled to the entire property – On appeal, held: Plaintiff was entitled to decree in her favour – Defendant No. 1 was in the helm of affairs pertaining to the property for the benefit of widow and the plaintiff after the death of the owner and for the benefit of plaintiff after the civil death of the widow (due to her remarriage) – The claim of defendant by way of oral gift has no sanctity.

Plaintiff-respondent No. 1 field a suit for title over the suit property. The case of the plaintiff was that the suit property originally belonged to her father 'S'. The property was being managed by defendant No. 1 as he was appointed as guardian of 'S' by the Court. Defendant No. 1 taking advantage of his position, got executed two

'*zerpesgi*' deeds, one in favour of his nephew 'M' and another in favour of one 'D' without any consideration. After the death of 'S', the property was in possession of his widow 'P' and the plaintiff was a minor. After 2 to 3 months of the death of 'S', 'P' married 'M', and after the remarriage, plaintiff inherited the suit property. Defendant No. 1 was still in possession of the property.

The defendants contested the suit, stating that 'S' had taken possession of his property after attaining majority. 'S' orally gifted some part of land to defendant No. 1 in lieu of his services as guardian and also for performing shraddh of his mother, and that '*zerpeshgies*' were genuine transactions.

Trial court decreed the suit in part holding that plaintiff was entitled to half share in the property and for half share her mother 'P' acquired the right of widow's estate by adverse possession. The Court also held that plaintiff was not entitled to recover the possession of that part of the property which was orally gifted by 'S' to defendant No. 1.

Single Judge of High Court affirmed the judgment of trial court. In LPA, Division Bench of High Court set aside the decree passed by courts below and declared title and ownership of the plaintiff in respect of the entire suit property left by 'S'. Hence the present appeal by defendant-appellant.

Dismissing the appeal, the Court

HELD: 1. Once a person is appointed by the Court to be a Guardian of the property of ward, he is bound to deal with the property as carefully as a man of ordinary prudence would deal with it, if it were his own property. He is bound to do all acts for the protection and benefit of the property. A Guardian appointed by court cannot

deal with the property by way of sale, mortgage, charge or lease without the permission of the court and against the interest of minor. A Guardian stands in a fiduciary relation to his ward and he is not supposed to make any profit out of his office. On being appointed as Guardian of the property of minor, he is to act as a trustee and he cannot be permitted to gain any personal profit availing himself of his position and such action of the Guardian while dealing with the property against the interest of ward would be voidable in the eye of law. [Paras 12 and 13] [811-B-E]

2. Defendant No. 1, immediately after the appointment as Guardian of 'S' started dealing with the property against his interest. Not only he entered into a compromise in a suit filed in 1933 but executed two '*zerpesgi*' deed in the year 1940 in favour of his nephew 'M' and also in favour of one 'D' without the permission of court and without any consideration. After the death of 'S' in 1946 at the age of 23 years, leaving behind the plaintiff who was only 3 years old, he continued in possession of the suit property as trustee. He claimed to have acquired a portion of the suit property alleged to have been orally gifted to him by 'S' lieu of his services as Guardian. The said claim by way of oral gift has no sanctity in the eye of law. The Division Bench of the High Court has considered all these facts and also the claim of widow of 'S' over the suit property although she remarried 2-3 months after the death of 'S'. The Division Bench rightly came to the conclusion that the question of anyone acquiring any interest in any part of the said estate through adverse possession never arose inasmuch as the property in question remained in the custody of the guardian all throughout and through the custody of the guardian, the property was in fact *custodia legis*. The properties of 'S' remained *custodia legis* all throughout and, accordingly, there was no question of

anyone acquiring the same by adverse possession. On the civil death of the widow, the properties vested in the daughter, i.e. the plaintiff. Thus, defendant No. 1 during his lifetime, was holding the properties in question initially for the benefit of 'S' and upon his death for the benefit of his widow and upon her civil death for the benefit of the plaintiff. He continued to be in the helm of the affairs pertaining to the properties of 'S' for the sole benefit of the plaintiff after the civil death of the widow and, accordingly, the suit ought to have been decreed in favour of the plaintiff directing discharge of defendant No. 1 with a further direction to furnish accounts pertaining to the properties in question. [Paras 14 and 15] [811-F-H; 812-A-E, G; 813-D-E]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1012 of 2013.

From the Judgment & Order dated 16.4.2007 of the High Court of Judicature at Patna in L.P.A. No. 58 of 1993.

Sunil Kumar, Anil K. Jha, Rohini Prasad for the Appellants.

A.N. Choudhary, Chander Shekhar Ashri for the Respondents.

The Judgment of the Court was delivered by

M.Y. EQBAL, J. 1. Leave granted.

2. Aggrieved by the judgment and decree dated 16.04.2007 passed by the Division Bench of the Patna High Court in LPA No. 58/1993, the defendant-appellant preferred this appeal before this Court. By the impugned judgment, the Division Bench allowed the appeal holding that the plaintiff-respondent became the absolute owner of the suit properties.

3. The plaintiff-Respondent No.1 filed Title Suit No.12/3 of 1965/71 in the Court of Subordinate Judge, Siwan for

declaration of title over the suit property. The case of the plaintiff, *inter-alia,* is that Sukai Mahto is last male holder of the properties described in Schedule 1 , 2, and 3 of the plaint. He died leaving behind his widow Mst. Parbatia and one daughter, that is the plaintiff of this suit. Mst. Parbatia after the death of Sukai Mahto remarried in *Sagai Form* with Mahadeo Mahto son Ramsharan Mahto. Hurdung @ Bacha Mahto who is defendant No.12 in this suit was born out of the wedlock Mahadeo through Parbatia after he remarried. Mahadeo Mahto died about 12 to 16 years ago. Mst. Dhanwatia was the first wife of Mahadeo Mahto. Now, after the death of Mahadeo Mahto both his widows Mst.Dhanpatia and Mst. Parbatia remarried in *Sagai Form* with Gopal Mahto defendant.No.2 and Bal Kishun Mahto. Plaintiff's further case was that Bal Kishun Mahto who was *Chachera* uncle of Sukai Mahto was appointed guardian of Sukai Mahto by the order of district judge in the year 1930 to look after the person and properties of Sukai Mahto during his minority. Bal Kishun Mahto as guardian of Sukai Mahto had instituted a suit against one Keshwar Mahto which was numbered as T.S. No. 35/33. That suit was compromised whereby Keshwar Mahto gave the property described in Schedule 1 of the plaint to Sukai Mahto. Sukai Mahto was not a prudent man and was not sufficiently intelligent to understand his interest as Bal Kishun continued to look after his properties even after he attained majority. Besides that he was minor according to law because Bal Kishun was appointed guardian through the court. Balkishun taking advantage of his position got executed two *zerpesgi* deed dated 26.06.1940 in favour of his nephew Mahadeo Mahto and also in favour of Deoraj Mahto without consideration. Even after Sukai Mahto attained majority Bal Kishun Mahto continued to look after his properties. Sukai Mahto died in the year 1946 at the age of 23 years and at the time of his death the plaintiff was only three years of age. Now after the death of Sukai Mahto his properties were inherited by his widow but his widow Mst. Parbatia remarried after three to four months after Sukai's death. So the properties were inherited by the plaintiff after Parbatia's

remarried. Bal Kishun defendant No.1 continued to look after the properties of the plaintiff even after remarriage of Mst. Parbatia. Hence the possession of Bal Kishun allegedly continued as a constructive trustee on behalf of the plaintiff. Defendant No.1 has sold many of the costly trees of *sesam, mango and mahuwa*. Now the plaintiff was married on 08.07.61 and the plaintiff's *gawana* took place in 1962 and since then the plaintiff is living in her *sasural.* Plaintiff seeing dishonest intention of defendant No.1 demanded possession of the properties but defendant No.1 failed to do so. Hence this suit has been brought.

4. The suit was contested by the defendant-appellant by filing written statement. Defendant Nos.1 to 3 have filed a joint written statement. These defendants have stated in para 5 of the written statement that they do not deny the statements contained in para 1 to 4 of the plaint i.e. statements contained in paras 1 to 4 are admitted specifically. In para 3 of the plaint the plaintiff has said that Sukai died leaving behind his widow Mst.Parbatia and a daughter i.e. the plaintiff. They have further stated that Mst. Parbatia remarried with Mahadeo soon thereafter Sukai had become major before institution of T.S.No. 35/33 and he had taken possession of his properties from Bal Kishun Mahto and had taken accounts from him. Therefore, nothing is due against Bal Kishun during minority of Sukai Mahto. Balkishun had properly managed his properties and performed sharadh of his mother. Hence after Sukai attained majority, he orally gifted 1 B 14 dhurs to defendant No.1 in presence of *panchas* in lieu of his services as guardian and also in lieu of performing his sharadh. After the death of Sukai his properties were inherited by his widow Mst. Parbatia. Now Mst. Parbatia remarried with Mahadeo and since then the plaintiff and Mst. Parbatia started residing with Mahadeo. There was no question of defendant No.1 managing the properties as a trustee. Sukai Mahto had executed *zerpesgi* deed and got consideration. He had also executed another *zerpesgi* dated 26.04.40 in favour of Mahadeo Mahto and consideration was

duly paid. The *zerpeshgies* were genuine transactions and it is not a fact that Mahadeo Mahato got it executed by Sukai by undue influence. Defendant No.1 was never in possession of the properties of Sukai after his attaining majority, as a trustee. He was never in possession as a trustee after the death of Sukai on behalf of the plaintiff. Now these defendants have stated in para 35 of the written statement that except the properties described in Schedule Ka of the written statement, other properties after the death of Sukai came in possession of his widow Mst. Pabatia and after her *sagai* the properties were inherited by the plaintiff and is coming in possession of the plaintiff.

5. Defendant No.12 has filed separate written statement. Substance of the defence is that the suit is not maintainable; the plaintiff has no cause of action for the suit; that the suit is barred by limitation; the plaintiff has no right, title and interest to the suit land. The genealogical table given in the plaint is not correct. The plaintiff is not the daughter of Sukai but the plaintiff is the daughter of Mahadeo through Mst. Dhanwatia defendant No.10. The plaintiff has no title nor the plaintiff was ever in possession of the suit land. Defendant No.12 Hurdung Mahto is the son of Mahadeo Mahato through Mst. Parbatia. It is correct that Sukai died in 1946 leaving behind his widow Mst. Parbatia and Mst. Parbatia came in possession over all his properties. Mst. Parbatia remarried with Mahadeo in *sagai* form two to three months after the death of Sukai. Now Mst. Parbatia gave birth of defendant No.2 through Mahadeo Mahto. Now this defendant Hurdung Mahato became major during the pendency of his suit. Now mother of Hurdung died during his childhood. The mother of Hurdung died more than 10 years ago. After the death of his mother Parbatia, the step mother of Hurdung, that is, Dhanwatia looked after the affairs of defendant No.12 after the death of his father. After sagai of Dhanwatia the entire properties of Sukai came in possession of Mahadeo Mahto and so long as Mahadeo was alive he remained in possession. After the death of Mahadeo, Hurdung came in possession.

Dhanwatia is the step mother of Hurdung. Now she has remarried with Gopal Mahato. Now under influence of Gopal Mahto, Dhanwatia wants to deprive defendant No.12 Hurdung from his properties and Gopal wants to acquire those properties for his son defendant No.10. Defendant No.1 is old man. Now defendant No.2 by bringing father of defendant No.1 and Jagdeo in collusion want to grab the properties of this defendant. Now this suit has been filed by the plaintiff at the instance of Gopal Charbaran Mahato was the Mukhia Gopal was created some documents by bringing Mukea in his collusion. Sukai was never illiterate. Defendant No.1 had given up possession of the properties of Sukai during the life time of Sukai. He had also rendered all his accounts and the suit was brought surreptitiously without knowledge of the defendant No.12 and that defendant No.12 came to know about the suit then he filed this written statement. The plaintiff was not born in *Magh,* 1252F, but the plaintiff was born in Falgun, 1947 and the plaintiff was not major at the time of filing of this suit. The age of the plaintiff was not 20 years at the filing of this suit.

6. On the basis of the pleadings of the parties, the trial court framed the following issues:

1. Whether the suit as framed is maintainable?
2. Whether the plaintiff has cause of action for the suit?
3. Whether the suit is barred by law of limitation?
4. Whether the plaintiff has subsisting title over the suit land?
5. Whether the plaintiff is entitled to recover possession from any of the defendants who is held to be in possession over the suit land?
6. Whether Sukai Mahato had made oral gift of 1B 14 dhurs in favour of Balkishun defendant No.1 and

whether Balkishun remained in possession of that land and whether his title is perfected by adverse possession over that area?

7. Whether the plaintiff's is entitled to demand account from Balkishun Mahato and also recovery of dues from Balkishun as claimed in the plaint?

8. Whether the plaintiff is entitled to recover mesne profits from any of the defendants?

9. Whether the plaintiff is entitled to any relief or reliefs?

7. While deciding issue No.4 as to whether the plaintiff has subsisting title over the suit land, the trial court after discussing the evidence proceeded to decide the legal issue and held that after remarriage Parbatia lost her title and interest in the estate of her previous husband but she continued in possession of the property even after remarriage hence her possession according to law continued to be that of trespasser. The trial court further held that possession of Parbatia even after remarriage cannot be said to be as a constructive trustee of the plaintiff and she was holding the property independently treating the property as her widow's estate. The trial court consequently held that she acquired a right of widow's estate by adverse possession.

8. While deciding issue Nos. 3 and 5 the trial court held that since the suit was filed within 12 year from the date of death of Mst. Parbatia the suit is not barred by limitation and the plaintiff is entitled to half share in the suit property. Curiously enough, while deciding issue No.6 regarding the validity of oral gift, the trial court held that Bal Kishun being in possession of property allegedly under the oral gift, the plaintiff is not entitled to recover possession of the same. Hence the suit was decreed in part.

9. Aggrieved by the said judgment and part decree both parties preferred appeals before the High Court which were

disposed of by a common judgment. The learned Single Judge concurred the finding recorded by the trial court and dismissed the appeal. The plaintiff respondent then filed Letters Patent Appeal before the Patna High Court against the judgment of a learned Single Judge passed in appeal and the same was registered as LPA No.58/1993. The Division Bench of the Patna High Court after elaborate discussion of the evidence and facts and also the law allowed the appeal and set aside the judgment and decree passed by the trial court and the first appellate court. The Division Bench declared title and ownership of the plaintiff-Respondent in respect of the entire suit properties left by Sukai. Hence this appeal by defendant-Appellant.

10. Mr. Sunil Kumar, learned senior counsel appearing for the Appellants assailed the impugned judgment rendered by the Division Bench as being illegal, perverse in law and contrary to facts and evidence available on record. Learned senior counsel firstly contended that the Division Bench erred in law in not holding that the guardianship ceases automatically, on minor attaining majority and no order by the court is necessary for declaring Sukai Mahto as major. He further submitted that Mst. Parbatia, widow of Sukai Mahto remained in possession of her previous husband's estate even after remarriage claiming title by adverse possession. Learned counsel strenuously contended that Bal Kishen Mahto, uncle of Sukai Mahto was appointed guardian in the year 1930 to look after the properties of Sukai Mahto during minority and, the moment Sukai Mahto became major, the guardianship ceases automatically. According to the learned counsel even Bal Kishun Mahto having been in continuous possession of the suit property acquired title by adverse possession in respect of 1B 4 Dhurs of the land and building. The Division Bench committed serious illegality in so far as it failed to take into consideration that Mst. Parbatia was holding the properties independently and not as a trustee. Consequently, Hurdung came in possession after the death of his mother Mst. Parbatia. In the result, the suit

filed by the plaintiff-respondent ought to have been dismissed as barred by limitation and adverse possession.

11. We do not find any substance in the submission made by the learned counsel for the appellant.

12. Indisputably defendant No.1 Bal Kishun Mahto was appointed as Guardian of Sukai by the order of District Judge. Once a person is appointed by the Court to be a Guardian of the property of ward, he is bound to deal with the property as carefully as a man of ordinary prudence would deal with it, if it were his own property. He is bound to do all acts for the protection and benefit of the property. A Guardian appointed by Court cannot deal with the property by way of sale, mortgage, charge or lease without the permission of Court and against the interest of minor.

13. It is well settled law that a Guardian stands in a fiduciary relation to his ward and he is not supposed to make any profit out of his office. On being appointed as Guardian of the property of minor, he is to act as a trustee and he cannot be permitted to gain any personal profit availing himself of his position and such action of the Guardian while dealing with the property against the interest of ward would be voidable in the eye of law.

14. Coming back to the instant case it appears that Bal Kishun Mahto immediately after the appointment as Guardian started dealing with the property against the interest of Sukai. Not only he entered into a compromise in a suit filed in 1933 but executed two zerpesgi deed in the year 1940 in favour of his nephew Mahadev Mahto and also in favour of Dev Raj Mahto without the permission of Court and without any consideration. After the death of Sukai Mahto in 1946 at the age of 23 years leaving behind the plaintiff who was only 3 years old, he continued possession of the suit property as trustee. Curiously enough the said Bal Kishun Mahto claimed to have acquired a portion of the suit property alleged to have been orally gifted

to him by Sukai in lieu of his services as Guardian. The said claim by way of oral gift has no sanctity in the eye of law.

15. The Division Bench of the High Court in the impugned judgment has considered all these facts and also the claim of Parbatia over the suit property although she remarried 2-3 months after the death of Sukai Mahto. The Division Bench rightly came to the following conclusion:

> "In the instant appeal, the plaintiff-appellant is contending that the question of anyone acquiring any interest in any part of the said estate through adverse possession never arose inasmuch as the property in question remained in the custody of the guardian all throughout and through the custody of the guardian the property was in fact custodia legis. Having regard to the fact that Bal Kishun was, admittedly, appointed as a guardian of the person and the property of Sukai and, admittedly, there being no order of discharge, in law, it must be held that the properties of Sukai remained custodia legis all throughout and, accordingly, there was no question of anyone acquiring the same by adverse possession.
>
> Bal Kishun, as the guardian of the person and property of Sukai, was holding the same for the benefit of Sukai during his lifetime and upon his death for and on behalf of the person who was entitled to inherit the property of Sukai in accordance with the laws of inheritance. Inasmuch as the properties in question were not coparcenary properties, the widow was entitled to inherit before the daughter, but on the civil death of the widow, the properties vested in the daughter, i.e. the plaintiff. Thus, Bal Kishun, during his lifetime, was holding the properties in question initially for the benefit of Sukai and upon his death for the benefit of his widow and upon her civil death for the benefit of the plaintiff. Inasmuch as the court did not authorise dealing of any part of the estate of Sukai in any manner whatsoever, neither Sukai, during his liefetime, nor Bal

Kishun in his life time and at the same time not even the widow of Sukai, namely, Parbatia or the plaintiff, upon the civil death of Parbatia, could deal with the said properties in any manner whatsoever. As a result, the conclusion would be that Bal Kishun remained accountable in respect of the properties in question to the true owner thereof until his death, when in fact he stood discharged in law from the guardianship of the properties of Sukai,although by reason of death of Sukai, Bal Kishun stood discharged of the guardianship of the person of Sukai from the date of the death of Sukai.

In those circumstances, the one and the only logical conclusion that could be arrived at one the basis of the evidence on record that Bal Kishun continued to be in the helm of the affairs pertaining to the properties of Sukai for the sole benefit of the plaintiff after the civil death of Parbatia and, accordingly, the suit ought to have been decreed in favour of the plaintiff directing discharge of Bal Kishun with a further direction to furnish accounts pertaining to the properties in question."

16. In our considered opinion, the Division Bench rightly allowed the appeal and set aside the judgment and decree passed by the trial court and the first appellate court which were totally perverse in law.

17. For the reasons aforesaid, there is no merit in this appeal which is accordingly dismissed.

K.K.T. Appeal dismissed.

M/S. KALINGA MINING CORPORATION
v.
UNION OF INDIA & ORS.
(Civil Appeal No. 1013 of 2013)

FEBRUARY 07, 2013.

[SURINDER SINGH NIJJAR AND H.L.GOKHALE, JJ.]

Res Judicata:

Writ petition – Substitution of legal heirs of applicant for grant of mining lease – Allowed by High Court – SLP dismissed in limine – Issue again raised by appellant in writ petition challenging the order of granting mining lease – Held: It cannot be said that High Court has erroneously accepted the plea raised by LRs of respondent that the claim of appellant is barred by res judicata – On the plea of a decision in a subsequent judgment, the issue cannot be permitted to be reopened since it has become final inter partes – Judgments – Finality of judgment.

Mineral Concession Rules, 1960:

r.25-A – Held: Is prospective in operation.

Administrative Law:

Opportunity of hearing – Mining lease – Plea of violation of principles of natural justice alleging that parties were heard by a different officer and decision was made by another officer – Held: Judicial review of administrative action/quasi judicial orders passed by Government is limited only to correcting the errors of law or fundamental procedural requirements which may lead to manifest injustice – When conclusions of authority are based on evidence, the same cannot be re-appreciated by the court in exercise of its powers of judicial review – In the instant case, the order was the verbatim

reproduction of report prepared by the officer who had heard the parties and it was signed by the other officer merely to communicate the approval of Central Government to parties – It is clearly a case of institutional hearing – Order does not suffer from any legal or procedural infirmity – Judicial review.

In response to the notification dated 20.7.1965 issued by the State Government, the appellant, respondent no. 10 and others submitted their applications for grant of mining lease in respect of the notified area. On 8.6.1973, the Central Government rejected all the applications. Respondent no. 10 filed a writ petition (OJC No. 829 of 1978), which was allowed by High Court on 4.9.1987 directing the Central Government to reconsider the matter after giving all the parties concerned an opportunity of hearing. On 10.9.1987 respondent no. 10 died. Legal heirs of respondent no. 10 approached the High Court for substitution, which was allowed.

On 8.4.1999, the Central Government approved the recommendation of the State Government for grant of mining lease in favour of legal representatives of respondent no. 10. In the writ petition filed by the appellant, the High Court, by its order dated 2.7.2001 held that on the death of respondent no. 10, her application for mining lease did not abate. SLP No. 13556 of 2001 filed by the appellant against the said order was dismissed *in limine* **on 24.8.2001. Ultimately, by order dated 27.9.2001, mining lease was granted in favour of legal representatives of respondent no. 10. The appellant challenged the said order before the High Court in OCJ No. 3662 of 2002. Meanwhile in** *Saligram Khirwal's* **case it was held that legal heirs could not pursue an application for mining lease and that r.25-A was prospective. However, the High Court observed that legal heirs would be at liberty to make a fresh application in their own right. The writ petition was allowed to be amended in view of**

judgment in *Saligram's* case, but the preliminary objection raised by the appellant regarding the maintainability of the application for mining lease by legal heirs, was rejected by the High Court, by its order dated 3.8.2007, holding that the controversy stood concluded between the parties by rejection of earlier SLP No. 13556 of 2001 on 24.8.2001. The appellant challenged the order dated 31.8.2007 in C.A. No. 1013 of 2013. OCJ No. 3662 of 2002 was, ultimately, dismissed by the High Court on 24.11.2008. The appellant challenged the said order in C.A. No. 1014 of 2013.

In C.A. No 1013 of 2013, the question for consideration before the Court was: whether the dismissal on 24.8.2001 of the SLP filed by the appellant against the judgment of the High Court dated 2.7.2001 in OJC No. 11537 of 1999 would attract the principles of *res judicata***, so as to disentitle the appellant from urging the invalidity of the application of the legal heirs in place of the deceased-respondent no. 10 in the pending proceedings in OJC No. 3662 of 2002. In C.A. No. 1014 of 2013, it was contended for the appellant that the order dated 27.9.2001 was passed in violation of principles of natural justice in asmuch as the parties were heard by the Joint Secretary, whereas the order was passed by the Deputy Secretary, who did not hear the parties at all.**

Dismissing the appeals, the Court

HELD: 1.1. It is a matter of record that on the application filed by the legal heirs for substitution in place of respondent No. 10, the appellant was duly heard. The appellant had accepted the locus standi of the LRs of respondent no. 10. This is evident from the fact that in the subsequent hearings before the Central Government, which were held consequent upon the directions issued by the High Court, the appellant raised no objection with regard to the locus standi of the legal heirs of respondent

No. 10. Clearly, therefore, a final decision had been reached with regard to the acceptability of the locus standi of the LRs of respondent No. 10 to step into the shoes of the deceased. [para 30-31] [835-D; 836-A-C]

1.2. The locus standi of the LRs of respondent No. 10 was not under challenge in the proceedings before the High Court in OJC No. 4316 of 1990. It is noteworthy that the appellant accepted the judgment in the said writ petition. It was not assailed either by way of a review petition before the High Court or by way of a Special Leave Petition before this Court. This was the second time when the locus standi of the LRs of respondent no. 10 was accepted judicially. In such circumstances, it cannot be said that the High Court has erroneously accepted the plea raised by the LRs of the respondent that the claim of the appellant is barred by *res judicata***. Even after the judgment in** *Saligram's* **case, the matter regarding the locus standi of the LRs of respondent No. 10 to proceed with a mining lease application cannot be permitted to be reopened since it has become final** ***inter partes*****. The subsequent interpretation of r.25A by this Court, that it would have only prospective operation, in the case of Saligram, would not have the effect of reopening the matter which was concluded between the parties. Given the history of litigation between the parties, which commenced in 1950s, the High Court was justified in finally giving a quietus to the same. [para 31,33 and 34] [837-G-H; 838-A-B; 838-F-G; 839-B]**

Saligram Khirwal Vs. Union of India & Ors. **2003 (3) Suppl. SCR 522 = (2003) 7 SCC 689;** *State of West Bengal Vs. Hemant Kumar Bhattacharjee & Ors.* **1963 Supp (2) SCR 542 and** *Mohanlal Goenka Vs. Benoy Kishna Mukherjee & Ors.* **1953 SCR 377 – referred to.**

1.3. In the instant case, not only the High Court had rejected the objection of the appellant to the substitution

of the legal heirs of the deceased but the SLP from the said judgment has also been dismissed. Even though, strictly speaking, the dismissal of the SLP would not result in the merger of the judgment of the High Court in the order of this Court, the same cannot be said to be wholly irrelevant. The High Court committed no error in taking the same into consideration in the peculiar facts of the case. Ultimately, the decision of the High Court was clearly based on the facts and circumstances of the case. The High Court clearly came to the conclusion that the appellant had accepted the locus standi of the LRs of the deceased to pursue the application for the mining lease before the Central Government, as well as in the High Court. [para 34] [839-E-G]

The Chamber of Colours and Chemicals (P) Ltd. Vs. Trilok Chand Jain **(1973) 9 DLT 510 Para 6;** *Taleb Ali & Anr. Vs. Abdul Aziz & Ors.* **AIR 1929 Cal 689 Para 38, and** *Shah Babulal Khimji Vs. Jayaben D. Kania & Anr.* **(1981) 4 SCC 8;** *Mathura Prasad Bajoo Jaiswal & Ors. Vs. Dossibai N.B. Jeejeebhoy* **1970 (3) SCR 830 = (1970) 1 SCC 613,** *Nand Kishore Vs. State of Punjab* **1995 (4) Suppl. SCR 16 = 1995 (6) SCC 614,** *Sushil Kumar Mehta Vs. Gobind Ram Bohra (Dead) Through His LRs* **1989 (2) Suppl. SCR 149 = 1990 (1) SCC 193, and** *Kunhayammed & Ors. Vs. State of Kerala & Anr.* **2000 (1) Suppl. SCR 538 = 2000 (6) SCC 359;** *P. Pollution Control Board & Ors. Vs. Kanoria Industrial Ltd. & Anr.* **2001 (1) SCR 559 = 2001 (2) SCC 549;** *C. Buchi Venkatarao Vs. Union of India & Ors.* **1972 (3) SCR 665 = 1972 (1) SCC 734;** *Shanti Devi Vs. State of Haryana & Ors.* **1999 (5) SCC 703;** *Union of India & Ors. Vs. Mohd. Nayyar Khalil & Ors.* **2000 (9) SCC 252; and** *Satyadhyan Ghosal & Ors. Vs. Deorajin Debi (Smt.) & Anr.* **1960 SCR 590 = AIR 1960 SC 941 – cited.**

CIVIL APPEAL NO. 1014 OF 2013

2.1. It is by now well settled that judicial review of the

administrative action/quasi judicial orders passed by the Government is limited only to correcting the errors of law or fundamental procedural requirements which may lead to manifest injustice. When the conclusions of the authority are based on evidence, the same cannot be re-appreciated by the court in exercise of its powers of judicial review. The court does not exercise the powers of an appellate court in exercise of its powers of judicial review. It is only in cases where either findings recorded by the administrative/quasi judicial authority are based on no evidence or are so perverse that no reasonable person would have reached such a conclusion on the basis of the material available that the court would be justified to interfere in the decision. The scope of judicial review is limited to the decision making process and not to the decision itself, even if the same appears to be erroneous. [para 44] [846-G; 847-A-C]

Tata Cellular Vs. Union of India **1994 (2) Suppl. SCR 122 = 1994 (6) SCC 651 – referred to.**

2.2. In the instant case, the High Court has examined the entire record and has concluded that the decision making process is not flawed in any manner. The record indicated that the matter was heard by Joint Secretary for two days i.e. on 28.8.2001 and 13.9.2001. Both the parties had been given opportunity to place on record any documents and written submissions in support of their claim. Upon conclusions of the arguments by the parties, the Joint Secretary who had heard the parties prepared the note running into 19 pages, and duly signed it on 17.9.2001. The High Court further noticed that in fact this is the report which had been duly approved by the Secretary on 18.9.2001 and by the Minister on 25.9.2001. The impugned order dated 27.9.2001 is, in fact, a verbatim copy of the report/note prepared by the Officer who had heard the parties. The High Court has concluded that the

order has been signed by the Deputy Secretary merely to communicate the approval of the Central Government to the parties. [para 45-47] [849-B, D-F; 850-B-C, E-F]

2.3. The conclusions reached by the High Court cannot be said to be contrary to the established principles and parameters for exercise of the power of judicial review by the courts. It cannot be said that the order dated 27.9.2001 is vitiated as it has been passed by an officer who did not give a hearing to the parties. This is clearly a case of an institutional hearing. [para 48] [850-G; 851-C-D]

Pradyat Kumar Bose Vs. The Hon'ble The Chief Justice of Calcutta High Court **1955 (2) SCR 1331– referred to**

Local Government Board Vs. Arlidge **(1915) AC 120 – referred to**

2.4. In view of the settled position of law, it cannot be said that the order dated 27.9.2001 suffers from any legal or procedural infirmity. The conclusions reached by the High Court are in accordance with the settled principles of law. Undoubtedly, any decision, even if it is administrative in nature, which causes adverse civil consequences must be passed upon hearing the parties concerned. The Central Government has fully complied with the said principle in passing the order dated 27.9. 2001. [para 48] [852-C-D, E-F]

Gullapalli Nageswara Rao & Ors. Vs. Andhra Pradesh State Road Transport Corporation & Anr. **1959 Suppl. SCR 319 = AIR 1959 SC 308;** *Bachhittar Singh Vs. State of Punjab & Anr.* **AIR 1963 SC 395;** *Automotive Tyre Manufacturers Association Vs. Designated Authority & Ors.* **2011 (1) SCR 198 = (2011) 2 SCC 258;** *Commissioner of Income Tax, Bombay & Ors. Vs. Mahindra and Mahindra Limited & Ors.* **1983 (3) SCR 773 = 1983**

(4) SCC 392; *Sandur Manganese and Iron Ores Limited Vs. State of Karnataka & Ors.* **2010 (11) SCR 240 = 2010 (13) SCC 1;** *Lord Krishna Textile Mills Vs. Workmen* **1961 SCR 204 = AIR 1961 SC 860;** *Ashok Kumar Das & Ors. Vs. University of Burdwan & Ors.* **2010 (3) SCR 429 = 2010 (3) SCC 616;** *State of Tamil Nadu Vs. Hind Stone & Ors.* **1981(2) SCR 742 = 1981 (2) SCC 205 and** *Kabini Minerals (P) Ltd. & Anr. Vs. State of Orissa & Ors.* **2005 (5) Suppl. SCR 341= 2006 (1) SCC 54;** *Regional Manager, Central Bank of India Vs. Madhulika Guruprasad Dahir & Ors.* **2008 (11) SCR 319 = 2008 (13) SCC 170; and** *State of Orissa & Ors. Vs. Harapriya Bisoi* **2009 (7) SCR 34 = 2009 (12) SCC 378;** *Ossein and Gelatine Manufacturers' Association of India Vs. Modi Alkalies and Chemicals Limited & Anr.* **1989 (3) SCR 815 = 1989 (4) SCC 264 - cited.**

Case Law Reference:

2003 (3) Suppl. SCR 522	**referred to**	**para 19**
(1973) 9 DLT 510 Para 6	**cited**	**para 24**
AIR 1929 Cal 689 Para 38	**cited**	**para 24**
(1981) 4 SCC 8	**cited**	**para 24**
1970 (3) SCR 830	**cited**	**para 24**
1995 (4) Suppl. SCR 16	**cited**	**para 24**
1989 (2) Suppl. SCR 149	**cited**	**para 24**
2000 (1) Suppl. SCR 538	**cited**	**para 24**
2001 (1) SCR 559	**cited**	**para 25**
1972 (3) SCR 665	**cited**	**para 25**
1999 (5) SCC 703	**cited**	**para 27**
2000 (9) SCC 252	**cited**	**para 27**

1963 Supp (2) SCR 542	**referred to**	**para 27**
1953 SCR 377	**referred to**	**para 27**
1960 SCR 590	**referred to**	**para 28**
1959 Suppl. SCR 319	**cited**	**para 39**
AIR 1963 SC 395	**cited**	**para 39**
2011 (1) SCR 198	**cited**	**para 39**
1983 (3) SCR 773	**cited**	**para 39**
2010 (11) SCR 240	**cited**	**para 39**
1961 SCR 204	**cited**	**para 39**
2010 (3) SCR 429	**cited**	**para 39**
1981 (2) SCR 742	**cited**	**para 39**
2005 (5) Suppl. SCR 341	**cited**	**para 39**
2008 (11) SCR 319	**cited**	**para 40**
2009 (7) SCR 34	**cited**	**para 40**
(1915) AC 120	**referred to**	**para 42**
1989 (3) SCR 815	**cited**	**para 42**
1955 (2) SCR 1331	**referred to**	**para 42**
1994 (2) Suppl. SCR 122	**cited**	**para 44**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1013 of 2013.

From the Judgment & Order dated 24.11.2008 of the High Court of Orissa, Cuttack in O.J.C. No. 3662 of 2002.

WITH

C.A. No. 1014 of 2013

Mohan Jain, ASG, Krishnan Venugopal, Surya Prasad Misra, T.S. Doabia, Ashok K. Gupta, S. Ravi Shankar, S. Yamunah Nachiar, D.K. Thakur, Kiran Bhardwaj, R.K. Rathore, S.S. Rawat, D.S. Mahra, Sunita Sharma (for Anil Katiyar), P.K. Manohar, M. Paikaray, Kirti Renu Mishra, Apurva Upamanyu, Suresh Chandra Tripathy for the Appearing parties.

The Judgment of the Court was delivered by

SURINDER SINGH NIJJAR, J. 1. Leave granted in both the Special Leave Petitions.

2. By this common judgment, we propose to dispose of both the aforesaid appeals. The Appeal arising out of Special Leave Petition (C) No. 23141 of 2007 has been filed challenging the order dated 31st August, 2007 rejecting the preliminary issue raised by the appellant in OJC No.3662 of 2002. The Appeal arising out of Special Leave Petition (C) No. 5130 of 2009 has been filed challenging the final order dated 24th November, 2008 in OJC No. 3662 of 2002 upholding the order dated 27th September, 2001.

CIVIL APPEAL NO. 1013 OF 2013

[Arising out of SLP (C) No. 23141 of 2007]

3. We may notice here briefly the facts as noticed by the High Court.

4. On 27th October, 1953, the appellant M/s. Kalinga Mining Corporation applied to the Government of Orissa for a prospecting licence. This was granted by the State Government on 15th September, 1961 in respect of an area of 480 acres in Kalaparbat Hill range of Keonjhar district subject to compliance of lease stipulations. The appellant applied for the grant of mining lease also for iron manganese ore over 420 acres in Kalaparbat Hill range of Keonjhar district. As the same was not considered by the State Government, the appellant filed a revision before the Central Government. The same was

disposed of by the Central Government on 23rd July, 1962 by intimating the State Government that since the prospecting licence was not granted in favour of the appellant, the mining lease application could not be considered. The direction was issued to the State Government to consider the application of the appellant for mining lease which was dated 4th September, 1961 on merit by 1st January, 1964. Since no decision was taken by the State Government by stipulated date, the application of the appellant dated 4th January, 1961 was deemed to have been refused. By notification dated 20th July, 1965, the State Government of Orissa threw open an area of 438.5 acres in Kalaparbat Hill Range area, Keonjhar district for mining under Rule 58(1) of Mineral Concession Rules, 1960 for mining in respect of manganese and iron ore. On 10th September, 1965, six applicants including the appellant and respondent No.10 submitted their applications for grant of mining lease in respect of the aforesaid area. It appears that the mining lease applications of the appellant as well as the respondent No.10 were not disposed of by the State Government within the statutory period, therefore, both of them separately moved the Central Government in revision. By an order dated 7th April, 1967, the Central Government allowed the revision petitions of the appellant and respondent No.10 and directed the State Government to consider their mining lease applications. Still no decision was taken by the State Government, as a result of which the appellant moved another revision petition before the Central Government on 22nd July, 1967. The Central Government rejected the revision of the appellant by its order dated 13th October, 1967.

5. Being aggrieved, the appellant filed OJC No.855 of 1969 seeking a direction from the High Court for grant of mining lease in its favour. Respondent No.10 intervened in the aforesaid writ petition. By an order dated 21st June, 1971, the High Court dismissed the writ petition filed by the appellant.

6. Pursuant to the order of the Central Government dated

7th April, 1967, the State Government on 3rd September, 1971, for the first time, passed an order recommending the grant of mining lease in favour of respondent No.10 and sought the approval of the Central Government as required under Section 5(1) of the Mines and Minerals (Development and Regulation) Act, 1957. The Central Government by its order dated 18th January, 1972 refused to accord its approval in favour of respondent No.10. It appears that the State Government on 25th April, 1972 again requested the Central Government for grant of approval to its recommendation made in favour of respondent No.10 Dr. Sarojini Pradhan. However, by its letter dated 29th December, 1972, the Central Government directed the State Government to reject the mining lease application of Dr. Pradhan. Thereafter on 8th June, 1973, the State Government rejected all pending mining lease applications including the application of appellant and Dr. Sarojini Pradhan.

7. Challenging the aforesaid order, both the appellant and Dr. Pradhan filed the revision petitions before the Central Government. The Central Government by its order dated 2nd May, 1978 rejected the revision filed by Dr. Sarojini Pradhan but allowed the revision filed by the appellant with a direction to the State Government to pass a fresh order on merits.

8. It appears that Dr. Pradhan filed a writ petition being OJC No.829 of 1978 challenging the order passed by the Central Government dated 2nd May, 1978. On 4th September, 1987, the High Court allowed the writ petition with the following directions :

> "We direct the Central Government to reconsider the question of grant of approval for the grant of lease of iron ore and manganese in respect of the area after giving all parties concerned an opportunity of hearing. The mode and manner of hearing shall be regulated by the Central Government and it shall convey its decision by a speaking order, i.e. by giving reasons for the decision."

9. We may notice here that in the aforesaid writ petition, the appellant and the other applicants had filed applications for intervention. However, the cases of interveners were not considered individually by the High Court, having regard to the directions which were given by it. Few days after the aforesaid decision dated 4th September, 1987, Dr. Pradhan died on 10th September, 1987. Since at that time Dr. Pradhan was only an applicant for the mining lease, the appellant claims that her application was lapsed.

10. An application was filed by the legal heirs of Dr. Pradhan for substitution in the revision filed by her and was pending before the Central Government. In OJC No.829 of 1978, a Miscellaneous Case No.1773 of 1988 was filed wherein the aforesaid fact of death of Dr. Pradhan and the fact of application for substitution of her legal heirs were considered. In the aforesaid application, a direction was given by the High Court on 28th April, 1988 to the Central Government to inform the parties about the stage of revision and the date on which the revision petition was posted for hearing. It was made clear that the legal heirs of Dr. Pradhan may appear before the Central Government on 16th May, 1988 and seek directions; regarding the hearing of revision application. With these observations, the miscellaneous case was disposed of. Another Misc. Case being Misc. Case No.1977 of 1988 was field in the aforesaid OJC NO.829 of 1978. In the aforesaid Case No.1977 of 1988, on 11th May, 1988, the High Court passed the following order :

> "Heard.
>
> On 28.4.1988, on a complaint made by the petitioner that no action had been taken by the Central Government to implement our judgment in OJC No.829/87, we directed that the legal representatives of the deceased petitioner would appear before the Central Government on 16th May, 1988 to take steps regarding hearing. An application has now been filed stating that the legal representatives could

not appear before the Central Government on that day due to difficulties stated in the petition. *The counsel for the parties now agree that the legal representatives of the deceased petitioner would appear before the Central Government on the 6th of June, 1988 on which day a date of hearing shall be fixed.*

The Misc. case is disposed of accordingly."

11. It may be noted here that in both the Misc. cases the appellant was a party and was heard.

12. In the meantime, another matter being OJC No.1431 of 1980 was filed. In the aforesaid matter, a Division Bench of the High Court rejected the contentions of the State that on the death of Dr. Pradhan, her writ petition will abate.

13. Thereafter on 11th May, 1990, the Central Government conveyed to the State Government its approval of grant of mining lease in favour of the legal representatives of Dr. Pradhan. The appellant, however, claims that no such order, with reasons, was made available to the parties. In view of the aforesaid approval, the State Government by its order dated 24th May, 1990 asked the legal representatives of Dr. Pradhan to furnish certain information and documents regarding the grant of mining lease. By a letter dated 26th June, 1990, the legal representatives of Dr. Pradhan furnished the information and documents to the State Government. At this stage, the appellant filed OJC No.4316 of 1990 challenging the order dated 11th May, 1990 passed by the Central Government, even though the said order was not made available to the parties. On 18th December, 1990 the High Court passed an interim order staying the operation of the order of Central Government dated 11th May, 1990.

14. Whilst this controversy between the parties about the abatement of the application of Dr. Pradhan for mining, as also the writ petition filed by her, was pending, a significant change

took place in that on 20th February, 1991 Rule 25A was inserted in the Minor Concession Rules, 1961 w.e.f. 1st April, 1991. The aforesaid rule permitted the legal representatives to continue pressing an application for grant of mining lease even if the applicant dies.

15. It appears that OJC No.1269 of 1982 filed by Dr. Pradhan challenging the order passed by the State Government rejecting the application filed by her for mining lease for "lime stone and Dolmite" over an area in respect of certain other areas which are not subject matter of the present proceedings came to be decided on 23rd February, 1993. In this judgment, the High Court held that Rule 25A is clarificatory in nature and allowed the substitution of legal heirs of Dr. Pradhan to pursue the mining application.

16. On 13th December, 1996, the High Court disposed of OJC No.4316 of 1990 directing the State Government to reconsider the matter and pass a fresh and speaking order after hearing the appellant, legal representatives of Dr. Pradhan and one M/s. Balasore Minerals. On 8th April, 1999, the Central Government approved the recommendations of the State Government for grant of lease in favour of legal representatives of Dr. Sarojini Pradhan. Thereafter, terms and conditions were offered by the State Government to the legal representatives of Dr. Pradhan on 8th July, 1999, which were accepted by them on 20th July, 1999.

17. At this stage, the appellant filed OJC No.11537 of 1999 challenging the order dated 8th April, 1999. By judgment dated 2nd July, 2001, the High Court allowed the aforesaid writ petition, quashed the order of the Central Government and remanded the matter for fresh consideration. Relying on the order passed in OJC No.1269 of 1982, it was held that on the death of the original applicant Dr. Pradhan, her application for mining lease does not abate. The Court also held that this being a pure question of law, the issue has become final and shall

not be reopened in the hearing before the Central Government.

18. The appellant challenged the order dated 2nd July, 2001 passed in OJC No.11537 of 1999 by filing SLP (C) No.13556 of 2001 on the issue of allowing the legal representatives of the deceased to be substituted in place of the latter. This was dismissed *in limine* on 24th August, 2001. Thereafter on 26th September, 2001, the Central Government approved the recommendations of the State Government for grant of mining lease in favour of legal representatives of Dr. Pradhan.

19. The appellant filed a fresh OJC No.3662 of 2002 (writ petition) challenging the grant of lease dated 27th September, 2001, on the basis that it constituted a new cause of action. At this stage, according to the appellant, another significant change took place in that on 9th September, 2003, this Court set aside the order passed by the High Court in OJC No.1269 of 1982 on 23rd February, 1993, which had been filed by the legal representatives of Dr. Pradhan for certain other areas. It was held by this Court in *Saligram Khirwal Vs. Union of India & Ors.*[1] that legal heirs cannot pursue an application for mining lease. Thus, the interpretation placed on Rule 25A by the High Court to the effect that it was clarificatory in nature, was reversed by this Court. It was held that Rule 25A was only prospective. Upon such interpretation, this Court further observed that the legal heirs shall be at liberty to make a fresh application in their own right.

20. On 2nd June, 2006, the High Court passed further order in OJC No. 3662 of 2002 directing that any action taken in connection with the grant of lease shall be subject to the result of the writ petition. On 21st February, 2007, the writ petition was allowed to be amended in view of the judgment in *Saligram's* case (supra). The appellant raised a preliminary objection relating to the maintainability of the application for the grant of

1. (2003) 7 SCC 689.

mining lease by the legal heirs of Dr. Pradhan, contending that on the death of the original applicant, her application for grant of mining lease abates and the legal heirs cannot maintain the said application. By order dated 31st August, 2007, the High Court held that the controversy stood concluded between the parties by the rejection of the earlier SLP (C) No. 13556 of 2001 on 24th August, 2001. It was held that the order dated 24th August, 2001 having attained finality, the question of allowing the legal heirs to be substituted for the deceased applicant had also attained finality between the parties and would operate as *res judicata.* The subsequent decision in *Saligram's* case (supra) is of no consequence. Therefore, the preliminary objection raised by the appellant about the maintainability of the mining lease application by the legal heirs of Dr. Pradhan was rejected. It is this interim order which has been challenged in the present appeal.

21. We may further notice here that OJC No. 3662 of 2002 was ultimately dismissed by the High Court on 24th November, 2008. The dismissal of the aforesaid writ petition was challenged by the appellant by filing SLP (C) No. 5130 of 2009.

22. From the aforesaid narration of the facts, it becomes apparent that only two issues arise in this appeal for consideration viz. :

(a) Is Rule 25A, as introduced in the Mineral Concession Rules, 1960, w.e.f. 1st April, 1991, by way of amendment dated 20th February, 1991, clarificatory in nature, and hence retrospective, or is it only prospective in nature?

(b) Whether the dismissal of the SLP on 24th August, 2001, filed by the appellant against the judgment of the High Court dated 2nd July, 2001 in OJC No. 11537 of 1999 would attract the principles of *res judicata*, so as to disentitle the appellant from urging the invalidity of the application of the legal

heirs in place of the deceased Dr. Pradhan, in the pending proceedings in OJC No. 3662 of 2002, the judgment which is the subject matter of the present appeal?

23. We have heard the learned counsel for the parties at length.

24. Mr. K.K. Venugopal, learned senior counsel appearing for the appellant, submitted that the dismissal of the earlier SLP on the preliminary issue will not act as a bar against the SLP challenging the order passed at the final stage. He submitted that in SLP (C) No. 13556 of 2001, this Court did not entertain the challenge against the order of the High Court permitting the legal heirs of Dr. Pradhan to be substituted for her and to pursue the litigation with regard to the mining lease. In support of this submission, the learned counsel relied on *The Chamber of Colours and Chemicals (P) Ltd. Vs. Trilok Chand Jain*[2], *Taleb Ali & Anr. Vs. Abdul Aziz & Ors.*[3], and *Shah Babulal Khimji Vs. Jayaben D. Kania & Anr.*[4] He further submitted that the principle of *res judicata* would not be applicable when the law is subsequently declared contrary to the law earlier declared, on the basis of which the decision was given which is sought to be reopened. In support of this proposition, he relies upon the law laid in cases of *Mathura Prasad Bajoo Jaiswal & Ors. Vs. Dossibai N.B. Jeejeebhoy*[5], *Nand Kishore Vs. State of Punjab*[6], *Sushil Kumar Mehta Vs. Gobind Ram Bohra (Dead) Through His LRs,*[7] and *Kunhayammed & Ors. Vs. State of Kerala & Anr*[8].

2. (1973) 9 DLT 510 Para 6.
3. AIR 1929 Cal 689 Para 38.
4. (1981) 4 SCC 8 Paras 55 and 78.
5. (1970) 1 SCC 613.
6. (1995) 6 SCC 614 para 17.
7. (1990) 1 SCC 193 para 26.
8. (2000) 6 SCC 359.

25. In *Kunhayammed* (supra), it was held that the dismissal in *limine* is not a decision on merits, it is only an expression of opinion that the Court would not exercise jurisdiction under Article 136 (Paras 14, 16 and 17). Additionally in the written submissions, the learned counsel has also relied upon the judgment in the case of *Saligram* (supra). On the basis of this judgment, it was submitted that upon the death of an applicant for mining lease, the application abates and the legal heirs would have no legal right to step into the shoes of the deceased applicant, and that such an application would be *non est* in the eyes of law. If so, any recommendation for grant of mining lease to the legal heirs, or approval of such recommendation of the Central Government, would be mere nullities in the eyes of law. He relied on paragraphs 11 and 12 of the judgment. Learned senior counsel further submitted that the judgment in *Saligram's* case (supra) involved an interpretation of the statutory Rule 25A. Such an interpretation is in the realm of public law. It would, therefore, be a judgment in rem. Principle of *res judicata* would have no application in such a case. In support of this proposition, learned senior counsel relied on the judgment of this Court in *U.P. Pollution Control Board & Ors. Vs. Kanoria Industrial Ltd. & Anr*[9]. He submitted that the law declared in the aforesaid judgment would necessarily apply to any pending case where the issue is a live one. The contrary interpretation placed on Rule 25A by the High Court in the earlier proceedings would be of no consequence. An application which is *non est* and the order made thereon in favour of the legal heirs is a mere nullity, in the eyes of law, and cannot be treated as a valid application in the pending writ petition OJC No. 3662 of 2002. Mr. Venugopal further submitted that the legal position was made clear by this Court even before insertion of Rule 25A in the case of *C. Buchi Venkatarao Vs. Union of India & Ors.*[10]

26. Mr. Dushyant Dave, learned senior counsel for the

9. (2001) 2 SCC 549 Para 18.
10. (1972) 1 SCC 734 Para 14.

respondent No. 10 submits that in the facts and circumstances of this case, it is not open to the appellant to question the status of the LRs of respondent No. 10 on the basis of the "order" in the case of *Saligram Khirwal* (supra).

27. Learned senior counsel submits that the case of *Saligram Khirwal* (supra) is merely an order and not a judgment. There is no declaration of law in the case of *Saligram Khirwal* (supra). In fact, this Court has not interpreted Rule 25A of the Rules in the aforesaid order. The order makes it clear that Rule 25A, on its plain reading does not have any applicability to the situation emerging from the facts in that case. He further submitted that even assuming for the sake of argument that *Saligram's* order lays down any principle of law, the same can not aid the appellant in reopening the status of the LRs of the respondent No. 10 in the present case. He seeks support for the aforesaid proposition from the explanation to Order 47 Rule 1 of the Code of Civil Procedure, 1908. He relies on the judgment of this Court in the case of *Shanti Devi Vs. State of Haryana & Ors*[11]. and *Union of India & Ors. Vs. Mohd. Nayyar Khalil & Ors*[12]. The learned senior counsel reiterates that the claim made by the appellant would be barred by *res judicata*. In support of his submission, he relies on the judgment in the case of *State of West Bengal Vs. Hemant Kumar Bhattacharjee & Ors*[13]. and *Mohanlal Goenka Vs. Benoy Kishna Mukherjee & Ors.*[14]. On the basis of the aforesaid judgments, it is submitted that even if the judgment dated 2nd July, 2001 rendered by the High Court in OJC No. 11537 of 1999 and the dismissal of the SLP (C) No. 13556 of 2001 are considered to be erroneous in view of the earlier judgment of this Court in *C. Buchivenkata Rao* (supra) and/or orders in *Saligram* (supra), the matter regarding LRs of respondent No. 10 and their status to maintain and proceed with the mining

11. (1999) 5 SCC 703.

12. (2000) 9 SCC 252.

13. 1963 Supp (2) SCR 542.

14. 1953 SCR 377.

lease application can not be reopened since it has become final *inter parte*. According to the learned senior counsel, *res judicata* is not a mere technical rule, it is based on principle of justice and public interest, viz. a litigant should not be vexed twice over the same issue and there should be finality. The rule is based on equity, justice and good conscience. Subsequent change in law cannot unsettle a matter which has attained finality. He points out that principles of *res judicata* and constructive *res judicata* have been applied even to Public Interest Litigation, which cannot be said to be in the realm of private law. He submits that the judgment relied by the appellant in the case of *Mathura Prasad* (supra) is distinguishable as it is dealing with a situation where there was inherent lack of jurisdiction and is therefore, not applicable in the present case.

28. Mr. Mohan Jain, has also submitted that the claim of the appellant is clearly barred by the principle of *res judicata*. He has relied upon the case of *Satyadhyan Ghosal & Ors. Vs. Deorajin Debi (Smt.) & Anr*[15]*.*

29. We have considered the submissions made by the learned counsel for the parties.

30. At the outset, it needs to be noticed that the parties herein have been competing for the same mining lease for the past half-a-century. A perusal of the facts narrated herein above would also show that there have been several rounds of litigation between the parties. Although, we have noticed all the facts in-extenso for the purpose of deciding the issue of *res judicata*, it is necessary to recapitulate the foundational facts with regard to the aforesaid issue of *res judicata*. On 3rd September, 1971, the State Government passed an order recommending the grant of mining lease in favour of respondent No. 10. Since the Central Government did not approve the recommendation made by the State Government, on 8th June, 1973, it rejected all pending mining lease

15. AIR 1960 SC 941.

applications including the application of the appellant and Dr. Sarojini Pradhan. On 2nd May, 1978, in a revision petition filed by the appellant challenging the order of cancellation of its application for grant of lease, the Central Government issued a direction to the State Government to pass a fresh order on merits. This order was challenged by Dr. Pradhan in OJC No. 829 of 1978. The writ petition was allowed by the High Court on 4th September, 1987 by directing the Central Government to reconsider the question for the grant of lease after giving all parties concerned an opportunity of hearing. During the pendency of the revision petitions, Dr. Pradhan died on 10th September, 1987. Since OJC No. 829 of 1978 was still pending in the High Court, the legal heirs of Dr. Sarojini Pradhan by way of a Misc. Case No. 1773 of 1988 brought the fact of her death on the record of the proceedings and sought a direction of the High Court to be substituted as her legal heirs. It is a matter of record that on the application filed by the legal heirs for substitution in place of respondent No. 10, the appellant was duly heard. The application made by the LRs of respondent No. 10 was allowed on 28th April, 1988 with the following observations:-

"Misc. Case No. 1773 of 1988

Heard counsel for the parties.

2. By judgment dated 4/9/1987, while quashing Annexure 5 the order passed by the Central Government, and the consequential order passed by the State Government as per Annexure 8 and the revisional order as per Annexure 11, we directed the Central Government to re-consider the question of grant of approval for the grant of lease for iron ore and manganese giving the parties concerned an opportunity of hearing. A grievance is now made that despite lapse of more than six months, nothing is heard from the Central Government. In the meanwhile, the sole petitioner has died and it is stated than an application for substitution of his legal representatives has already been

filed and the revision is pending before the Central Government.

3. In these circumstances, we would require the central government to inform the parties the further stage of the revision and the date to which the revision would be posted for hearing. The legal representatives of the petitioner may appear before the Central Government on 16th May, 1988 to take directions regarding hearing of the revision.

4. The Misc. Case is disposed of accordingly. A copy of this order be communicated to the Central Government. A copy of this order be also handed over to the standing counsel for the Central Government. Certified copy of this order be granted in course of today, if an urgent application is made therefore."

31. It appears that the LRs of respondent No. 10 failed to appear before the Central Government on 16th May, 1988. Therefore, they filed another Misc. Case No. 1977 of 1988 seeking another opportunity to appear before the Central Government. Therefore, the High Court by its order dated 11th May, 1988 directed the LRs of Dr. Sarojini Pradhan to appear before the Central Government on 6th June, 1988. As is evident from the order, which we have reproduced in the earlier part of this judgment that the direction was issued on the agreement of the counsel for the parties. In the meantime in another matter being OJC No. 1431 of 1980, the Division Bench rejected the contention of the State that on the death of Dr. Sarojini Pradhan, her writ petition will abate and the substitution of the LRs of Dr. Sarojini Pradhan was allowed. In accordance with the directions issued by the High Court in the orders dated 28th April, 1988 and 11th May, 1988, the LRs of respondent No. 10 duly appeared before the Central Government. Upon hearing the concerned parties, the Central Government took a decision under Section 5(1) of the Mines and Minerals (Development and Regulation) Act, 1957 to approve the grant of mining lease in favour of LRs of Dr. Sarojini Pradhan. Appellant ought to

have challenged the status of the LRs before the High Court at the time of the hearing of Misc. Case No. 1773 of 1988 and Misc. Case No. 1977 of 1988. Appellant, it would appear, had accepted the locus standi of the LRs of Dr. Sarojini Pradhan. This is evident from the fact that in the subsequent hearing before the Central Government, which were held consequent upon the directions issued by the High Court in the aforesaid two Misc. cases, the appellant raised no objection with regard to the locus standi of the legal heirs of respondent No. 10. Clearly, therefore, a final decision had been reached with regard to the acceptability of the locus standi of the LRs of respondent No. 10 to step into the shoes of the deceased Dr. Sarojini Pradhan. The appellant decided to raise the issues of the abatement of the application of Dr. Sarojini Pradhan only after a decision was taken by the Central Government on 11th May, 1990, which approved the recommendation of the State Government for grant of mining lease in favour of the legal heirs of Dr. Sarojini Pradhan. It is also noteworthy that OJC No. 4316 was decided on 13th December, 1996 with a direction to the Central Government to reconsider the matter and pass a speaking order. In the aforesaid writ petition, Dr. Sarojini Pradhan was a respondent. The appellant sets out in meticulous detail the history of litigation between the parties. It is specifically noticed in the judgment that although a number of contentions have been raised to challenge the order dated 11th May, 1990, ultimately the dispute was confined to the question as to whether or not it was necessary for the Central Government to hear all the applicants alongwith Dr. Sarojini Pradhan. The main ground for challenging the order of the Central Government accepting the recommendation of the State Government was that the Central Government had failed to pass a speaking order. The locus standi of the LRs of respondent No. 10 was not under challenge in the proceedings before the High Court in OJC No. 4316 of 1990. The writ petition was allowed, a direction was again issued to the Central Government to reconsider the matter and pass a fresh speaking order giving reasons for the decision after hearing

all the concerned parties. This was the second time when the locus standi of the LRs of respondent No. 10 was accepted judicially. It is noteworthy that the appellant accepted the aforesaid judgment. It was not assailed either by way of a review petition before the High Court or by way of a Special Leave Petition before this Court. In such circumstances, it would be difficult to accept the submissions of Mr. Venugopal that the High Court has erroneously accepted the plea raised by the LRs of the respondent that the claim of the appellant is barred by *res judicata*. Considering the principle of *res judicata*, this Court in the case of *Mohanlal Goenka Vs. Benoy Kishna Mukherjee* (supra) held as under:

> "22. There is ample authority for the proposition that even an erroneous decision on a question of law operates as res judicata between the parties to it. The correctness or otherwise of a judicial decision has no bearing upon the question whether or not it operates a res judicata."

32. This court also held that "a wrong decision by a court having jurisdiction is as much binding between the parties as a right one and may be superseded only by appeals to higher tribunals or other procedure like review which the law provides." [See *State of West Bengal Vs. Hemant Kumar Bhattacharjee* (supra)]

33. In view of the aforesaid clear enunciation of the law by this Court, it would appear that even if the judgment dated 2nd July, 2001 rendered by the High Court in OJC No. 11537 of 1999 and the dismissal *in limine* of SLP (C) No. 13556 of 2001 arising from the aforesaid judgment is considered to be erroneous in view of the judgment in *Saligram's* case (supra), the matter regarding the locus standi of the LRs of respondent No. 10 to proceed with a mining lease application cannot be permitted to be reopened at this stage since it has become final *inter partes*.

34. Even though, strictly speaking, *res judicata* may not be

applicable to the proceedings before the Central Government, the High Court in exercise of its power under Article 226 was certainly entitled to take into consideration the previous history of the litigation *inter partes* to decline the relief to the appellant. Merely because the High Court has used the expression that the claim of the appellant is barred by *res judicata* would not necessarily result in nullifying the conclusion which in fact is based on considerations of equity and justice. Given the history of litigation between the parties, which commenced in 1950s, the High Court was justified in finally giving a quietus to the same. The subsequent interpretation of Rule 25A by this Court, that it would have only prospective operation, in the case of *Saligram* (supra), would not have the effect of reopening the matter which was concluded between the parties. In our opinion, if the parties are allowed to re-agitate issues which have been decided by a Court of competent jurisdiction on a subsequent change in the law then all earlier litigation relevant thereto would always remain in a state of flux. In such circumstances, every time either a statute or a provision thereof is declared *ultra vires*, it would have the result of reopening of the decided matters within the period of limitation following the date of such decision. In this case not only the High Court had rejected the objection of the appellant to the substitution of the legal heirs of Dr. Sarojini Pradhan in her place but the SLP from the said judgment has also been dismissed. Even though, strictly speaking, the dismissal of the SLP would not result in the merger of the judgment of the High Court in the order of this Court, the same cannot be said to be wholly irrelevant. The High Court, in our opinion, committed no error in taking the same into consideration in the peculiar facts of this case. Ultimately, the decision of the High Court was clearly based on the facts and circumstances of this case. The High Court clearly came to the conclusion that the appellant had accepted the locus standi of the LRs of Dr. Sarojini Pradhan to pursue the application for the mining lease before the Central Government, as well as in the High Court.

35. In view of the conclusions recorded by us above, it is not necessary to express an opinion on the interpretation of Rule 25A of the Mineral Concession Rules, 1960. In any event, the judgment in the case of *Saligram* (supra) has concluded that the Rule would have only prospective operation. The legal position having been so stated, it is not necessary for us to dilate upon the same.

CIVIL APPEAL NO. 104 OF 2013

[Arising out of SLP (C) No. 5130 of 2009]

36. This now brings us to the second appeal arising out of Special Leave Petition, i.e., 5130 of 2009, wherein the appellant has challenged the final judgment rendered by the High Court in the amended OJC No. 3662 of 2002 which was decided on 24th November, 2008.

37. The appellant now claims that order dated 27th September, 2001 is void as it has been passed in breach of rules of natural justice. Mr. Krishnan Venugopal, Senior Advocate, appearing for the appellant has submitted that in pursuance of the order dated 2nd July, 2001 passed by the High Court in OJC No. 11537 of 1999, parties were heard by Mr. S.P. Gupta, Joint Secretary for two days, i.e., 28th August, 2001 and 13th September, 2001. However, the order dated 27th September, 2001 has been passed by Dr. R.K. Khatri, Deputy Secretary, who did not hear the parties at all. Mr. Krishnan submits that, by virtue of the orders passed by the High Court, the proceedings before the Central Government were quasi-judicial in nature. Therefore, it was necessary that the same officer who gave a hearing to the parties ought to have passed the order in relation to the competing claims with regard to the grant of mining lease. Learned counsel highlights that originally the appellant had obtained the prospecting licence for the area in dispute between 17th October, 1962 and 16th October, 1963. However, while the appellant's application for mining lease was pending, the State Government made the

area available for re-grant under Rule 58 [now Rule 59(1)] of the Rules, as they stood in 1965. Six persons including the appellant and Late Dr. Sarojini Pradhan applied for the grant of mining lease on the same date, i.e. 10th September, 1965, thus triggering the application of the proviso to Section 11(2) read with the merit based criteria in Section 11(3) of the MMDR Act. As four of the contenders dropped out over the next four decades, only appellant and respondent No. 10, i.e., the legal heirs of the Late Dr. Pradhan were the only contesting parties for the mining lease at the relevant time. Repeatedly, the orders passed in favour of Dr. Sarojini Pradhan for the grant of mining lease has been set aside by the High Court on the ground of being in violation of the rules of natural justice. On 31st August, 2007, the Division Bench rejected the preliminary issue raised by the appellant to the effect that the application made by Dr. Pradhan for a mining lease abates on her death, in 1987. Although the High Court held that legal heirs of Dr. Pradhan can be substituted in her place, the writ petition was kept pending for final disposal on the issue of as to whether the orders granting the lease in favour of her legal heirs had been passed in violation of rules of natural justice.

38. The High Court in the impugned judgment took note of the submissions made by Dr. Devi Pal, learned senior counsel appearing for the appellant. The main thrust of the argument of Dr. Pal was that the matter had been heard by Mr. S.P. Gupta, Joint Secretary on 28th August, 2001 and 13th September, 2001, but has been decided by Dr. R.K. Khatri, Deputy Secretary of the Government of India, Ministry of Coal Mines vide order dated 27th September, 2001, and the said order had been communicated by Mr. O.P. Kathuria, Under Secretary to the Government of India. The submissions made in the High Court have been reiterated before us by Mr. Krishnan Venugopal. He submits that the approval granted in favour of legal heirs of Dr. Sarojini Pradhan causes adverse civil consequences to the appellant. Such an order could only have been passed by the officer, who had heard the parties.

The order, however, has been passed by a different officer, Dr. R.K. Khatri, on the basis of the notes recorded by Mr. S.P. Gupta in the relevant file. In support of the submission, the learned counsel has relied on the judgment of this Court in *Gullapalli Nageswara Rao & Ors. Vs. Andhra Pradesh State Road Transport Corporation & Anr*[16]*.*

39. Learned counsel then submitted that even if, for the sake of argument, it is accepted that approval under the proviso to Section 5(1) of the MMDR Act is to be treated as administrative in character, the impugned order dated 27th September, 2001 still deserves to be set aside because it is neither expressed nor can it be deemed to be expressed in the name of the President of India, as required by Article 77 of the Constitution of India and the Conduct of Business Rules. In support of this submission, the learned counsel relies upon the judgment of this Court in *Bachhittar Singh Vs. State of Punjab & Anr.*[17] On the basis of the aforesaid judgment, Mr. Krishnan Venugopal submits that the impugned order, not having been passed by the concerned Minister of the Central Government, can not be deemed to be in the name of the President. He further emphasised that there is no material on the record to show that, under the Rule of Business, the power to pass the order on behalf of the Central Government under proviso to Section 5(1) of the MMDR Act was delegated to the Deputy Secretary. He further pointed out that even if the order is administrative in character, it would still be *non est* and void, having been passed in violation of rules of natural justice and causes serious civil consequences to the appellant. For this proposition, he relies on the judgment of this Court in *Automotive Tyre Manufacturers Association Vs. Designated Authority & Ors*[18]*.* Mr. Krishan further submitted that the Central Government's order is vitiated because it is based mainly on

16. AIR 1959 SC 308.

17. AIR 1963 SC 395.

18. (2011) 2 SCC 258.

the report of the Indian Bureau of Mines comparing the Iron Ore production of the appellant with that of the legal heirs of Late Dr. Sarojini Pradhan for 1999-2000 and 2000-2001, which is a period after the State Government's recommendation dated 5th February, 1999. The relevant period prior to 5th February, 1999 has been wholly ignored by the Central Government in passing the order dated 27th September, 2001. He further submitted that the comparative merit of the parties had to be judged on the criteria specified under Section 11(3) of the MMDR Act. The criteria under the aforesaid section include :- (a) special knowledge or experience in prospecting operations or mining operations; (b) the financial resources of the applicants, (c) nature and quality of technical staff employed or to be employed by the applicant, (d) the investment which the applicant proposes to make in the mines. Even though the written statements submitted by the parties about their financial and technical capabilities were sent to the State Government for verification, a separate report was sought from the Indian Bureau of Mines which was confined only to two years: 1999-2000 and 2000-2001. The impugned order dated 27th September, 2001 has been passed primarily based on the report of the Indian Bureau of Mines for the aforesaid two years. The order is clearly vitiated as it is based on extraneous considerations. In support of this, the learned senior counsel relies on *Commissioner of Income Tax, Bombay & Ors. Vs. Mahindra and Mahindra Limited & Ors*[19]*.* The order passed by the Central Government is contrary to the directions issued by the High Court on 2nd July, 2001 by which the matter had been remanded to the Central Government with a direction to place the recommendation dated 5th February, 1999 of the State Government before the parties, to hear them, and to pass a speaking order with reasons. The High Court did not authorise the Central Government to conduct its own investigations and elicit fresh materials outside the scope of the State Government recommendation. In support of this submission, the learned counsel relies on a judgment of this Court in *Sandur*

19. (1983) 4 SCC 392.

Manganese and Iron Ores Limited Vs. State of Karnataka & Ors.[20] The learned counsel further pointed out that the State Government can not grant a mining lease without the previous approval of the Central Government under the proviso to Section 5(1) of the Act. Therefore, the power of the Central Government is confined to the grant of the previous approval on the basis of the material submitted by the State Government for seeking such a previous approval. In support of this submission, the learned counsel relied on the judgments of this Court in *Lord Krishna Textile Mills Vs. Workmen*[21]*, Ashok Kumar Das & Ors. Vs. University of Burdwan & Ors.*[22]*, State of Tamil Nadu Vs. Hind Stone & Ors*[23]*.* and *Kabini Minerals (P) Ltd. & Anr. Vs. State of Orissa & Ors*[24]*.*

40. Learned counsel further submitted that the impugned order dated 27th September, 2001 is vitiated as it has been obtained by fraud. He submitted that both parties have provided a statement of the respective technical and financial capabilities to the Central Government. In their submissions before the Central Government, the legal heirs of Late Dr. Sarojini Pradhan had categorically stated that one Mr. Nilamani Ojha, a mining engineer, was the number two person in their technical team. This fact was denied by Mr. Ojha in a latter dated 5th November, 2001 written to the Central Government. He further submitted that even technical information submitted by the legal heirs of Late Dr. Pradhan is factually incorrect. Therefore, the decision of the Central Government is vitiated by fraud. Learned counsel relies on *Regional Manager, Central Bank of India Vs. Madhulika Guruprasad Dahir & Ors*[25]*.* and *State of Orissa & Ors. Vs. Harapriya Bisoi*[26]*.*

20. (2010) 13 SCC 1.
21. AIR 1961 SC 860.
22. (2010) 3 SCC 616.
23. (1981) 2 SCC 205.
24. (2006) 1 SCC 54.
25. (2008) 13 SCC 170.
26. (2009) 12 SCC 378.

41. Mr. Ashok K. Gupta, learned senior counsel appearing for the legal heirs of respondent No. 10, had made detailed submissions controverting the submissions made on behalf of the appellant.

42. It is submitted that the submissions made by the appellant that the Central Government's order is not in consonance with Article 77, is wholly unfounded and devoid of merits. This ground was not even pleaded in the writ petition before the High Court. In fact, no such submission was made at the hearing of the writ petition by the High Court. No grievance is made in the SLP that such a submission was made before the High Court and that it was not considered. The submissions raised by the appellant at this stage being a mixed question of law in fact ought not to be permitted to be raised in the present proceedings. This apart, he submits that the judgment in the case of *Bachhittar Singh* (supra) was rendered on the basis of its own facts. Furthermore, in that case, the order signed by the Minister was not communicated to the parties and therefore, it was held that there was no effective order. In the present case, the order was passed on the basis of the approval granted and conveyed in the manner prescribed under law. With regard to the order being vitiated as it was passed on consideration of the material subsequent to the date of recommendation of the State Government viz. 5th February, 1999, he submits that the appellant cannot even be permitted to raise such an objection, having willingly submitted materials/ information subsequent to the date of the recommendation by the State Government. Mr. Gupta further submits that Section 5(2) of the MMDR Act does not prohibit the Central Government to take into account material subsequent to the recommendations made by the State Government. In the present case, it was necessary as the hearing was being conducted 2½ years after the recommendations have been submitted. Learned counsel further submits that no fraud was played by the legal heirs of respondent No.10, as is sought to be canvassed by the appellant. No such ground of fraud was

either pleaded in the writ petition before the High Court nor was any submission made to that effect before the High Court. The letter dated 5th November, 2001 of Mr. Nilamani Ojha has been obtained by the appellant only for the purpose of prejudicing the case of the appellant in this Court. With regard to the main ground relating to breach of rules of natural justice and which is premised on the basis that no hearing was granted by the officer that passed the impugned order, it is submitted that the submission is contrary to the material on the record. The matter was heard by Mr. S. P. Gupta, and it was his note running into 47 paragraphs, which was approved by the Secretary and the Minister, as per the rules of the business. The hearing was to be given by the Central Government and not by a particular individual. Therefore, it was clearly a case of institutional hearing and it was not necessary that Mr. Gupta should have passed the order. In this context, he relies on a judgment of the House of Lords in *Local Government Board Vs. Arlidge*[27]. According to the learned counsel, this principle is also recognized by this Court in *Automotive Tyre Manufacturers Association* (supra) and *Ossein and Gelatine Manufacturers' Association of India Vs. Modi Alkalies and Chemicals Limited & Anr*[28]. and *Pradyat Kumar Bose Vs. The Hon'ble The Chief Justice of Calcutta High Court*[29].

43. We have considered the submissions made by the learned counsel for the parties.

44. It is by now well settled that judicial review of the administrative action/quasi judicial orders passed by the Government is limited only to correcting the errors of law or fundamental procedural requirements which may lead to manifest injustice. When the conclusions of the authority are based on evidence, the same cannot be re-appreciated by the court in exercise of its powers of judicial review. The court does

27. (1915) AC 120.

28. 1989 (4) SCC 264.

29. 1955 (2) SCR 1331.

not exercise the powers of an appellate court in exercise of its powers of judicial review. It is only in cases where either findings recorded by the administrative/quasi judicial authority are based on no evidence or are so perverse that no reasonable person would have reached such a conclusion on the basis of the material available that the court would be justified to interfere in the decision. The scope of judicial review is limited to the decision making process and not to the decision itself, even if the same appears to be erroneous. This Court in the case of *Tata Cellular Vs. Union of India*[30] upon detailed consideration of the parameters within which judicial review could be exercised, has culled out the following principles :

> *"70. It cannot be denied that the principles of judicial review would apply to the exercise of contractual powers by Government bodies in order to prevent arbitrariness or favouritism. However, it must be clearly stated that there are inherent limitations in exercise of that power of judicial review. Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. The right to refuse the lowest or any other tender is always available to the Government. But, the principles laid down in Article 14 of the Constitution have to be kept in view while accepting or refusing a tender. There can be no question of infringement of Article 14 if the Government tries to get the best person or the best quotation. The right to choose cannot be considered to be an arbitrary power. Of course, if the said power is exercised for any collateral purpose the exercise of that power will be struck down.*
>
> ……. …… …… ….. ….. ….. … …. ……. …… …… ….. ….. …..

30. (1994) 6 SCC 651.

77. *The duty of the court is to confine itself to the question of legality. Its concern should be:*

1. *Whether a decision-making authority exceeded its powers ?*
2. *Committed an error of law,*
3. *committed a breach of the rules of natural justice,*
4. *reached a decision which no reasonable tribunal would have reached or,*
5. *abused its powers.*

Therefore, it is not for the court to determine whether a particular policy or particular decision taken in the fulfillment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under :

(i) Illegality : This means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it.

(ii) Irrationality, namely, Wednesbury unreasonableness.

(iii) Procedural impropriety.

The above are only the broad grounds but it does not rule out addition of further grounds in course of time…… ……..

…….. …….. …….. ……. ……. ….”

45. The aforesaid judgment has been followed again and

again. It was clearly observed in the said judgment that where the Court comes to the conclusion that the administrative decision is arbitrary, it must interfere. However, the Court can not function as an appellate authority substituting the judgment for that of the administrator. Applying the aforesaid principles, the High Court has examined the entire record and has concluded that the decision making process is not flawed in any manner, as canvassed by the appellant. The High Court noticed that the record was duly produced by Mr. J.K. Mishra, learned Assistant Solicitor General. It was also noticed that throughout the proceedings, no reference has been made to any particular officer or post or any designation. The order dated 11th July, 2001 passed by the High Court merely directed that they shall appear before the Central Government on 18th July, 2001. Order dated 14th August, 2001 clearly indicates that the matter was being heard in view of the directions given by the High Court in OJC No. 11537 of 1999 and secondly, notice was issued for hearing on 28th August, 2001. The record further indicated that the matter was heard by Mr. S. P. Gupta, Joint Secretary for two days i.e. on 28th August, 2001 and 13th September, 2001. Both the parties had been given opportunity to place on the record any documents and written submissions in support of their claim. It was also apparent that particulars submitted were made available to all the parties. On 13th September, 2001, Mr. S. P. Gupta, Joint Secretary made a note as under :

> "Thus, all the documents available with the Central Government are also available with both the parties."

46. The High Court also took note of the fact that independently of all the material supplied by the State Government along with the recommendation and the material made available by the parties, the Central Government had also asked Indian Bureau of Mines to furnish certain reports in support of both the parties. These reports were, in turn, made available to the rival parties. The High Court further noticed that

after complying with all the formalities required, the issues were finally adjudicated. Upon conclusions of the arguments by the parties, Mr. S. P. Gupta, Joint Secretary who had heard the parties prepared the note running into 19 pages (from pages 30 – 49) containing 47 paragraphs of original record. The note has been duly signed by Mr. S.P. Gupta, Joint Secretary on 17th September, 2001. The High Court further noticed that in fact this is the report which had been duly approved by the Secretary on 18th September, 2001 and by the Central Government Minister on 25th September, 2001. While making the endorsement of the approval, the Secretary has written as under :-

> "I endorse fully the above note of the Joint Secretary. This is a very old case in which the parties have repeatedly recourse to the courts. As such (sic) even now near litigation may follow. *Therefore the decision of the Central Government has to be in terms of a speaking order which is backed by facts and law."*

47. The High Court further notices that the impugned order dated 27th September, 2001 is, in fact, a verbatim copy of the report/note prepared by Mr. S.P. Gupta, Joint Secretary. Upon examination of the entire matter, the High Court has concluded that the order has been signed by Mr. R.P. Khatri merely to communicate the approval of the Central Government to the parties.

48. We are of the considered opinion that the conclusions reached by the High Court cannot be said to be contrary to the established principles and parameters for exercise of the power of judicial review by the courts. At this stage, we may also make a reference to a submission made by Mr. Krishnan that the High Court did not give due consideration to the grievance of the appellant raised in the writ petition with respect to the merits because it assumed that the appellant had attempted to bye-pass the alternative remedy of revision

available to it under Section 30 of MMDR Act read with Rules 54 and 55 of the Rules. We are of the considered opinion that the aforesaid submission of the learned counsel is wholly misplaced. The High Court merely noticed that the matter had been referred back to the Central Government on a limited issue. Therefore, it was not open to the Central Government to re-open the entire controversy. It has been observed by the High Court that such a power would only be available to the Central Government in exercise of its Revisional Powers under Section 30 read with Rules 54 and 55 of the Rules. We also do not find much substance in the submission made by Mr. Krishnan that the order dated 27th September, 2001 is vitiated as it has been passed by an officer who did not give a hearing to the parties. This is clearly a case of an institutional hearing. The direction has been issued by the High Court for a hearing to be given by the Central Government. There was no direction that any particular officer or an authority was to give a hearing. In such circumstances, the orders are generally passed in the relevant files and may often be communicated by an officer other than the officer who gave the hearing. The legality of institutional hearing has been accepted in England since the case of *Local Government Board Vs. Arlidge* (supra). The aforesaid judgment was quoted with approval by this Court in *Pradyat Kumar Bose* (supra). This Court approved the following passage from the speech of Lord Chancellor in the aforesaid case:

> "My Lords, I concur in this view of the position of an administrative body to which the decision of a question in dispute between parties has been entrusted. The result of its enquiry must, as I have said, be taken, in the absence of directions in the statute to the contrary, to be intended to be reached by its ordinary procedure. In the case of the Local Government Board it is not doubtful what this procedure is. The Minister at the head of the Board is directly responsible to Parliament like other Ministers. He is responsible not only for what he himself does but for all

> that is done in his department. The volume of work entrusted to him is very great and he cannot do the great bulk of it himself. He is expected to obtain his materials vicariously through his officials, and he has discharged his duty if he sees that they obtain these materials for him properly. To try to extend his duty beyond this and to insist that he and other members of the Board should do everything personally would be to impair his efficiency. Unlike a Judge in a Court he is not only at liberty but is compelled to rely on the assistance of his staff."

In view of the aforesaid settled position of law, it is difficult to accept the submissions of Mr. Krishnan that the order dated 27th September, 2001 suffers from any legal or procedural infirmity. In our opinion, the conclusions reached by the High Court are in accordance with the settled principles of law. Although a large number of cases have been cited by the learned counsel for the parties on either side, but it is not necessary to consider all of them individually as the principles with regard to observance of natural justice are well entrenched in our jurisprudence. Undoubtedly, any decision, even if it is administrative in nature, which causes adverse civil consequences must be passed upon hearing the concerned parties. In our opinion, the Central Government has fully complied with the aforesaid principle in passing the order dated 27th September, 2001.

49. In view of the above, we find no merit either in Civil Appeal No. 1013 of 2013 arising out of SLP (C)No. 23141 of 2007 or Civil Appeal No. 1014 of 2013 arising out of SLP (C) No. 5130 of 2009. Both the appeals are, therefore, dismissed with no order as to costs.

R.P. Appeals dismissed.

THE COMMISSIONER, BANGALORE DEVELOPMENT AUTHORITY & ANR.
v.
BRIJESH REDDY & ANR.
(Civil Appeal No. 1051 of 2013)

FEBRUARY 08, 2013

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

Code of Civil Procedure, 1908 – s. 9 – Jurisdiction of civil court – To adjudicate on the dispute contemplated under Land Acquisition Act – Land acquired by Development Authority – Subsequently purchased from the original owner – Suit by the purchaser for permanent injunction against the Authority – Trial Court held that suit was not maintainable – High Court remanding the matter to trial court to adjudicate the suit on merits – On appeal, held: Civil court is devoid of jurisdiction to give declaration or grant injunction on the invalidity of the procedure contemplated under Land Acquisition Act – The acquisition proceedings having been completed before the land was purchased, the purchaser had no right to maintain the suit against the Authority – High Court erred in remitting the matter, when the suit was not maintainable – Land Acquisition Act, 1894.

Certain land including the land in dispute was acquired by appellant-Development Authority in 1960-70. The respondent No. 1 purchased the land in dispute from its original owner in 1995. He filed civil suit against the appellant-Authority for permanent injunction. The suit was dismissed as not maintainable. First appeal was allowed by High Court and the matter was remitted to the trial court with a direction to dispose of the same on merits.

In appeal to this Court, the questions for consideration were whether civil court had jurisdiction to

entertain a suit when the Schedule lands were acquired under Land Acquisition proceedings and whether the High Court was justified in remanding the matter to the trial court without examining the question with regard to maintainability of the suit?

Allowing the appeal, the Court

HELD: 1.1. Courts have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred. The jurisdiction of civil court with regard to a particular matter can be said to be excluded if there is an express provision or by implication it can be inferred that the jurisdiction is taken away. An objection as to the exclusion of civil court's jurisdiction for availability of alternative forum should be taken before the trial court and at the earliest failing which the higher court may refuse to entertain the plea in the absence of proof of prejudice. [Para 8] [860-E-G-H; 861-A]

State of Bihar vs. Dhirendra Kumar and Ors. **(1995) 4 SCC 229: 1995 (3) SCR 857;** *Laxmi Chand and Ors. vs. Gram Panchayat, Kararia and Ors.* **(1996) 7 SCC 218: 1995 (4) Suppl. SCR 774;** *Commissioner, Bangalore Development Authority vs. K.S. Narayan* **(2006) 8 SCC 336: 2006 (7) Suppl. SCR 186 – relied on.**

1.2. The Land Acquisition Act is a complete Code in itself and is meant to serve public purpose. By necessary implication, the power of civil court to take cognizance of the case u/s. 9 CPC stands excluded and a civil court has no jurisdiction to go into the question of the validity or legality of the notification u/s. 4, declaration u/s. 6 and subsequent proceedings except by the High Court in a proceeding under Article 226 of the Constitution. It is thus clear that the civil court is devoid of jurisdiction to give declaration or even bare injunction being granted on the invalidity of the procedure contemplated under the Act.

The only right available for the aggrieved person is to approach the High Court under Article 226 and this Court under Article 136 with self-imposed restrictions on their exercise of extraordinary power. [Para 13] [864-D-G]

1.3. No doubt, in the instant case, the plaintiffs approached the civil court with a prayer only for permanent injunction restraining defendant Nos. 1 and 2, i.e., the Development Authority, their agents, servants and any one claiming through them from interfering with the peaceful possession and enjoyment of the schedule property. It is true that there is no challenge to the acquisition proceedings. However, in view of the assertion of the Development Authority, in their written statements, about the initiation of acquisition proceedings ending with the passing of award, handing over possession and subsequent action etc., the said suit is not maintainable. [Para 14] [864-G-H; 865-A-B]

2.1. The High Court committed an error in remanding the matter to the trial court on the ground that the plaintiffs were not given opportunity to adduce evidence to show that their vendor was in possession which entitles them for grant of permanent injunction from evicting them from the scheduled property without due process of law by the defendants. In the light of the specific assertion coupled with materials in the written statement about the acquisition of land long ago and subsequent events, suit of any nature including bare injunction is not maintainable. [Para 14] [865-C-E]

2.2. Having regard to the fact that the acquisition proceedings had been completed way back in 1960-70, the plaintiffs who purchased the suit land in 1995 cannot have any right to maintain the suit of this nature particularly, against defendant Nos. 1 and 2, namely, the Development Authority. The High Court clearly erred in remanding the matter when the suit was not maintainable

on the face of it. The High Court failed to take note of the fact that even in the plaint itself, the respondents-plaintiffs have stated that the suit land was acquired and yet they purchased the suit land in 1995 and undoubtedly have to face the consequence. The possession vests with the Development Authority way back in 1969 and 1978 and all the details have been asserted in the written statements, hence the remittal order cannot be sustained. [Para 15] [865-F-H; 866-A]

Case Law Reference:

1995 (3) SCR 857	**Relied on**	**Para 9**
1995 (4) Suppl. SCR 774	**Relied on**	**Para 10**
2006 (7) Suppl. SCR 186	**Relied on**	**Para 11**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1051 of 2013.

From the Judgment & Order dated 27.7.2005 of the High Court of Karnataka at Bangalore in R.F.A. No. 947 of 2003.

Altaf Ahmed, S.K. Kulkarni, M. Gireesh Kumar, Ankur S. Kulkarni for the Appellants.

G.V. Chandrashekhar, N.K. Verma, Anjana Chandrashekar for the Respondents.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. Leave granted.

2. This appeal is directed against the judgment and final order dated 27.07.2005 passed by the High Court of Karnataka at Bangalore in R.F.A. No. 947 of 2003 whereby the High Court allowed the first appeal filed by the respondents herein and remitted the matter to the trial Court for fresh disposal.

3. **Brief facts:**

(a) On 28.09.1965, a notification was issued by the State Government proposing to acquire several lands including the suit land being Survey No. 23/10 of Ejipura measuring 22 guntas for formation of Koramangala Layout. The original khatedars, who were notified were one Papaiah, Thimaiah, Patel Narayan Reddy, Smt. Rathnamma, Smt. Perumakka (Defendant No.3 in the suit), Munivenkatappa and Chickaabbaiah, the husband of 3rd defendant. After holding an enquiry, the Land Acquisition Officer passed the award on 07.09.1969. Thereafter, 10 guntas of land held by Smt. Rathnamma was taken possession on 28.11.1969 and the remaining 12 guntas held by defendant No.3 was taken possession on 22.07.1978 and then handed over the entire land to the Engineering Section. The layout was formed, sites were allotted to the intending purchasers.

(b) According to the respondents herein, they purchased 12 guntas of land under a registered sale deed dated 15.11.1995 from Perumakka-3rd defendant in the suit. Originally the said land belonged to Chikkaabbaiah – husband of 3rd defendant. Chikkaabbaiah mortgaged the said property to Patel Narayan Reddy on 26.02.1985. Thereafter, the said property was re-conveyed in favour of Chikkaabbiah. After the death of Chikkaabbiah, his wife Perumakka, (3rd defendant in the suit) was the absolute owner and in possession of the property.

(c) When the Bangalore Development Authority (in short "the BDA") tried to interfere with the possession of the suit property, 3rd defendant in the suit filed O.S. No. 10445 of 1985 for injunction and obtained an order of temporary injunction on 15.06.1985 which was in force till 22.05.1994. Ultimately the said suit was dismissed on the ground that before filing of the suit, statutory notice had not been given to the BDA. Thereafter, another suit being O.S. No. 2069 of 1994 was filed by the third

defendant on the file of the Civil Judge, Bangalore and the same was dismissed as withdrawn on 14.06.1995 with liberty to file a fresh suit.

(d) In the meantime, the respondents herein purchased the suit land from the third defendant under a registered sale deed on 15.11.1995. After the purchase of the land, the respondents were put in possession. When the BDA tried to interfere with the possession of the respondents herein, they filed a petition being W.P. No. 41497 of 1995 before the High Court, ultimately the said petition was dismissed as withdrawn by the respondents herein with a liberty to file a fresh suit.

(e) Thereafter, the respondents herein filed a suit being O.S. No. 4267 of 1996 on the file of the Court of the XVI Addl. City Civil & Sessions Judge at Bangalore for permanent injunction. By order dated 18.06.2003, the trial Court dismissed the said suit as not maintainable.

(f) Challenging the said order, the respondents herein filed first appeal being R.F.A. No.947 of 2003 before the High Court. By impugned order dated 27.07.2005, the High Court allowed the appeal and remitted the matter to the trial Court with a direction to dispose of the same after permitting the plaintiffs to adduce evidence on merits.

(g) Aggrieved by the said order, the appellants have preferred this appeal by way of special leave.

4. Heard Mr. Altaf Ahmed, learned senior counsel for the appellants and Mr. G.V. Chandrashekar, learned counsel for the respondents.

Discussion:

5. The only point for consideration in this appeal is whether a civil court has jurisdiction to entertain a suit when the schedule lands were acquired under the land acquisition proceedings

and whether the High Court was justified in remanding the matter to the trial Court without examining the question with regard to the maintainability of the suit?

6. It is seen from the plaint averments in O.S. No. 4267 of 1996 that the plaintiffs purchased the suit schedule property from the third defendant under a registered sale deed dated 15.11.1995 and since then they are in exclusive possession and enjoyment of the same. Since other details are not necessary for our purpose, there is no need to traverse the entire plaint allegations.

7. The third defendant, who filed a separate written statement supporting the case of the plaintiffs, had asserted that she did had the right, interest and title in the schedule property and she possessed every right to transfer and alienate it in favour of the plaintiffs. On the other hand, the BDA and its officers/defendant Nos. 1 and 2, in their written statements, specifically denied all the allegations made by the plaintiff. According to the BDA, the suit schedule property which forms part and parcel of Survey No. 23 of 2010 of Ejipura, totally measuring 22 guntas was notified for acquisition for the formation of Koramangala Layout. In their statements, they specifically pleaded that the notification came to be issued on 28.09.1965. The original khatedars who were notified were one Papaiah, Thimaiah, Patel Narayan Reddy, Smt. Rathnamma, Smt. Perumakka (D-3), Muni Venkatappa and Chickaabbaiah, the husband of D-3. The Land Acquisition Officer, after complying with the provisions of the Land Acquisition Act and after holding enquiry passed an award. It is further stated that 10 guntas of land held by Smt. Rathnamma was taken possession on 28.11.1969, remaining 12 guntas held by defendant No.3 was taken possession on 22.07.1978 and thereafter, handed over the entire land to the Engineering Section. It is also stated that as a follow-up action, the lay out was formed, sites were allotted to the intending purchasers. According to defendant Nos. 1 and 2, the entire land vested

with them and the so-called purchase now alleged by the plaintiff from Defendant No. 3 on 15.11.1995 is bad and in any event, not binding on the defendants. It is also stated that the persons who purchased the sites were issued possession certificates, khata was changed, khata certificates were issued, building licences were issued and there were constructions in the said site. Pursuant to the same, they had paid tax to the authority concerned. Accordingly, it is asserted that the plaintiff was not in possession on the date of filing of the suit. Before the trial Court, in order to substantiate the defence, the defendant Nos. 1 and 2 have produced copies of the Gazette Notification with respect to the acquisition of the said land. The award passed by the Land Acquisition Officer has also been produced and taken on record. The perusal of the discussion by the trial Court shows that the plaintiffs have not disputed the contents of those documents, even otherwise it cannot be disputed.

8. Section 9 of the Code of Civil Procedure, 1908 provides jurisdiction to try all suits of civil nature excepting those that are expressly or impliedly barred which reads as under:

> "**9. Courts to try all civil suits unless barred.-** The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred."

From the above provision, it is clear that Courts have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred. The jurisdiction of Civil Court with regard to a particular matter can be said to be excluded if there is an express provision or by implication it can be inferred that the jurisdiction is taken away. An objection as to the exclusion of Civil Court's jurisdiction for availability of alternative forum should be taken before the trial Court and at the earliest failing which the higher

court may refuse to entertain the plea in the absence of proof of prejudice.

9. In *State of Bihar vs. Dhirendra Kumar and Others*, (1995) 4 SCC 229, the core question was whether a civil suit is maintainable and ad interim injunction could be issued where proceedings under the Land Acquisition Act,1894 was taken pursuant to the notice issued under Section 9 of the Act and possession delivered to the beneficiary. On going through the entire proceedings initiated under the Land Acquisition Act, this Court held as under:

> "3. … … We are, therefore, inclined to think, as presently advised, that by necessary implication the power of the civil Court to take cognizance of the case under Section 9 of CPC stands excluded, and a civil Court has no jurisdiction to go into the question of validity or legality of the notification under Section 4 and declaration under Section 6, except by the High Court in a proceeding under Article 226 of the Constitution. So, the civil suit itself was not maintainable…"

After holding so, this Court set aside the finding of the trial Court that there is a *prima facie* triable issue. It also held that the order of injunction was without jurisdiction.

10. In *Laxmi Chand and Others vs. Gram Panchayat, Kararia and Others*, (1996) 7 SCC 218 while considering Section 9 of the Civil Procedure Code, 1908 vis-à-vis the Land Acquisition Act, 1894, this Court held as under:

> "2. … It is seen that Section 9 of the Civil Procedure Code, 1908 gives jurisdiction to the civil court to try all civil suits, unless barred. The cognizance of a suit of civil nature may either expressly or impliedly be barred. The procedure contemplated under the Act is a special procedure envisaged to effectuate public purpose, compulsorily

> acquiring the land for use of public purpose. The notification under Section 4 and declaration under Section 6 of the Act are required to be published in the manner contemplated thereunder. The *inference* gives conclusiveness to the public purpose and the extent of the land mentioned therein. The award should be made under Section 11 as envisaged thereunder. The dissatisfied claimant is provided with the remedy of reference under Section 18 and a further appeal under Section 54 of the Act. If the Government intends to withdraw from the acquisition before taking possession of the land, procedure contemplated under Section 48 requires to be adhered to. If possession is taken, it stands vested under Section 16 in the State with absolute title free from all encumbrances and the Government has no power to withdraw from acquisition.
>
> 3. It would thus be clear that the scheme of the Act is complete in itself and thereby the jurisdiction of the Civil Court to take cognizance of the cases arising under the Act, by necessary implication, stood barred. The Civil Court thereby is devoid of jurisdiction to give declaration on the invalidity of the procedure contemplated under the Act. The only right an aggrieved person has is to approach the constitutional Courts, viz., the High Court and the Supreme Court under their plenary power under Articles 226 and 136 respectively with self-imposed restrictions on their exercise of extraordinary power. Barring thereof, there is no power to the Civil Court."

11. In *Commissioner, Bangalore Development Authority vs. K.S. Narayan*, (2006) 8 SCC 336, which arose under the Bangalore Development Authority Act, 1976, was similar to the case on hand, this Court held that a civil suit is not maintainable to challenge the acquisition proceedings. In that case one K.S. Narayan filed Original Suit No. 5371 of 1989 in the Court of the City Civil Judge, Bangalore, praying that a decree for

permanent injunction be passed against the defendant - Bangalore Development Authority, their agents and servants restraining them from interfering with the plaintiff's possession and enjoyment of the plaint scheduled property and from demolishing any structure situate thereon. The case of the plaintiff is that the plaintiff purchased the property in dispute bearing No. 46, situated in Banasawadi village, K.R. Pura Hobli, Bangalore, South Taluk from S. Narayana Gowda by means of a registered sale deed dated 17.06.1985. The erstwhile owners of the property had obtained conversion certificate from the Tahsildar and the property is situated in a layout which is properly approved by obtaining conversion for non-agricultural use from the competent authority. The plaintiff applied for mutation entries and the same was granted in his favour. The property in dispute was not covered by any acquisition proceedings as neither notice of acquisition had been received nor any award regarding the said property had been passed. The defendant had no right, title or interest over the property but it was trying to dispossess the plaintiff from the same on the ground of alleged acquisition. The plaintiff issued a notice to the defendant on 11.07.1989 calling upon it not to interfere with his possession and enjoyment of the property in dispute. The suit was contested by the defendant - Bangalore Development Authority on the ground *inter alia* that the plaintiff was not the owner of the property in dispute. S. Narayana Gowda, who is alleged to have executed the sale deed in favour of the plaintiff on 17.06.1985, had no right, title or interest over the property in dispute and he could not have conveyed any title to the plaintiff. It was further pleaded that the disputed land had been acquired by the Bangalore Development Authority after issuing preliminary and final notifications in accordance with the Bangalore Development Authority Act and the possession had also been taken over and thereafter it was handed over to the engineering section on 22.06.1988 after completion of all formalities. The award for the land acquired had already been made and the compensation amount had been deposited in the civil court under Sections 30 and 31(2)

of the Land Acquisition Act. It was specifically pleaded that it was the defendant - Bangalore Development Authority which was in possession of the plaint scheduled property on the date of filing of the suit and, therefore, the suit for injunction filed by the plaintiff was not maintainable and was liable to be dismissed.

12. It is relevant to note that in the above decision, the acquisition proceedings in question had been taken under the Bangalore Development Authority Act, 1976 and the provisions of Sections 17 and 19 are somewhat similar to the provisions of Sections 4 and 6 of the Land Acquisition Act, 1894. After noting out all the details, this Court allowed the appeals and set aside the decision rendered by the High Court.

13. It is clear that the Land Acquisition Act is a complete Code in itself and is meant to serve public purpose. By necessary implication, the power of civil Court to take cognizance of the case under Section 9 of CPC stands excluded and a Civil Court has no jurisdiction to go into the question of the validity or legality of the notification under Section 4, declaration under Section 6 and subsequent proceedings except by the High court in a proceeding under Article 226 of the Constitution. It is thus clear that the civil Court is devoid of jurisdiction to give declaration or even bare injunction being granted on the invalidity of the procedure contemplated under the Act. The only right available for the aggrieved person is to approach the High Court under Article 226 and this Court under Article 136 with self imposed restrictions on their exercise of extraordinary power.

14. No doubt, in the case on hand, the plaintiffs approached the civil Court with a prayer only for permanent injunction restraining the defendant Nos. 1 and 2,i.e., BDA, their agents, servants and any one claiming through them from interfering with the peaceful possession and enjoyment of the schedule

property. It is true that there is no challenge to the acquisition proceedings. However, in view of the assertion of the BDA, in their written statements, about the initiation of acquisition proceedings ending with the passing of award, handing over possession and subsequent action etc., the said suit is not maintainable. This was rightly concluded by the trial Court. For proper compensation, the aggrieved parties are free to avail the statutory provisions and approach the court concerned. All these aspects have been clearly noted by the trial Court and ultimately rightly dismissed the suit as not maintainable. On the other hand, the learned Single Judge of the High Court though adverted to the principles laid down by this Court with reference to acquisition of land under the Land Acquisition Act and Section 9 of CPC committed an error in remanding the matter to the trial Court on the ground that the plaintiffs were not given opportunity to adduce evidence to show that their vendor was in possession which entitles them for grant of permanent injunction from evicting them from the scheduled property without due process of law by the defendants. In the light of the specific assertion coupled with materials in the written statement about the acquisition of land long ago and subsequent events, suit of any nature including bare injunction is not maintainable, hence, we are of the view that the High Court is not right in remitting the matter to the trial Court for fresh disposal.

15. Having regard to the fact that the acquisition proceedings had been completed way back in 1960-70, the plaintiffs who purchased the suit land in 1995 cannot have any right to maintain the suit of this nature particularly, against defendant Nos. 1 and 2, namely, the BDA. The High Court clearly erred in remanding the matter when the suit was not maintainable on the face of it. The High Court failed to take note of the fact that even in the plaint itself, the respondents herein/ plaintiffs have stated that the suit land was acquired and yet they purchased the suit land in 1995 and undoubtedly have to face the consequence. The possession vests with the BDA way back in 1969 and 1978 and all the details have been asserted

in the written statements, hence the remittal order cannot be sustained.

16. In the light of the above discussion, the impugned judgment dated 27.07.2005 passed by the High Court in R.F.A. No. 947 of 2003 remitting the matter to the trial Court is set aside and the judgment dated 18.06.2003 of the trial Court in O.S. No. 4267 of 1996 is restored.

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

K.K.T. Appeal allowed.

ATMARAM S/O RAYSINGH RATHOD
v.
STATE OF MAHARASHTRA
(Criminal Appeal No. 985 of 2004)

FEBRUARY 08, 2013

[A.K. PATNAIK AND CHANDRAMAULI KR. PRASAD, JJ.]

Evidence Act, 1872:

s.113-A – Presumption as to abetment of suicide – 'Cruelty' – Suicide by second wife of appellant – Conviction of appellant u/ss 306 and 498-A – Held: It is not the case of prosecution that appellant had subjected the deceased to cruelty of the nature described in clause (b) of Explanation to s.498A, IPC – As regards clause (a) of the Explanation, prosecution has not been able to prove beyond reasonable doubt that appellant was guilty of any wilful conduct which was of such a nature as was likely to drive deceased to commit suicide – Therefore, presumption u/s 113A is not attracted and the appellant cannot also be held guilty of abetting suicide of deceased – Judgment of courts below holding the appellant guilty of offences punishable u/ss 306 and 498-A IPC are set aside – Penal Code, 1860 – ss. 306 and 498-A.

The appellant, his first wife and his parents were prosecuted for committing offences punishable u/ss 306 and 498 read with s.34 IPC, on the allegations that the accused ill-treated the second wife of the appellant and did not give her food for two days because she delivered a female child, as a result of which she jumped into a well with her daughter and committed suicide. The trial court, on the strength of s.113-A of the Evidence Act, 1872, convicted the accused of the offences charged and

sentenced to them to imprisonment of three years and a fine of Rs.5000/- each. The High Court affirmed the conviction and sentence of the appellant, but acquitted the other accused.

Allowing the appeal, the Court

HELD: 1.1. A reading of s. 113A of the Evidence Act, 1872 will show that for the purposes of the said section, 'cruelty' shall have the same meaning as in s.498A, IPC. Therefore, to convict a husband or any relative of the husband of a woman or to draw presumption as to abetment of suicide by a married woman by her husband or any relative of her husband in case of suicide committed by a woman within a period of seven years from the date of her marriage, there must first be evidence to establish that such husband or the relative of her husband committed cruelty of the nature described in clauses (a) or (b) of the Explanation to s.498A, IPC. [para 7] [874-G-H; 875-A-B]

1.2. In the instant case, it is not the case of the prosecution that the appellant had subjected the deceased to cruelty of the nature described in clause (b) of Explanation to s.498A, IPC, as there is no allegation that the appellant had harassed her with a view to coerce her or any person related to her to meet any unlawful demand for any property or valuable security or that he subjected her to harassment on account of failure by her or any person related to her to meet such demand. [para 8] [875-C-E]

1.3. As regards Clause (a) of the Explanation to s. 498A, the High Court has relied on Ext. 47 i.e. a written undertaking dated 17.4.1988 given by appellant to give equal treatment to both his wives. Exts. 47 is an evidence of some misbehaviour of the appellant towards the deceased but the nature of the misbehaviour has not

been stated in it. Besides, the drowning of the deceased took place three months after Ext. 47 had been executed. For holding the appellant guilty of the offences u/s 306 and 498A, IPC, there must be evidence of wilful conduct of the appellant towards the deceased soon before her death which could have driven her to commit suicide. The *post mortem* examination report of deceased described her as 'well nourished' and the last meal was taken by her within six hours. Moreover, the *post mortem* examination report does not show that the deceased was subjected to any severe beating before her death. [para 3, 9, 11 and 13] [871-D; 876-E; 877-C-D; 879-C-D]

1.4. Thus, the prosecution has not been able to prove beyond reasonable doubt that the appellant was guilty of any wilful conduct which was of such a nature as was likely to drive the deceased to commit suicide. Rather, there appears to be some evidence in the depositions of PW-1 and PW-4 (father and sister of the deceased) that the deceased was sad due to a daughter being born to her and a son being born to the first wife of the appellant. These circumstances may have driven her to commit suicide by jumping into the well along with her daughter. Such a consequence from the mental state of the deceased cannot be a ground for holding the appellant guilty of cruelty within the meaning of clause (a) of the Explanation to s.498A, IPC. Therefore, the presumption u/s 113A is not attracted and the appellant cannot also be held guilty of abetting the suicide of the deceased. The judgments of the High Court and the trial court holding the appellant guilty of the offences punishable u/ss 306 and 498A, IPC are set aside. [para 14-15] [879-D-G; 880-D]

State of West Bengal v. Orilal Jaiswal & Anr. **(1994) 1 SCC 73 – referred to**

Case Law Reference:

(1994) 1 SCC 73 referred to para 14

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 985 of 2004.

From the Judgment & Order dated 3.12.2003 of the High Court of Judicature at Bombay, bench at Nagpur in Criminal Appeal No. 10 of 1991.

Anagha Desai, Shashant Pareek, Satyajit A. Desai, Venkateswara Rao Anumolu for the Appellant.

Shankar Chillagre, Asha Gopalan Nair for the Respondent.

The Judgment of the Court was delivered by

A.K. PATNAIK, J. 1. This is an appeal against the judgment dated 03.12.2003 of the Bombay High Court, Nagpur Bench, in Criminal Appeal No.10 of 1991 by which the High Court has maintained the conviction of the appellant for offences under Sections 306 and 498A of the Indian Penal Code (for short 'the IPC') and the sentence of rigorous imprisonment of three years and a fine of Rs.5,000/- for each of the aforesaid two offences by the Sessions Court.

2. The facts very briefly are that a written report was lodged by Gorsing Shewa Pawar (hereinafter referred to as 'the informant') on 17.07.1988 in the Police Station, Pusad (Rural). In this report, the informant stated that the appellant got married for the second time to his daughter Purnabai with the consent of his first wife with a hope to get a son from Purnabai and he treated her well for the first 2 to 2½ years but when she delivered a female child, the appellant and his family members started beating and harassing Purnabai and also did not provide her with meals and on 16.07.1988, the informant received a message that Purnabai died by drowning in the well at Bhandari. The informant has further stated in the report that

he reached Bhandari in the evening and came to know that Purnabai had not been given food for two days and was ill-treated with an intention to ensure that she leave the house and because of such ill-treatment Purnabai jumped into the well along with her daughter Nanda and committed suicide. On the basis of the written report, an FIR was registered under Sections 306 and 498A of the IPC and after investigation, a charge-sheet was filed against the appellant, his first wife, his father and his mother and they were all tried for offences under Sections 306 and 498A read with Section 34 of the IPC in Sessions case No.29/1990.

3. At the trial, altogether eight witnesses were examined. The informant was examined as PW-1, the sister of Purnabai was examined as PW-4, the Police Patil of Bhandari was examined as PW-5 and the Investigating Officer was examined as PW-8. At the trial, a written undertaking dated 17.04.1988 signed by the appellant to give equal treatment to both his wives was marked as Ext.47 and a written undertaking signed by Purnabai to behave properly in future was marked as Ext. 48. The learned Sessions Judge considered the evidence and, in particular, the evidence of PW-1 and PW-4 as well as Ext.47 and held that the presumption as to abetment by the husband and his relatives of suicide by a married woman as provided in Section 113A of the Indian Evidence Act, 1872 was attracted and the appellant, his first wife, his father and his mother were all guilty of the offences under Sections 306 and 498A read with Section 34, IPC. After hearing the accused persons on the sentence, the learned Sessions Judge sentenced each of the accused persons to rigorous imprisonment for three years in respect of each offence and in addition, for a fine of Rs.5,000/- each in respect of each offence by judgment and order dated 09.01.1991. Aggrieved, all the accused persons filed Criminal Appeal No.10 of 1991 before the High Court and by the impugned judgment dated 03.12.2003, the High Court set aside the conviction and sentence of the first wife, the mother and the father of the appellant and acquitted them of the offences, but

maintained the conviction of the appellant as well as the sentence imposed upon him by the learned Sessions Judge.

4. Learned counsel for the appellant submitted that the High Court has relied on Ext.47 and Ext.48 as well as evidence of PW-1 and PW-4 to come to the conclusion that the appellant had ill-treated the deceased Purnabai on account of which she had committed suicide by jumping into the well along with her daughter. She submitted that there is nothing in Exts.47 and 48 to indicate that the appellant had actually ill-treated Purnabai. She submitted that Exts.47 and 48 would show that the appellant had undertaken before the *Panchas* to give equal treatment to both his wives Purnabai and Kesri and Purnabai had also similarly undertaken before the *Panchas* that she would behave properly in future even though the appellant was having another wife. She submitted that the evidence of PW-1 and PW-4 also do not establish any specific act of cruelty committed by the appellant because of which Purnabai committed suicide. She submitted that the *post mortem* report of the deceased Purnabai (Ext.35) does not show any injury on her body and it also shows that she had her meals. She submitted that the appellant has not committed any cruelty of the nature defined in the Explanation to Section 498A, IPC. She submitted that the Explanation to Section 113A of the Indian Evidence Act, 1872 is also clear that to attract the presumption as to abetment of suicide by a married woman, the husband must be shown to have subjected the married woman to cruelty of the nature defined in Section 498A, IPC and, therefore, the presumption under Section 113A of the Indian Evidence Act, 1872 was not attracted in this case. She submitted that the FIR (Ext.49) was lodged on 17.07.1988, two days after the drowning took place on 15.07.1988, because the appellant denied a share in his properties to PW-1 and this was the defence of the appellant in his statement under Section 313, Cr.P.C. She finally submitted that the evidence of PW-1 and PW-4 would rather show that Purnabai was depressed and unhappy after a female child instead of male child was born to her and it is quite

possible that she jumped into the well with the female child on account of such depression and unhappiness.

5. Learned counsel for the respondent-State, on the other hand, submitted in his reply that the evidence of PW-1 and PW-4 clearly establishes that the appellant has been beating the deceased Purnabai and has not been providing her with food and because of these cruel acts of the appellant she committed suicide by jumping into the well with her daughter. He submitted that the evidence of PW-1 and PW-4 were also corroborated by the FIR lodged by PW-1 as well as the evidence of PW-8. He submitted that the presumption in Section 113A of the Indian Evidence Act, 1872 as to abetment of suicide by a married woman is also attracted in this case as the deceased Purnabai has committed suicide within a period of seven years from the date of her marriage and the appellant has subjected her to cruelty. He submitted that this is, therefore, not a fit case in which concurrent findings of the trial court and the High Court with regard to the guilt of the appellant under Sections 306 and 498A, IPC, should be disturbed.

6. Section 498A, IPC, and Section 113A of the Indian Evidence Act, 1872 are extracted hereinbelow:

> **"498A. Husband or relative of husband of a woman subjecting her to cruelty.—**Whoever, being the husband or the relative of the husband of a woman, subjects such woman to cruelty shall be punished with imprisonment for a term which may extend to three years and shall also be liable to fine.
>
> *Explanation***-** For the purpose of this section, "cruelty" means-
>
> (a) any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or

> (b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand."
>
> "**113A. Presumption as to abetment of suicide by a married woman**.- When the question is whether the commission of suicide by a women had been abetted by her husband or any relative of her husband and it is shown that she had committed suicide within a period of seven years from the date of her marriage and that her husband or such relative of her husband has subjected her to cruelty, the court may presume, having regard to all the other circumstances of the case, that such suicide had been abetted by her husband or by such relative of her husband.
>
> *Explanation*.— For the purposes of this section, "cruelty" shall have the same meaning as in section 498-A of the Indian Penal Code (45 of 1860)."

7. A reading of Section 498A, IPC, would show that if the husband or relative of the husband of a woman subjected such woman to cruelty, they shall be liable for the punishment mentioned therein. Moreover, the Explanation to Section 498A, IPC, defines 'cruelty' for the purpose of Section 498A, IPC, to mean (a) any willful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or (b) harassment of the woman where such harassment is with a view to coercing her or any person related to her to meet any unlawful demand for any property or valuable security or is on account of failure by her or any person related to her to meet such demand. A reading of Section 113A of the Indian Evidence Act, 1872 will show that for the purposes of Section 113A of the Indian Evidence Act, 1872, 'cruelty' shall have the same meaning as in Section 498A, IPC. Hence, to convict a husband or any relative of the husband of a woman

or to draw up presumption as to abetment of suicide by a married woman by her husband or any relative of her husband in case of suicide committed by a woman within a period of seven years from the date of her marriage, there must first be evidence to establish that such husband or the relative of her husband committed cruelty of the nature described in clauses (a) or (b) of the Explanation to Section 498A, IPC.

8. Therefore, the main question, which we have to decide in this case, is whether there is any such evidence to establish beyond reasonable doubt that the appellant had subjected his second wife, Purnabai, to cruelty either of the nature described in clause (a) or of the nature described in clause (b) of the Explanation to Section 498A, IPC. It is not the case of the prosecution in this case that the appellant had subjected Purnabai to cruelty of the nature described in clause (b) of Explanation to Section 498A, IPC, as there is no allegation in this case that the appellant had harassed Purnabai with a view to coerce her or any person related to her to meet any unlawful demand for any property or valuable security or that he subjected Purnabai to harassment on account of failure by her or any person related to her to meet such demand. We have, therefore, only to decide whether the appellant treated Purnabai with cruelty of the nature described in clause (a) of the Explanation to Section 498A, IPC.

9. Clause (a) of the Explanation to Section 498A, IPC, defines 'cruelty' to mean any wilful conduct which is of such a nature as is likely to drive the woman to commit suicide or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman. Exhibit 47, on which the High Court has relied on, is the English translation of the written undertaking given by the appellant before the *Panchas,* and is extracted hereunder:

> "…. As I was not having son, I got married with Purnabai from village Bhidongar, in Ganhar for getting son, about 5 to 6 years back. As I have first wife, an bhangad (problems) used to take place (between them) at my home. As the dispute was taken (brought) before panchas. On this day, the panchas advised me to treat both the wives well. Henceforth I will give equal treatment to Purna as well as Kesari, the sisters. If I commit any mistake in future, I will be bound by the rules. Hence this undertaking. .."

A reading of Ext. 47 would only indicate that the appellant got married with Purnabai for getting a son and as he had his first wife also, some problems used to take place between Purnabai and his first wife in his house and the dispute was brought before the *Panchas* and the *Panchas* advised the appellant to treat both the wives well. The appellant had stated in his undertaking that as the *Panchas* advised him to treat both the wives well, he gave an undertaking that in future he will give equal treatment to Purnabai as well as Kesari (his first wife) and he will not commit any mistake in this regard. Exhibit 48 is an undertaking dated 17.04.1988 given by Purnabai in which she has assured that she would behave properly in future but her husband should also behave properly with her. Thus, Exts. 47 and 48 are evidence of some misbehaviour of the appellant towards Purnabai but the nature of the misbehaviour of the appellant towards Purnabai has not been stated in these two Exhibits.

10. PW-1 in his evidence, however, has stated that since the birth of a son from the first wife, the appellant started beating and ill-treating Purnabai and they were not providing her food and this he had come to learn from Purnabai. He has also stated in his evidence that he had gone to Paradha at the house of Shantabai before the death of Purnabai and some ladies from Bhandari had come there for grinding their grains in the flour mill and they had reported to him that the appellant and his family members were beating Purnabai severely. He has stated that he, therefore, went to the house of the appellant and found marks of Shiwal on the hands and thigh of Purnabai and he brought her to Paradha and he was going to report the

matter to the Police Station, but the appellant and his family members and others came and told him that the appellant is going to give in writing that henceforth he will not beat Purnabai. PW-1 has further deposed that thereafter the appellant executed the undertaking (Ext.47) dated 17.04.1988 and Purnabai executed the undertaking (Ext.48) dated 17.04.1988 before the *Panchas* and Exts. 47 and 48 were kept with the *Sarpanch* and the Police Patil.

11. The aforesaid evidence of PW-1 establishes that the appellant used to beat Purnabai and was not giving her food before he executed the undertaking in Ext.47 on 17.04.1988. The drowning of Purnabai took place three months thereafter on 15.07.1988. For holding the appellant guilty of the offences under Sections 306 and 498A, IPC, there must be evidence of wilful conduct of the appellant towards Purnabai soon before her drowning which could have driven her to commit suicide and this is what PW-1 has said in his Examination-in-Chief on what happened before the drowning of Purnabai:

> "Thereafter I took Purana to Bhandari in the house of accused no.1. Thereafter I brought her back to my house for Rasai. She complained that there is ill-treatment going on though it is lessened. She complained me that accused was not providing her with meals and used to beat her. She also told that as accused do not give her food she begs for food from others even then I reached her with the hope that everything will be settled. Later on I received the news of her death. On hearing dead news of Purana I went to Bhandari. I found Purana and her daughter dead due to drowning in the well. I enquired there at Bhandari and I came to know that there was lot of beating given to Purana and hence she died on fall in the well. I came to know that there was accidental death. I also came to know that Purana died along with her girl after falling in the well due to ill-treatment received by her from accused persons. Then I went to Rural P.S. Pusad and reported the matter.

> The report now read over to me is the same. It's contents are correct. It bears my thumb impression. It is at exh.49. Printed F.I.R. shown to me also bears my signature. It is at exh.50. Police recorded my statement."

12. In the written report (FIR) lodged by PW-1 on which the prosecution has relied upon for corroboration, it has been similarly stated:

> "So, I sent my daughter again to Bhandari and then I brought my daughter on the occasion of Rosa. At that time I came to know that the said four non-applicants were again ill-treating and beating my daughter and not providing her meals too. I also came to know that she is required to beg for food. Still then, I sent my daughter to their house. On 16.7.88 I received message that my grand daughter died on account of drowning into the well at Bhandari. On getting the said message, I reached there at the time of evening and then I came to know that my daughter Purnabai and grand daughter died. On enquiry in the village, I came to know that my daughter was not given food since last two days and was ill-treated with an intention that she should leave the house and hence my daughter Purnabai jumped into the well and committed suicide with her daughter Nanda."

It is thus clear from the evidence of the PW-1 and from the FIR lodged by him that he had no personal knowledge about the cause of the death of Purnabai but on enquiry at Bhandari he had come to learn that there was lot of beating of Purnabai and no food was given to her and for such ill-treatment she had jumped into the well with her daughter.

13. No witness of Bhandari from whom PW-1 made the inquiry has been examined by the prosecution to prove such beating and denial of food to Purnabai soon before she committed suicide. PW-4, the sister of Purnabai, has not deposed that there was any beating and denial of food to

Purnabai soon before her drowning in the well. PW-5, the Police Patil of Bhandari, has stated that Purnabai was ill-treated by the appellant in his house and he came to learn of this fact from the father of the appellant Raysingh who also told him that Purnabai's father had for this reason taken Purnabai to Paradha three months back but the appellant and his father took four to five *Panchas* to Paradha and brought back Purnabai. PW-5 has, therefore, also not deposed that Purnabai was beaten or not given food because of which she jumped into the well with her daughter on 15.07.1988. On the other hand, on a perusal of the *post mortem* examination report (Ext. 35) of deceased Purnabai, we find that the Doctor has described Purnabai as 'well nourished' and the last meal appears to have been taken by her within six hours. Moreover, the *post mortem* examination report (Ext. 35) does not show that the Purnabai was subjected to any severe beating before her death.

14. From the discussion of the aforesaid evidence on record, we find that the prosecution has not been able to prove beyond reasonable doubt that the appellant was guilty of any wilful conduct which was of such a nature as was likely to drive Purnabai to commit suicide. Rather, there appears to be some evidence in the depositions of PW-1 and PW-4 (father and sister of Purnabai) that Purnabai was sad due to a daughter being born to her and a son being born to the first wife of the appellant. These circumstances may have driven Purnabai to commit suicide by jumping into the well along with her daughter. Such a consequence from the mental state of Purnabai cannot be a ground for holding that the appellant was guilty of cruelty within the meaning of clause (a) of the Explanation to Section 498A, IPC. We, therefore, hold that the presumption under Section 113A is not attracted and the appellant cannot also be held guilty of abetting the suicide of Purnabai. We have to bear in mind this note of caution in *State of West Bengal v. Orilal Jaiswal & Anr*. [(1994) 1 SCC 73]:

"……the Court should be extremely careful in assessing

the facts and circumstances of each case and the evidence adduced in the trial for the purpose of finding whether the cruelty meted out to the victim had in fact induced her to end the life by committing suicide. If it transpires to the Court that a victim committing suicide was hypersensitive to ordinary petulance, discord and differences in domestic life quite common to the society to which the victim belonged and such petulance, discord and differences were not expected to induce a similarly circumstanced individual in a given society to commit suicide, the conscience of the Court should not be satisfied for basing a finding that the accused charged of abetting the offence of suicide should be found guilty."

15. For the aforesaid reasons, we allow this appeal and set aside the impugned judgment of the High Court and the judgment of the trial court holding the appellant guilty of the offences under Sections 306 and 498A, IPC and direct that the bail bonds executed by the appellant be discharged.

R.P. Appeal allowed.