MANAGER, NATIONAL INSURANCE CO. LTD.
v.
SAJU P. PAUL AND ANOTHER
(Civil Appeal No. 5 of 2013)

JANUARY 3, 2013

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

Motor Vehicles Act, 1988 - s. 147 - Motor accident of goods vehicle - Injury to the claimant, who was travelling in the vehicle and claiming to be a spare driver - Liability of the insurance company - Held: Insurance company not liable to pay compensation - Spare driver was not covered under the policy - He was admittedly not driving the vehicle nor was engaged for driving the said vehicle - Thus he was a gratuitous passenger - In the facts of the case, Insurance Company directed to pay the compensation and later to recover the same from the owner-insured.

The question for consideration in the present appeal was as to whether the insurance company was liable to pay compensation for the bodily injury caused to the claimant who was travelling in a goods vehicle as a spare driver, though he was employed as a driver in another vehicle owned by the vehicle owner-insured.

Allowing the appeal, the Court

HELD: 1.1 The impugned judgment is founded on misconstruction of s. 147 of the Motor Vehicles Act, 1988. The High Court was wrong in holding that the insurance company was liable to indemnify the owner of the vehicle and pay the compensation to the claimant [Para 18] [15-F]

1.2 The High Court committed grave error in holding that s.147(1)(b)(i) takes within its fold any liability which may be incurred by the insurer in respect of the death or bodily injury to any person. The High Court erroneously assumed that the claimant died in the course of

employment and overlooked the fact that the claimant was not in any manner engaged on the vehicle that met with an accident, but he was employed as a driver in another vehicle. The insured (owner of the vehicle) got insurance cover in respect of the subject goods vehicle for driver and cleaner only and not for any other employee. Therefore, second driver or for that purpose 'spare driver' was not covered under the policy. As a matter of law, the claimant did not cease to be a gratuitous passenger though he claimed that he was a spare driver. [Para 16] [14-G-H; 15-A-C]

New India Assurance Co. Ltd. v. Asha Rani and Ors. **(2003) 2 SCC 223:2002 (4) Suppl. SCR 543;** *National Insurance Co. Ltd. v. Cholleti Bharatamma and Ors.* **(2008) 1 SCC 423:2007 (11) SCR 531;** *Oriental Insurance Co. Ltd. v. Devireddy Konda Reddy and Ors.* **(2003) 2 SCC 339:2003 (1) SCR 537 - relied on.**

New India Assurance Company v. Satpal Singh and Ors. **(2000) 1 SCC 237:1999 (5) Suppl. SCR 149 - referred to.**

1.3 The High Court misconstrued the proviso following sub-section (1) of s. 147 of the Act. What is contemplated by proviso to s.147 (1) is that the policy shall not be required to cover liability in respect of death or bodily injury sustained by an employee arising out of and in the course of his employment other than a liability arising under the Workmen's Compensation Act, 1923. The claimant was admittedly not driving the vehicle nor he was engaged in driving the said vehicle. Merely because he was travelling in a cabin, would not make his case different from any other gratuitous passenger. [Para 17] [15-D-E]

2. In the peculiar facts of the present case, a direction is issued to the insurance company to first satisfy the awarded amount in favour of the claimant and recover the same from the owner of the vehicle. The insurance company has already deposited the entire awarded

amount pursuant to the order of this Court passed on 01.08.2011 and the said amount has been invested in a fixed deposit account. The claimant is allowed to withdraw the amount deposited by the insurance company before this Court, along-with accrued interest. The insurance company thereafter may recover the amount so paid, from the owner-respondent No. 2 by following the procedure as laid down by this Court in the case of *Challa Bharathamma case . [Paras 19 and 25] [15-G; 19-E-F]

National Insurance Co. Ltd. v. Baljit Kaur and Ors. **(2004) 2 SCC 1:2004 (1) SCR 274 ;** **National Insurance Co. Ltd. v. Challa Bharathamma and Ors.* **(2004) 8 SCC 517: 2004 (4) Suppl. SCR 587;** *National Insurance Company Limited v. Kaushalaya Devi and Ors.* **(2008) 8 SCC 246: 2008 (8) SCR 500 - relied on.**

Case Law Reference:

1999 (5) Suppl. SCR 149	**referred to**	**Para 11**
	relied on	**Para 12**
2003 (1) SCR 537	**relied on**	**Para 14.1**
2007 (11) SCR 531	**relied on**	**Para 15**
2004 (1) SCR 274	**relied on**	**Para 20**
2004 (4) Suppl. SCR 587	**relied on**	**Para 21**
2008 (8) SCR 500	**relied on**	**Para 22**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5 of 2013.

From the Judgment & Order dated 23.03.2011 of the High Court of Kerala at Ernakulam in R.P. No. 106 of 2010 in M.A.C.No. 713 of 2003.

M.K. Dua for the Appellant.

K. Radhakrishnan, Kiran Bhardwaj for the Respondents.

The Judgment of the Court was delivered by

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

2. The appellant, insurance company, is in appeal by special leave against the judgment and order dated 23.03.2011 whereby the Division Bench of the Kerala High Court allowed the review petition and reviewed its order dated 09.11.2010 and held that the insurance company was liable to pay compensation in sum of Rs. 2,88,000/- with 9% interest thereon to the claimant awarded by the Motor Accident Claims Tribunal in its award dated 23.07.2002.

3. The question of law that arises in this appeal is as to whether having regard to the provisions of the Motor Vehicles Act, 1988 (for short, '1988 Act'), the insurance company is liable to pay compensation for the bodily injury caused to the claimant who was travelling in a goods vehicle as a spare driver though he was employed as a driver in another vehicle owned by the owner of the vehicle under the policy of insurance.

4. The above question arises in this way. Saju P. Paul, claimant (Respondent No. 1), was a heavy vehicle driver. He was employed with Respondent No. 2 as a driver in some other vehicle. On 16.10.1993, he was travelling in a goods vehicle bearing No. KL-2A/3411 in the cabin. The goods vehicle was being driven by one Jayakumar. In that vehicle, many other persons were also travelling. At Nilackal, due to rash and negligent driving of the driver Jayakumar, the goods vehicle capsized. As a result of which the claimant suffered fracture and injuries. The claimant remained under treatment for quite some time and the injuries that he sustained in the accident rendered him permanently disabled. In the claim petition filed by him before the Motor Accident Claims Tribunal, Pathanamthitta (for short, 'the Tribunal'), he claimed compensation of Rs. 3,00,000/-. The owner and insurer were impleaded as respondent no. 2 and respondent no. 3 respectively in the claim petition.

5. The insurer filed its written statement and opposed the claimant's claim insofar as it was concerned. The insurer set up the plea that the vehicle was a goods vehicle and the risk of the passengers travelling in the goods vehicle was not covered under the policy of insurance. It was stated in the written statement that nearly 50 unauthorised passengers were

travelling at the time of accident; they were not traveling in the vehicle in pursuance of the contract of employment, such as loading and unloading nor they were travelling as the owner of the goods or the representative of the owner of the goods and hence the insurer could not be saddled with any liability.

6. The Tribunal, after recording the evidence and hearing the parties, on 23.07.2002, passed an award in favour of the claimant holding that he was entitled to a total compensation of Rs. 3,00,000/-. The liability of the insurer was made joint and several with the owner and driver.

7. Being not satisfied with the award of the Tribunal, the insurer filed an appeal before the Kerala High Court. The Division Bench of that Court by relying upon decisions of this Court in *New India Assurance Co. Ltd. v. Asha Rani and Others*[1] and *National Insurance Co. Ltd. v. Cholleti Bharatamma and Others*[2] allowed the appeal of the insurer vide judgment and order dated 09.11.2010. The Division Bench held that insurer was not liable as gratuitous passengers travelling in a goods vehicle were not covered under the policy and the claimant shall be entitled to recover the awarded amount from the owner or driver of the vehicle.

8. The claimant sought review of the order dated 09.11.2010 and, as noted above, by the impugned order that review application has been allowed. While allowing the review application, the Division Bench held as under:

> "It has already been noticed that the petitioner was admittedly a spare driver of the vehicle. It may be true that he was not driving the vehicle at the relevant point of time; but he was directed to go to the worksite by his employer as a spare driver in the vehicle. Therefore, by no stretch of imagination, it can be said that the petitioner was not travelling in the vehicle in the course of his employment and as directed by his employer. Section 147(1)(b)(i) takes within its fold any liability which may be incurred by the insurer in respect of the death or bodily injury to any person.

1. (2003) 2 SCC 223.
2. (2008) 1 SCC 423

> Therefore, the argument of the insurance company that no goods were being carried in the vehicle at the time of accident and therefore, the petitioner was only a gratuitous passenger cannot be countenanced at all. Even otherwise, the first proviso to Section147(1) will cast a liability on the insurer to indemnify the owner in respect of the injury sustained by the employee of the insured arising out of and in the course of his employment."

9. It is appropriate to quote Section 147 of the 1988 Act as was obtaining on the date of accident, i.e., 16.10.1993, which reads as follows :

> "147. *Requirements of policies and limits of liability*.— (1) In order to comply with the requirements of this Chapter, a policy of insurance must be a policy which—
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> (*a*) is issued by a person who is an authorized insurer; and\
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> (*b*) insures the person or classes of persons specified in the policy to the extent specified in sub-section (2)—
>
> (*i*) against any liability which may be incurred by him in respect of the death of or bodily injury to any person or damage to any property of a third party caused by or arising out of the use of the vehicle in a public place;
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> (*ii*) against the death of or bodily injury to any passenger of a public service vehicle caused by or arising out of the use of the vehicle in a public place:
>
> Provided that a policy shall not be required—
>
> (*i*) to cover liability in respect of the death, arising out of and in the course of his employment, of the employee of a person insured by the policy or in respect of bodily injury sustained by such an employee arising out of and in the course of his employment other than a liability arising under the Workmen's Compensation Act, 1923 (8 of 1923), in respect of the death of, or bodily injury to, any such employee—
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> (*a*) engaged in driving the vehicle, or
>
> (*b*) if it is a public service vehicle engaged as a conductor

of the vehicle or in examining tickets on the vehicle, or

(*c*) if it is a goods carriage, being carried in the vehicle, or

(*ii*) to cover any contractual liability.

Explanation.—For the removal of doubts, it is hereby declared that the death of or bodily injury to any person or damage to any property of a third party shall be deemed to have been caused by or to have arisen out of, the use of a vehicle in a public place notwithstanding that the person who is dead or injured or the property which is damaged was not in a public place at the time of the accident, if the act or omission which led to the accident occurred in a public place.

(2) Subject to the proviso to sub-section (1), a policy of insurance referred to in sub-section (1), shall cover any liability incurred in respect of any accident, up to the following limits, namely—

(*a*) save as provided in clause (*b*), the amount of liability incurred;

(*b*) in respect of damage to any property of a third party, a limit of rupees six thousand:

Provided that any policy of insurance issued with any limited liability and in force, immediately before the commencement of this Act, shall continue to be effective for a period of four months after such commencement or till the date of expiry of such policy whichever is earlier.

(3) A policy shall be of no effect for the purposes of this Chapter unless and until there is issued by the insurer in favour of the person by whom the policy is effected a certificate of insurance in the prescribed form and containing the prescribed particulars of any condition subject to which the policy is issued and of any other prescribed matters; and different forms, particulars and matters may be prescribed in different cases.

(4) Where a cover note issued by the insurer under the provisions of this Chapter or the rules made thereunder is

not followed by a policy of insurance within the prescribed time, the insurer shall, within seven days of the expiry of the period of the validity of the cover note, notify the fact to the registering authority in whose records the vehicle to which the cover note relates has been registered or to such other authority as the State Government may prescribe.

(5) Notwithstanding anything contained in any law for the time being in force, an insurer issuing a policy of insurance under this section shall be liable to indemnify the person or classes of persons specified in the policy in respect of any liability which the policy purports to cover in the case of that person or those classes of persons."

10. By the Motor Vehicles (Amendment) Act, 1994 (for short, '1994 Amendment Act'), Section 147 came to be amended. The expression "including owner of the goods or his authorised representative carried in the vehicle" was added in Section 147. The amended Section 147 has been considered by this Court in various decisions, some of which we intend to refer a little later.

11. In *New India Assurance Company v. Satpal Singh and Others*[3], this Court with reference to the provisions in the Motor Vehicles Act, 1939 and the provisions in 1988 Act, particularly Section 147, held that under the 1988 Act an insurance policy covering third party risk was not required to exclude gratuitous passengers in a vehicle no matter that the vehicle is of any type or class. It was also held that the earlier decisions of this Court rendered under the 1939 Act vis-à-vis gratuitous passengers were of no avail while considering the liability of the insurance company in respect of any accident which occurred or would occur after the 1988 Act came into force.

12. The correctness of the judgment in *Satpal Singh*[3] was doubted, inter alia, in *Asha Rani*[1] . It was felt that *Satpal Singh3* needed re-look insofar as cases covered under the 1988 Act prior to its amendment in 1994 were concerned. A three-Judge Bench in *Asha Rani*[1] noticed Section 147 of the 1988 Act prior

3. (2000) 1 SCC 237.

to its amendment in 1994 and after its amendment in 1994 and held in paragraph 9 of the Report (Pgs. 231-232) as follows :

> "In *Satpal case* [(2000) 1 SCC 237] the Court assumed that the provisions of Section 95(1) of the Motor Vehicles Act, 1939 are identical with Section 147(1) of the Motor Vehicles Act, 1988, as it stood prior to its amendment. But a careful scrutiny of the provisions would make it clear that prior to the amendment of 1994 it was not necessary for the insurer to insure against the owner of the goods or his authorised representative being carried in a goods vehicle. On an erroneous impression this Court came to the conclusion that the insurer would be liable to pay compensation in respect of the death or bodily injury caused to either the owner of the goods or his authorised representative when being carried in a goods vehicle the accident occurred. If the Motor Vehicles Amendment Act of 1994 is examined, particularly Section 46, by which the expression "injury to any person" in the original Act stood substituted by the expression "injury to any person including owner of the goods or his authorised representative carried in the vehicle", the conclusion is irresistible that prior to the aforesaid Amendment Act of 1994, even if the widest interpretation is given to the expression "to any person" it will not cover either the owner of the goods or his authorised representative being carried in the vehicle. The objects and reasons of clause 46 also state that it seeks to amend Section 147 to include owner of the goods or his authorised representative carried in the vehicle for the purposes of liability under the insurance policy. It is no doubt true that sometimes the legislature amends the law by way of amplification and clarification of an inherent position which is there in the statute, but a plain meaning being given to the words used in the statute, as it stood prior to its amendment of 1994, and as it stands subsequent to its amendment in 1994 and bearing in mind the objects and reasons engrafted in the amended provisions referred to earlier, it is difficult for us to construe that the expression "including owner of the goods or his authorised representative carried in the vehicle" which was added to the pre-existing expression "injury to any person" is either clarificatory or amplification of the pre-existing statute. On the other hand it clearly demonstrates that the legislature wanted to bring within the sweep of Section 147 and making it compulsory for the insurer to insure even in case of a goods vehicle, the owner of the goods or his authorised representative being carried in a goods vehicle when that vehicle met with an accident and the owner of the goods or his representative either dies or suffers bodily injury. The judgment of this Court in *Satpal case* therefore must be held to have not been correctly decided and the impugned judgment of the Tribunal as well as that of the High Court accordingly are set aside and these appeals are allowed. It is held that the insurer will not be liable for paying compensation to the owner of the goods or his authorised representative on being carried in a goods vehicle when that vehicle meets with an accident and the owner of the goods or his representative dies or suffers any bodily injury."

13. S.B. Sinha, J. in his supplementary judgment in *Asha Rani*[1], while concurring with the above, observed as follows (Pg. 235):

> "26. In view of the changes in the relevant provisions in the 1988 Act vis-à-vis the 1939 Act, we are of the opinion that the meaning of the words "any person" must also be attributed having regard to the context in which they have been used i.e. "a third party". Keeping in view the provisions of the 1988 Act, we are of the opinion that as the provisions thereof do not enjoin any statutory liability on the owner of a vehicle to get his vehicle insured for any passenger travelling in a goods vehicle, the insurers would not be liable therefor.
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> 27. Furthermore, sub-clause (*i*) of clause (*b*) of sub-section (1) of Section 147 speaks of liability which may be incurred by the owner of a vehicle in respect of death of or bodily injury to any person or damage to any property of a third

party caused by or arising out of the use of the vehicle in a public place, whereas sub-clause (*ii*) thereof deals with liability which may be incurred by the owner of a vehicle against the death of or bodily injury to any passenger of a public service vehicle caused by or arising out of the use of the vehicle in a public place.

28. An owner of a passenger-carrying vehicle must pay premium for covering the risks of the passengers. If a liability other than the limited liability provided for under the Act is to be enhanced under an insurance policy, additional premium is required to be paid. But if the ratio of this Court's decision in *New India Assurance Co. v. Satpal Singh* [(2000) 1 SCC 237] is taken to its logical conclusion, although for such passengers, the owner of a goods carriage need not take out an insurance policy, they would be deemed to have been covered under the policy wherefor even no premium is required to be paid.

14. *Asha Rani*[1] has been relied upon in *Oriental Insurance Co. Ltd. v*. *Devireddy Konda Reddy and Others*[4] wherein it was held as under (Pgs. 342-343):

"….The difference in the language of "goods vehicle" as appearing in the old Act and "goods carriage" in the Act is of significance. A bare reading of the provisions makes it clear that the legislative intent was to prohibit goods vehicle from carrying any passenger. This is clear from the expression "in addition to passengers" as contained in the definition of "goods vehicle" in the old Act. The position becomes further clear because the expression used is "goods carriage" is solely for the carriage of "goods". Carrying of passengers in a goods carriage is not contemplated in the Act. There is no provision similar to clause (*ii*) of the proviso appended to Section 95 of the old Act prescribing requirement of insurance policy. Even Section 147 of the Act mandates compulsory coverage against death of or bodily injury to any passenger of "public service vehicle". The proviso makes it further clear that

4. (2003) 2 SCC 339.

compulsory coverage in respect of drivers and conductors of public service vehicle and employees carried in goods vehicle would be limited to liability under the Workmen's Compensation Act, 1923 (in short "the WC Act"). There is no reference to any passenger in "goods carriage".

14.1. Then in paragraphs 10 and 11 of the Report (Pg. 343), this Court held in *Devireddy Konda Reddy*[4] as under :

"10. The inevitable conclusion, therefore, is that provisions of the Act do not enjoin any statutory liability on the owner of a vehicle to get his vehicle insured for any passenger travelling in a goods carriage and the insurer would have no liability therefor.

11. Our view gets support from a recent decision of a three-Judge Bench of this Court in *New India Assurance Co. Ltd. v. Asha Rani [(2003) 2 SCC 223]* in which it has been held that *Satpal Singh case [(2000) 1 SCC 237]* was not correctly decided. That being the position, the Tribunal and the High Court were not justified in holding that the insurer had the liability to satisfy the award."

15. In *Cholleti Bharatamma2*, this Court was concerned with the question about the liability of the insurance company to indemnify the owner of the vehicle in respect of death of passengers travelling in goods vehicle. The Court considered the applicability of Section 147 as it originally stood under 1988 Act and after its amendment in 1994. In relation to the accident that occurred on 16.12.1993 i.e., prior to the 1994 amendment in SLP(C) 7237-39/2003, this Court set aside the judgment of the High Court and allowed the appeal of the insurance company by observing as follows (Pg. 430):

"14. The date of accident being 16-12-1993, the amendment carried out in the year 1994 in Section 147 of the Motor Vehicles Act would not be applicable.

15. The Motor Accidents Claims Tribunal, Nalgonda, by a judgment and award dated 13-11-1997 awarded various sums overruling the defence of the appellant herein that they were unauthorised passengers. The High Court,

however, by reason of the impugned judgment, relying on or on the basis of a decision of this Court in *Satpal Singh* [(2000) 1 SCC 237] directed as under:

> "The learned counsel for the Insurance Company submitted that the issue involved in these appeals is squarely covered by the decision of the Supreme Court in *New India Assurance Co. Ltd. v. Satpal Singh* [(2000) 1 SCC 237], wherein Their Lordships held that under the Motor Vehicles Act, 1988 all insurance policies covering third-party risks are not required to exclude gratuitous passengers in the vehicle though vehicle is of any type or class.
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> In view of the proposition of law laid down by the Supreme Court in the decision stated supra, these appeals are dismissed. No costs."

16**.** Following the aforementioned principles, the impugned judgment cannot be sustained which is set aside. The appeals are allowed accordingly."

15.1. With reference to the accident that took place on 24.12.1993 (prior to 1994 amendment) in SLP(C) Nos. 7241-43/2003, this Court in *Cholleti Bharatamma*[2] in paragraphs 17,18,19,20 and 21 (Pgs. 430-431) held as under :

> "17. In the aforementioned case, accident took place on 24-12-1993. The respondents herein filed a claim petition claiming compensation for the death of one Kota Venkatarao who had allegedly paid a sum of Rs 20 for travelling in the lorry. The Tribunal held:
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> > "In the absence of rebuttal evidence from the deceased and some others who travelled in the said vehicle in the capacity of owner of the luggage which was carried by them at the time of accident, it cannot be said that it is a violation of the policy, since it is not fundamental breach so as to afford to the insurer to eschew the liability altogether as per the decision in *B.V. Nagaraju v. Oriental Insurance Co. Ltd.* [(1996) 4 SCC 647 : AIR 1996 SC 2054]"

18. The High Court, however, relying upon *Satpal Singh* [(2000) 1 SCC 237] opined:

> "This issue raised in this appeal is covered by the decision of the Supreme Court in *New India Assurance Co. Ltd. v. Satpal Singh* wherein Their Lordships held that under the Motor Vehicles Act, 1988 all insurance policies covering third-party risks are not required to exclude gratuitous passengers in the vehicles though the vehicle is of any type or class. Following the same, the appeal is dismissed. No order as to costs."

19. It is now well settled that the owner of the goods means only the person who travels in the cabin of the vehicle.

20. In this case, the High Court had proceeded on the basis that they were gratuitous passengers. The admitted plea of the respondents themselves was that the deceased had boarded the lorry and paid an amount of Rs 20 as transport charges. It has not been proved that the deceased was travelling in the lorry along with the driver or the cleaner as the owner of the goods. Travelling with the goods itself does not entitle anyone to protection under Section 147 of the Motor Vehicles Act.

21. For the reasons aforementioned, this appeal is allowed."

16. In the present case, Section 147 as originally existed in 1988 Act is applicable and, accordingly, the judgment of this Court in *Asha Rani*[1] is fully attracted. The High Court was clearly in error in reviewing its judgment and order delivered on 09.11.2010 in review petition filed by the claimant by applying Section 147(1)(b)(i). The High Court committed grave error in holding that Section 147(1)(b)(i) takes within its fold any liability which may be incurred by the insurer in respect of the death or bodily injury to any person. The High Court also erred in holding that the claimant was travelling in the vehicle in the course of his employment since he was a spare driver in the vehicle

although he was not driving the vehicle at the relevant time but he was directed to go to the worksite by his employer. The High Court erroneously assumed that the claimant died in the course of employment and overlooked the fact that the claimant was not in any manner engaged on the vehicle that met with an accident but he was employed as a driver in another vehicle owned by M/s. P.L. Construction Company. The insured (owner of the vehicle) got insurance cover in respect of the subject goods vehicle for driver and cleaner only and not for any other employee. There is no insurance cover for the spare driver in the policy. As a matter of law, the claimant did not cease to be a gratuitous passenger though he claimed that he was a spare driver. The insured had paid premium for one driver and one cleaner and, therefore, second driver or for that purpose 'spare driver' was not covered under the policy.

17. The High Court misconstrued the proviso following sub-section (1) of Section 147 of the 1988 Act. What is contemplated by proviso to Section 147 (1) is that the policy shall not be required to cover liability in respect of death or bodily injury sustained by an employee arising out of and in the course of his employment other than a liability arising under the Workmen's Compensation Act, 1923. The claimant was admittedly not driving the vehicle nor he was engaged in driving the said vehicle. Merely because he was travelling in a cabin would not make his case different from any other gratuitous passenger.

18. The impugned judgment is founded on misconstruction of Section 147. The High Court was wrong in holding that the insurance company shall be liable to indemnify the owner of the vehicle and pay the compensation to the claimant as directed in the award by the Tribunal.

19. The next question that arises for consideration is whether in the peculiar facts of this case a direction could be issued to the insurance company to first satisfy the awarded amount in favour of the claimant and recover the same from the owner of the vehicle (respondent no. 2 herein).

20. In *National Insurance Co. Ltd. v. Baljit Kaur and*

Others[5]*,* this Court was confronted with a similar situation. A three-Judge Bench of this Court in paragraph 21 of the Report (Pg. 8) held as under :

> "21. The upshot of the aforementioned discussions is that instead and in place of the insurer the owner of the vehicle shall be liable to satisfy the decree. The question, however, would be as to whether keeping in view the fact that the law was not clear so long such a direction would be fair and equitable. We do not think so. We, therefore, clarify the legal position which shall have prospective effect. The Tribunal as also the High Court had proceeded in terms of the decision of this Court in *Satpal Singh*. The said decision has been overruled only in *Asha Rani*. We, therefore, are of the opinion that the interest of justice will be subserved if the appellant herein is directed to satisfy the awarded amount in favour of the claimant, if not already satisfied, and recover the same from the owner of the vehicle. For the purpose of such recovery, it would not be necessary for the insurer to file a separate suit but it may initiate a proceeding before the executing court as if the dispute between the insurer and the owner was the subject-matter of determination before the Tribunal and the issue is decided against the owner and in favour of the insurer. We have issued the aforementioned directions having regard to the scope and purport of Section 168 of the Motor Vehicles Act, 1988, in terms whereof, it is not only entitled to determine the amount of claim as put forth by the claimant for recovery thereof from the insurer, owner or driver of the vehicle jointly or severally but also the dispute between the insurer on the one hand and the owner or driver of the vehicle involved in the accident inasmuch as can be resolved by the Tribunal in such a proceeding."

21. The above position has been followed by this Court in *National Insurance Co. Ltd. v. Challa Bharathamma & Ors.*[6]*,*

5. (2004) 2 SCC 1.

6. (2004) 8 SCC 517.

wherein this Court in paragraph 13 (Pg. 523) observed as under:

> "13. The residual question is what would be the appropriate direction. Considering the beneficial object of the Act, it would be proper for the insurer to satisfy the award, though in law it has no liability. In some cases the insurer has been given the option and liberty to recover the amount from the insured. For the purpose of recovering the amount paid from the owner, the insurer shall not be required to file a suit. It may initiate a proceeding before the executing court concerned as if the dispute between the insurer and the owner was the subject-matter of determination before the Tribunal and the issue is decided against the owner and in favour of the insurer. Before release of the amount to the claimants, owner of the offending vehicle shall furnish security for the entire amount which the insurer will pay to the claimants. The offending vehicle shall be attached, as a part of the security. If necessity arises the executing court shall take assistance of the Regional Transport Authority concerned. The executing court shall pass appropriate orders in accordance with law as to the manner in which the owner of the vehicle shall make payment to the insurer. In case there is any default it shall be open to the executing court to direct realisation by disposal of the securities to be furnished or from any other property or properties of the owner of the vehicle i.e. the insured. In the instant case, considering the quantum involved, we leave it to the discretion of the insurer to decide whether it would take steps for recovery of the amount from the insured."

22. In *National Insurance Company Limited v. Kaushalaya Devi and Others*[7]. In paragraph 15 of the Report (pg. 250), the Court observed as follows:

> "15. For the reasons aforementioned, civil appeal arising out of SLP (C) No. 10694 is allowed and civil appeal arising out of SLP (C) No. 9910 of 2006 is dismissed. If

7. (2008) 8 SCC 246.

> the amount deposited by the Insurance Company has since been withdrawn by the first respondent, it would be open to the Insurance Company to recover the same in the manner specified by the High Court. But if the same has not been withdrawn the deposited amount may be refunded to the Insurance Company and the proceedings for realisation of the amount may be initiated against the owner of the vehicle. In the facts and circumstances of the case, however, there shall be no order as to costs."

23. We are informed that by an order dated 19.01.2007 in *National Insurance Co. v. Roshan Lal and Another* [SLP (C) No. 5699/2006] in light of the argument raised before a two-Judge Bench that the direction ought not to be issued to the insurance company to discharge the liability under the award first and then recover the same from the owner, the matter has been referred to the larger Bench by the following order:

> "Having regard to the submissions urged before us, we are of the view that this petition may be placed for consideration before a larger Bench. We notice that in some of the decisions such a direction was made in cases where the compensation had already been paid by the insurer, but there are observations therein which support the view that such a direction can be made in all cases where the owner has insured his vehicle against third party risks. In *Baljit Kaur's* case (supra) which is a judgment rendered by three Hon'ble Judges, such a direction was made in the special circumstances noticed by the Court in paragraph 21 of the report. There are observations in *Oriental Insurance Co. Ltd. Vs. Ranjit Saikia and Ors.* (2002) 9 SCC 390 which may support the contention of the petitioners before us."

24. In *National Insurance Company Ltd. v. Parvathneni & Another* [SLP(C)….CC No. 10993 of 2009], the following two questions have been referred to the larger Bench for consideration:

> (1) If an Insurance Company can prove that it does not have any liability to pay any amount in law to the claimants

under the Motor Vehicles Act or any other enactment, can the Court yet compel it to pay the amount in question giving it liberty to later on recover the same from the owner of the vehicle.

(2) Can such a direction be given under Article 142 of the Constitution, and what is the scope of Article 142? Does Article 142 permit the Court to create a liability where there is none?"

25. The pendency of consideration of the above questions by a larger Bench does not mean that the course that was followed in *Baljit Kaur*[5] and *Challa Bharathamma*[6] should not be followed, more so in a peculiar fact situation of this case. In the present case, the accident occurred in 1993. At that time, claimant was 28 years' old. He is now about 48 years. The claimant was a driver on heavy vehicle and due to the accident he has been rendered permanently disabled. He has not been able to get compensation so far due to stay order passed by this Court. He cannot be compelled to struggle further for recovery of the amount. The insurance company has already deposited the entire awarded amount pursuant to the order of this Court passed on 01.08.2011 and the said amount has been invested in a fixed deposit account. Having regard to these peculiar facts of the case in hand, we are satisfied that the claimant (Respondent No. 1) may be allowed to withdraw the amount deposited by the insurance company before this Court along-with accrued interest. The insurance company (appellant) thereafter may recover the amount so paid from the owner (Respondent No. 2 herein). The recovery of the amount by the insurance company from the owner shall be made by following the procedure as laid down by this Court in the case of *Challa Bharathamma*[6].

26. Appeal is allowed and disposed of as above with no order as to costs.

K.K.T. Appeal allowed.

THE GOVERNMENT OF ANDHRA PRADESH AND OTHERS

v.

CH. GANDHI

(Civil Appeal No. 1427-1428 of 2013)

FEBRUARY 19, 2013

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

SERVICE LAW:

Disciplinary proceedings - Penalty - Disciplinary proceedings initiated under unamended rule - Penalty imposed in terms of amended rule - Held: In the case at hand, the disciplinary proceeding was initiated by serving a charge-sheet for the purpose of imposition of a major penalty - Employee had no vested right to be imposed a particular punishment as envisaged under the unamended rules - Unamended r.9(vii) was only dealing with reduction or reversion, but stipulation of postponement of future increments has come by way of amendment - The same being a lesser punishment than the maximum, is imposable and the disciplinary authority has not committed any error by imposing the said punishment, regard being had to the nature of charges - It does not violate any Constitutional protection - Andhra Pradesh Civil Services (Classification, Control and Appeal) Rules, 1991 - r. 9(vii)(b).

Service Law - Conditions of service - Amendment - Retrospective operaion - Held: There is a presumption against the retrospective operation of a statute - A substituted provision is the resultant factor of the amendment in the Rules and it shall guide the consequences that follow from the amended Rules - In the instant case, the amended Rule despite having been substituted has no retrospective effect.

Disciplinary proceedings initiated against the respondent, a Senior Accountant in the Sub-Treasury, culminated in the penalty of his reversion to the post of Junior Accountant for two years with the stipulation that there would be postponement of future increments. The State Administrative Tribunal upheld the order. The High Court set aside the punishment holding that it amounted to imposition of two penalties. However, the authorities were granted liberty to pass appropriate orders keeping in view the Andhra Pradesh Civil Services (Classification, Control and Appeal) Rules, 1991.

In the instant appeals filed by the State Government the question for consideration before the Court was: whether the punishment could be imposed in accord with the amended Rules or under the unamended Rules?

Allowing the appeals, the Court

HELD: 1.1 The disciplinary proceedings were initiated under the unamended Rules. The disciplinary authority has imposed the penalty under substituted sub-rule (vii) of r. 9 of the Andhra Pradesh Civil Services (Classification, Control and Appeal) Rules, 1991. However, the amended Rules were not brought to the notice of the High Court and it has referred to the unamended Rules.There is a presumption against the retrospective operation of a statute, and further a greater retrospectivity cannot be conferred on a statute than the language makes it necessary. [para 14, 15, 20 and 26] [32-G; 33-A-B; 35-C; 38-C]

Union of India and Others v. K.V. Jankiraman and Others **1991 (3) SCR 790 =1991 (4) SCC 109;** *Delhi Development Authority v. H.C. Khurana* **1993 (2) SCR 1033 = 1993 (3) SCC 196;** *Union of India and Others v. Sangram Keshari Nayak* **2007 (9) SCR 177 = 2007 (7) SCC 704;** *Coal India Ltd. and Others v. Saroj Kumar Mishra* **2007 (5) SCR 233 = 2007 (9)**

SCC 625; *Tejshree Ghag and Others v. Prakash Parashuram Patil and Others* **2007 (7) SCR 214 = 2007 (6) SCC 220; and** *Marripati Nagaraja and Others v. Government of Andhra Pradesh and Others* **2007 (11) SCR 506 = 2007 (11) SCC 522;** *Hitendra Vishnu Thakur v. State of Maharashtra and Others* **1994 (1) Suppl. SCR 360 = 1994 (4) SCC 602 - referred to.**

Maxwell on the Interpretation of Statute, 12th edition; and Francis Bennion's Statutory Interpretation, **2nd Edn. - referred to.**

1.2 On a perusal of the unamended r.9, there can be no doubt that clause (vii) only related to reduction to a lower rank in the seniority list or to a lower time scale of pay or in the lower grade or pay not being lower than that to which he was directly recruited. It did not have the stipulation of postponement of future increment on restoration to the higher category. After the amendment, r.9 (vii) has been bifurcated into two parts. Under r. 9(vii)(a), the punishment that is provided is reduction to a lower stage in the time scale of pay for a specified period with further directions as to whether or not the Government servant would earn increments of pay during the period of such reduction and whether on the expiry of such period, the reduction would or would not have the effect of postponing the future increments of his pay. Rule 9(vii)(b) deals with reduction to lower time-scale of pay, grade, post or service which shall ordinarily be a bar for promotion with or without further direction regarding conditions of restoration to the grade or post or service from which the Government servant was reduced and his seniority and pay on such restoration to that grade, post or service. [para 17 and 41] [33-G-H; 34-A; 49-D-G]

1.3 In the case at hand, the notification uses the phraseology that clause (vii) shall be substituted with the amending clause. The provision which is substituted by

the amending Rules, does not obliterate the rights of the parties as if they never existed. A substituted provision is the resultant factor of the amendment in the Rules and it shall guide the consequences that follow from the amended Rules. The amended Rule despite having been substituted has no retrospective effect. That apart, the notification uses the phraseology "shall be substituted" which clearly indicates the fact that the amended Rule is prospective. [para 27 and 33] [38-D-E; 42-E]

Government of India and Others v. Indian Tobacco Association **2005 (2) Suppl. SCR 859 = 2005 (7) SCC 396;** *Pyare Lal Sharma v. Managing Director and Others* **1989 (3) SCR 428 = 1989 (3) SCC 448 - relied on.**

Bhagat Ram Sharma v. Union of India and Others **1988 SCR 1034 = 1988 Suppl. SCC 30;** *Ritesh Agarwal and Another v. Securities and Exchange Board of India and Others* **2008 (8) SCR 553 = 2008 (8) SCC 205;** *Roshan Lal Tandon v. Union of India and Another* **1968 SCR 185 = 1967 AIR 1889;** *Raj Kumar v. Union of India and Others* **1975 (3) SCR 963 = 1975 AIR 1116 - referred to.**

Senior Superintendent, R.M.S. Cochin and Another v. K.V. Gopinath, Sorter **1972 (3) SCR 530 =1972 AIR 1487 - stands overruled.**

"Principles of Statutory Interpretation" **by G.P. Singh - referred to** *Salmond and Williams on Contracts* **- referred to.**

2.1 The rules have been framed under Art. 309 of the Constitution. There can be no cavil that by amending the rule, a punishment cannot be imposed in respect of amisconduct or delinquency which was not amisconduct or a ground to proceed in a departmental enquiry before the amended rules came into force. Further, a person cannot be subjected to a penalty greater than which

might have been inflicted under the rule in force at the time of commission of delinquency or misconduct. [para 43] [51-A-C]

Ex-Capt. K.C. Arora and Another v. State of Haryana and Others **1984 (3) SCR 623 = 1984 (3) SCC 281;** *State of Gujarat v. Raman Lal Keshav Lal Soni* **1983 (2) SCR 598 = 1983 (3) SCC 33;** *K. Satwant Singh v. The State of Punjab* **1960 SCR 89 = 1960 AIR 266;** *Smt. Maya Rani Punj v. Commissioner of Income-tax, Delhi* **1985 (3) Suppl. SCR 827 = 1986 AIR 293;** *Tiwari Kanhaiyalal etc. v. The Commissioner of Income-tax, Delhi* **1975 (3) SCR 927 = 1975 AIR 902 - referred to.**

2.2 It is worth noting that under the unamended rule, there were three other categories of punishments, namely, compulsory retirement, removal from service and dismissal from service. The said punishments have been maintained in the new rules. In the case at hand, the disciplinary proceeding was initiated by serving a charge-sheet for the purpose of imposition of a major penalty. In this backdrop, it would be difficult to say that the employee had the vested right to be imposed a particular punishment as envisaged under the unamended rules. The rule making authority thought it apposite to amend the rules to introduce a different kind of punishment which is lesser than the maximum punishment or, for that matter, lesser punishment than that of compulsory retirement from service. Rule 9(vii) was only dealing with reduction or reversion but issuance of any other direction was not a part of it. It has come by way of amendment. The same being a lesser punishment than the maximum, is imposable and the disciplinary authority has not committed any error by imposing the said punishment, regard being had to the nature of charges. [para 42 and 50] [50-F-G; 54-F-H; 55-A-B]

2.3 The rule making authority has splitted r. 9(vii) into two parts - one is harsher than the other, but, both are less severe than the other punishments, namely, compulsory retirement, removal from service or dismissal. The reason behind it is not to let off one with simple reduction but to give a direction about the condition of pay on restoration and also not to impose a harsher punishment which may not be proportionate. The same really does not affect any vested or accrued right. It also does not violate any Constitutional protection. [para 50] [55-C-D]

2.4 The order passed by the High Court that a double punishment has been imposed does not withstand scrutiny and is set aside and the order of punishment imposed by the disciplinary authority is restored. [para 51-52] [55-E-F]

Case Law Reference:

1993 (2) SCR 1033	**referred to**	**para 18**
1991 (3) SCR 790	**referred to**	**para 19**
2007 (9) SCR 177	**referred to**	**para 20**
2007 (5) SCR 233	**referred to**	**para 20**
2007 (7) SCR 214	**referred to**	**para 21**
2007 (11) SCR 506	**referred to**	**para 22**
1994 (1) Suppl. SCR 360	**relied on**	**para 25**
1988 SCR 1034	**referred to**	**para 27**
1989 (3) SCR 428	**relied on**	**para 28**
2008 (8) SCR 553	**referred to**	**para 31**
2005 (2) Suppl. SCR 859	**relied on**	**para 32**
1968 SCR 185	**referred to**	**para 35**

1975 (3) SCR 963	**referred to**	**para 36**
1972 (3) SCR 530	**stands overruled**	**para 36**
1984 (3) SCR 623	**referred to**	**para 37**
1983 (2) SCR 598	**referred to**	**para 37**
1997(3) Suppl. SCR 63	**relied on**	**para 39**
1960 SCR 89	**referred to**	**para 46**
1985 (3) Suppl. SCR 827	**referred to**	**para 47**
1975 (3) SCR 927	**referred to**	**para 48**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1427-1428 of 2013.

From the Judgment & Orders dated 14.06.2007 of the High Court of Judicature, Andhra Pradesh at Hyderabad in Writ Petition No. 12177 of 2007 and dated 08.02.2008 in Review WPMP No. 126152 of 2007 in WP No. 12177 of 2007.

G.N. Reddy for the Appellants.

R.S. Krishnan, C.S.N. Mohan Rao for the Respondent.

The Judgment of the Court was delivered by

DIPAK MISRA, J. 1. Leave granted.

2. The present appeals by special leave are directed against the judgment and order dated 14.6.2007 passed by the High Court of Judicature, Andhra Pradesh at Hyderabad in Writ Petition No. 12177 of 2007 and the order dated 8.2.2008 passed in Review WPMP (SR) No. 126152 of 2007 arising from the said writ petition whereby the Division Bench overturned the order dated 16.5.2007 passed by the Andhra Pradesh Administrative Tribunal, Hyderabad (for short "the Tribunal") in O.A. No. 923 of 2006 on the ground that the

disciplinary authority had imposed two major penalties. Be it noted, the High Court granted liberty to the department to pass appropriate orders keeping in view the Andhra Pradesh Civil Services (Classification, Control and Appeal) Rules, 1991 (for short "the Rules").

3. The facts which are imperative to be adumbrated are that a disciplinary proceeding under Rule 5 of the Rules was initiated against the respondent, a Senior Accountant in the Office of the Sub Treasury, Nakrekal, on the charges that while functioning as the senior most Accountant in the said office and in-charge of the strong room keys, at the time of surprise check by the Deputy Director, District Treasury, Nalgonda, he was absent and had not signed the attendance register in token of his having attended the office and also not maintained the movement register as required under the Rules; that he had failed to keep the currency chest book in the currency chest and not endorsed every transaction; that he had passed the bills, cheques and challans in token of approval of the payment/ receipts without signing them; that he had not properly maintained the strong entrants' register which was found outside the strong room and further the entries were not recorded and signed by him; that he had failed to remain present at the time of depositing money or withdrawing money from the currency chest and allowed others to operate the currency chest by using the keys of joint custodian; and that he had failed to submit the currency chest slip to R.B.I. on 15.4.2003 in respect of the currency chest transactions of 15.4.2003 and also failed to submit the daily sheets of 15.4.2003 and 16.4.2003.

4. An Enquiry Officer was appointed to enquire into the charges and he submitted the report that the charges were proven. On the basis of the enquiry report, the disciplinary authority, after following the requisite procedure, imposed the penalty of reversion to the post of Junior Accountant for two years with the stipulation that there would be postponement of future increments.

5. Aggrieved by the said punishment, the respondent approached the Tribunal in O.A. No. 923 of 2006 and raised various points assailing the validity of the initiation of the proceeding, the manner in which the enquiry was conducted and lastly, that the punishment imposed was disproportionate to the misconduct. The Tribunal referred to the Rule position and came to hold that there was no illegality or irregularity in the initiation of the disciplinary proceeding, framing of charge or conduct of the enquiry and further, regard being had to the gravity of the charge, the punishment could not be treated to be disproportionate. Being of this view, the Tribunal dismissed the original application.

6. The failure before the Tribunal compelled the respondent to invoke the jurisdiction of the High Court which, after adverting to the facts in detail and the competence of the person who had initiated the proceeding by issuing the memorandum of charges, came to hold that the findings recorded by the Tribunal on the said scores were absolutely defensible and did not warrant any interference. As far as the imposition of punishment was concerned, a contention was advanced that he had been imposed two major penalties which were not in consonance with the Rules. The High Court referred to the order of punishment, Rule 9 of the Rules that deals with major penalties and sub-Rule 27 of Rule 11 of the said Rules and came to hold that the penalty imposed by the disciplinary authority did amount to imposition of two penalties and, accordingly, set aside the punishment which had been concurred with by the tribunal and clarified that the said overturning of the orders would not preclude the authorities to pass appropriate orders pertaining to punishment keeping in view the provisions of the Rules.

7. Calling in question the legal propriety of the said order, it is urged by Mr. G.N. Reddy, learned counsel for the State and

its functionaries, that the High Court has erroneously opined that two major penalties had been issued in violation of the Rules though reversion to the lower post for a period of two years with the stipulation of postponement of future increments on restoration to higher category does not tantamount to two major penalties under Rule 9 and, under no circumstances, it contravenes sub-rule (27) to Rule 11 of the Rules. It is his submission that the said punishment, being in consonance with the Rules and further such imposition of punishment not being unknown to service jurisprudence, did not warrant interference by the High Court. The learned counsel further canvassed that the amended Rules permit imposition of such punishment but the same has not been taken note of by the High Court which makes the order absolutely vulnerable.

8. Mr. R.S. Krishnan, learned counsel appearing for the respondent, resisting the aforesaid proponements, contended that the interpretation placed by the High Court on the Rules cannot be found fault with inasmuch as the language employed in the Rules is absolutely plain, clear and unambiguous and, on a careful reading of the same, it is manifest that under the Rules, imposition of two major penalties is not permissible. It is further urged by him that when the language employed in the Rules has been differently couched and both the employer and employee are bound by the Rules, what could be jurisprudentially permissible need not be adverted to in this case. The learned counsel would further submit that the delinquent employee could not have been imposed such a punishment under Rule 9 of the Rules prior to its amendment as his case would be governed by the unamended Rules since the disciplinary proceeding was initiated prior to the amendment and, at that time, the punishment that was imposed was not envisaged.

9. In reply, the learned counsel for the State submitted that the respondent would be governed under the new Rules as clause (vii) of Rule 9 has been substituted and the term

"substituted" conveys that the Rule has retrospective effect. That apart, it is propounded that even if the rules are not treated as retrospective, the appellant had no vested right to be imposed a particular punishment under the unamended Rules.

10. At the very outset, we may clearly state that we are not concerned with the delinquency of the incumbent or the findings recorded in the disciplinary proceeding that has been conducted. We are also not required to address whether the competent authority had initiated the departmental proceeding, for the respondent has not assailed the order passed by the Division Bench of the High Court and it is only the State which has come up in appeal. Thus, the only aspect that requires to be dwelled upon is whether the punishment could be imposed in accord with the amended Rules or under the unamended Rules.

11. It is apt to note here that the punishment was imposed on 1.12.2005. The relevant part of the order passed by the Director of Treasuries and Accounts is reproduced below: -

> "After a detailed examination of the inquiry report and the explanation of the charged officer, the disciplinary authority finds that the charges framed against Sri Ch. Gandhi the then Senior Accountant and incharge Sub Treasury Officer, Sub Treasury (non-banking) Nakrekal have been proved. After careful consideration of the material facts and records and explanation of the individual, in exercise of the powers conferred under Sub Rule 27(ii) of Rule 11 read with Sub Rule (vii) of rule 9 of A.P.C.S. (C.C.&A) Rules, 1991 hereby awards a punishment of reversion to the lower post of junior accountant for two years with effect on postponing future increments on restoration to the higher category on Sri Ch. Gandhi, presently working as senior Accountant with immediate effect."

12. Regard being had to the nature of the punishment, it is necessary to scrutinize the Rule position. After the

amendment on 6.12.2003, the relevant part of Rule 9 which provides for major penalties is as follows: -

"Major Penalties

(vi) withholding of increments of pay with cumulative effect (G.O.Ms. No. 205, GA (Ser.C) Dept. dt. 5.6.98);

(vii) (a) save as provided for a in clause (v)(b), reduction to a lower stage in the time scale of pay for a specified period, with further directions as to whether or not the Government servant will earn increments of pay during the period of such reduction and whether on the expiry of such period, the reduction will or will not have the effect of postponing the future increments of his pay;

(vii) (b) reduction to lower time-scale of pay, grade, post or service which shall ordinarily be a bar to the promotion of the Government servant to the time-scale of pay, grade, post or service from which he was reduced, with or without further directions, regarding conditions of restoration to the grade or post or service from which the Government servant was reduced and his seniority and pay on such restoration to that grade, post or service;

(G.O.Ms. No. 373, G.A.(Ser.C) Dept., dt: 6.12.2003)

(viii) compulsory retirement;

(ix) removal from service which shall not be a disqualification for future employment under the Government;

(x) dismissal from service which shall ordinarily be a disqualification for future employment under the Government."

13. Sub-rule (27) of Rule 11 which has been relied on by the High Court reads as follows: -

"(27) Without prejudice to the foregoing provisions;

(i) every Head of Department may impose on a member of the State Services under his control, the penalty specified in clause (iii) of rule 9, except in the case of each member holding a post immediately below his rank; and

(ii) every Head of Department declared to be the appointing authority may impose on a member of the State Service holding a post at first level or at second level under his control, any of the penalties specified in clauses (i) to (viii) of rule 9.

(G.O.Ms. No. 428, GA (Ser.C) Dept. dt. 13.10.1999)

(iii) The special Chief Secretary and Chief Commissioner of Land Administration may impose any of the penalties specified in clause (ix) and clause (x) of rule 9 on Mandal Revenue Officers.

(G.O.Ms. No. 231, GA (Ser.C) Dept. dt. 7.6.2005)"

14. The High Court, relying on sub-rule (27)(ii) of Rule 11, has expressed the view that the punishments imposed against the respondent, namely, reversion to the lower rank and at the same time stoppage of increments, come under the purview of two major penalties as contemplated in Rule 9 of the Rules which is not permissible. On a perusal of the order passed by the High Court, it is evident that the High Court has referred to the unamended Rules.

15. The Rules were amended on 6.12.2003. Under the heading 'minor penalties' after clause (v)(a), clause (v)(b) was added. Under the heading 'major penalties', clause 7 was

substituted and the said clause was compartmentalized into two parts, namely, (vii)(a) and (vii)(b). The disciplinary authority, as is vivid from the aforequoted portion, has imposed the penalty under sub-rule (vii) of Rule 9 of the substituted Rule.

16. Rule 9 of the unamended or the old Rules read as follows: -

"Rule 9: Major Penalties:

(vi) withholding of increments of pay with cumulative effect.

(vii) Reduction to a lower rank in the seniority list or to a lower stage in the seniority list or to a lower stage in the timescale of pay or to a lower time scale of pay not being lower than that to which he was directly recruited or to lower grade or post not being lower than that to which he was directly recruited, whether in the same service or in another service, State or Subordinate;

(viii) Compulsory retirement;

(ix) Removal from service which shall not be a disqualification for future employment under the Government;

(x) Dismissal from service which shall ordinarily be a disqualification for future employment under the Government."

17. On a perusal of the unamended Rule, there can be no doubt that clause (vii) only related to reduction to a lower rank in the seniority list or to a lower time scale of pay or in the lower grade or pay not being lower than that to which he was directly recruited. It did not have the stipulation of postponement of future increment on restoration to the higher category. Thus, the seminal issue is whether the respondent could have been

imposed a punishment under the amended Rules. It is necessary to state here that the amended Rules were not brought to the notice of the High Court.

18. It is useful to note here that the charge-sheet was issued on 14.11.2003. In *Delhi Development Authority v. H.C. Khurana*[1], a two-Judge Bench posed the question relating to the stage when it can be said that a decision has been taken to initiate the disciplinary proceeding and, in this context, opined that the decision to initiate disciplinary proceedings cannot be subsequent to the issuance of the charge-sheet since issue of the charge-sheet is a consequence of the decision to initiate disciplinary proceedings. Framing the charge-sheet is the first step taken for holding the enquiry into the allegations on the decision taken to initiate disciplinary proceedings. The charge-sheet is framed on the basis of the allegations made against the government servant; the charge-sheet is then served on him to enable him to give his explanation; if the explanation is satisfactory, the proceedings are closed, otherwise, an enquiry is held into the charges; if the charges are not proved, the proceedings are closed and the government servant exonerated; but if the charges are proved, the penalty follows. Thus, the service of the charge-sheet on the government servant follows the decision to initiate disciplinary proceedings, and it does not precede or coincide with that decision.

19. Be it noted, in the said case, the decision rendered in *Union of India and Others v. K.V. Jankiraman and Others*[2] was explained by stating thus: -

"The word 'issued' used in this context in Jankiraman it is urged by learned counsel for the respondent, means service on the employee. We are unable to read Jankiraman in this manner. The context in which the word 'issued' has been used, merely means that the decision

1. (1993) 3 SCC 196.
2. (1991) 4 SCC 109.

to initiate disciplinary proceedings is taken and translated into action by despatch of the charge-sheet leaving no doubt that the decision had been taken. The contrary view would defeat the object by enabling the government servant, if so inclined, to evade service and thereby frustrate the decision and get promotion in spite of that decision."

20. In *Union of India and Others v. Sangram Keshari Nayak*[3], it has been held that a departmental proceeding is ordinarily said to be initiated when a charge-sheet is issued. In *Coal India Ltd. and Others v. Saroj Kumar Mishra*[4], similar view was reiterated. In view of the aforesaid pronouncements, there is not an iota of doubt that the disciplinary proceeding was initiated under the unamended Rules.

21. At this juncture, we may state with profit that the amended Rule has not been given any retrospective effect. In *Tejshree Ghag and Others v. Prakash Parashuram Patil and Others*[5], it has been ruled that the State has the power to alter the terms and conditions of service even with retrospective effect by making rules framed under the proviso appended to Article 309 of the Constitution of India, but it is also well settled that the rule so made ordinarily should state so expressly.

22. In *Marripati Nagaraja and Others v. Government of Andhra Pradesh and Others*[6], this Court has ruled that the State, in exercise of its power conferred upon it under the proviso appended to Article 309 of the Constitution of India, is entitled to make rules with retrospective effect and retroactive operation. Ordinarily, in absence of any rule and that too a rule which was expressly given a retrospective effect, the rules prevailing as on the date of the notification are to be applied. But if some rule has been given a retrospective effect which is within the domain

3. (2007) 6 SCC 704.
4. (2007) 9 SCC 625.
5. (2007) 6 SCC 220.
6. (2007) 11 SCC 522.

of the State, unless the same is set aside as being unconstitutional, the consequences flowing therefrom shall ensue. In such an event, the applicable rule would not be the rule which was existing but the one which had been validly brought on the statute book from an anterior date.

23. Presently, we shall deal with the contention of the learned counsel for the State who has laid emphasis on the fact that the said Rule has been substituted by the amendment dated 16.12.2003 and, therefore, it has to be treated to have retrospective effect. At this juncture, we may fruitfully refer to a passage from Maxwell on the Interpretation of Statute, 12th edition, wherein it has been stated thus: -

"Perhaps no rule of construction is more firmly established than thus - 'that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matters of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only'. The rule has, in fact, two aspects, for it, 'involves another and subordinate rule, to the effect that a statute is not to be construed so as to have greater retrospective operation than its language renders necessary'."

24. In *Francis Bennion's Statutory Interpretation,* 2nd Edn., while emphasizing on the concept of retrospective legislation and rights, the learned author has stated thus: -

"The essential idea of a legal system is that current law should govern current activities. Elsewhere in this work a particular Act is likened to a floodlight switched on or off, and the general body of law to the circumambient air. Clumsy though these images are, they show the inappropriateness of retrospective laws. If we do something today, we feel that the law applying to it should

be the law in force today, not tomorrow's backward adjustment of it. Such, we believe, is the nature of law. Dislike of ex post facto law is enshrined in the United States Constitution and in the Constitution of many American States, which forbid it. The true principle is that lex prospicit non respicit (law looks forward not back). As Willes, J. said retrospective legislation is 'contrary to the general principle that legislation by which the conduct of mankind is to be regulated ought, when introduced for the first time, to deal with future acts, and ought not to change the character of past transactions carried on upon the faith of the then existing law'."

25. In *Hitendra Vishnu Thakur v. State of Maharashtra and Others*[7], this Court dwelled upon the ambit and sweep of the amending Act and the concept of retrospective effect and, eventually, ruled thus: -

"(i) A statute which affects substantive rights is presumed to be prospective in operation unless made retrospective, either expressly or by necessary intendment, whereas a statute which merely affects procedure, unless such a construction is textually impossible, is presumed to be retrospective in its application, should not be given an extended meaning and should be strictly confined to its clearly-defined limits.

(ii) Law relating to forum and limitation is procedural in nature, whereas law relating to right of action and right of appeal even though remedial is substantive in nature.

(iii) Every litigant has a vested right in substantive law but no such right exists in procedural law.

(iv) A procedural statute should not generally speaking be applied retrospectively where the result would be to create new disabilities or obligations or to impose

7. (1994) 4 SCC 602.

new duties in respect of transactions already accomplished.

(v) A statute which not only changes the procedure but also creates new rights and liabilities shall be construed to be prospective in operation, unless otherwise provided, either expressly or by necessary implication."

26. From the aforesaid analysis of law, it is graphically clear that there is a presumption against the retrospective operation of a statute, and further a greater retrospectivity cannot be conferred on a statute than the language makes it necessary.

27. In the case at hand, the notification uses the phraseology that clause (vii) shall be substituted with the amending clause. The provision which is substituted by the amending Rules, does not obliterate the rights of the parties as if they never existed. A substituted provision is the resultant factor of the amendment in the Rules and it shall guide the consequences that follow from the amended Rules. In *Bhagat Ram Sharma v. Union of India and Others*[8], a two-Judge Bench, while dealing with the Punjab Public Service Commission (Conditions of Service) Regulations, 1958, making a distinction between two regulations, opined that in the absence of any provision giving Regulation 8(3) a retrospective operation, the same cannot prima facie bear a greater retroactive effect than intended. In this context, the Court proceeded to state as follows: -

"17. It is a matter of legislative practice to provide while enacting an amending law, that an existing provision shall be deleted and a new provision substituted. Such deletion has the effect of repeal of the existing provision. Such a law may also provide for the introduction of a new provision. There is no real distinction between 'repeal' and

8. AIR 1988 SC 740.

an 'amendment'. In Sutherland's Statutory Construction, 3rd Edn., Vol 1 at p. 477, the learned author makes the following statement of law:

> "The distinction between repeal and amendment as these terms are used by the Courts is arbitrary. Naturally the use of these terms by the Court is based largely on how the Legislature have developed and applied these terms in labeling their enactments. When a section is being added to an Act or a provision added to a section, the Legislatures commonly entitled the Act as an amendment..... When a provision is withdrawn from a section, the Legislatures call the Act an amendment particularly when a provision is added to replace the one withdrawn. However, when an entire Act or section is abrogated and no new section is added to replace it, Legislatures label the Act accomplishing this result a repeal. Thus as used by the Legislatures, amendment and repeal may differ in kind - addition as opposed to withdrawal or only in degree - abrogation of part of a section as opposed to abrogation of a whole section or Act; or more commonly, in both kind and degree - addition of a provision to a section to replace a provision being abrogated as opposed by abrogation of a whole section of an Act. This arbitrary distinction has been followed by the Courts, and they have developed separate rules of construction for each. However, they have recognized that frequently an Act purporting to be an amendment has the same qualitative effect as a repeal - the abrogation of an existing statutory provision - and have therefore applied the term 'implied repeal' and the rules of construction applicable to repeals to such amendments."

18. Amendment is in fact, a wider term and it includes abrogation or deletion of a provision in an existing statute. If the amendment of an existing law is small, the Act professes to amend; if it is extensive, it repeals a law and re-enacts it. An amendment of substantive law is not retrospective unless expressly laid down or by necessary implication inferred.

19. For the sake of completeness, we wish to add that mere use of the word 'substitution' does not imply that Regn. 8(3) must relate back to November 1, 1956, the appointed day."

28. In *Pyare Lal Sharma v. Managing Director and Others*[9], the Court was dealing with Regulation 16.14 of Jammu and Kashmir Industries Employees Service Rules and Regulations. Be it noted, the said regulation was amended on April 21, 1983. In the earlier regulations, certain grounds were provided for termination of service of a permanent employee. In the amended regulation, the ground, namely, unauthorized absence, was added apart from other grounds. The services of the appellants therein were terminated on the ground of unauthorized absence. The Court scanned the scheme of Regulation 16.14 before amendment which consisted of only clauses (a) and (b) relating to abolition of post and unfitness on medical ground and the company, the employer therein, had no authority to terminate the services of an employee on the ground of unauthorised absence without holding disciplinary proceedings against him. The regulation was amended on 20-4-1983 and grounds (c) and (d) were added. The amended regulation could not operate retrospectively but only from the date of the amendment. Ground (c) under which action was taken came into existence only on 20-4-1983 and as such, the period of unauthorised absence which could come within the mischief of ground (c) has to be the period posterior to 20-4-1983 and not anterior to that date.

9. (1989) 3 SCC 448.

29. After analyzing the facts, the two-Judge Bench expressed as follows:-

> "The period of absence indicated in the show-cause notice is obviously prior to April 20, 1983. The period of absence prior to the date of amendment cannot be taken into consideration. When prior to April 20, 1983 the services of person could not be terminated on the ground of unauthorised absence from duty under Regulation 16.14 then it is wholly illegal to make the absence during that period as a ground for terminating the services of Sharma. It is basic principle of natural justice that no one can be penalised on the ground of a conduct which was not penal on the day it was committed."
>
> [Emphasis supplied]

30. In "Principles of Statutory Interpretation" the learned author, Justice G. P. Singh, while discussing on the said decision in the context of retrospective operation pertaining to the penal statutes, has stated thus:-

> "This case shows that the rule of construction against retroactivity of penal laws is not restricted to Acts providing for criminal offences but applies also to laws which provide for other penal consequences of a severe nature, e.g. termination of service."

31. In *Ritesh Agarwal and Another v. Securities and Exchange Board of India and Others*[10], the issue was whether the Regulations that came into force on 25.10.1995 could apply to a case where the cause of action arose prior thereto. In the aforesaid context, it has been held that :-

> "Ex facie, a penal statute will not have any retrospective effect or retroactive operation. If commission of fraud was complete prior to the said date, the question of invoking the penal provisions contained in the said Regulations including Regulations 3 to 6 would not arise."

10. (2008) 8 SCC 205.

32. In this context, we may refer to the observations made in *Government of India and Others v. Indian Tobacco Association*[11] as follows:-

> "We are not oblivious of the fact that in certain situations, the court having regard to the purport and object sought to be achieved by the legislature may construe the word "substitution" as an "amendment" having a prospective effect but such a question does not arise in the instant case."
>
> We may also note that in the said case, the Court observed that the doctrine of fairness also is to be considered to be a relevant factor for construing the retrospective operation of a statute.

33. In view of the aforesaid, we have no hesitation in mind that the amended Rule despite having been substituted has no retrospective effect. That apart, the notification uses the phraseology "shall be substituted" which clearly indicates the fact that the amended Rule is prospective.

34. The controversy does not rest there. The learned counsel for the State has urged that even if the Rule is not retrospective, the decision having been taken after the Rules have come into force, it is the amended Rule which would be applicable. It is propounded by him that there could be alteration of service conditions by framing the subsequent rule or regulation and, hence, the date of the decision is the relevant date to attract the applicability of the rule. It is also highlighted that the respondent, in the obtaining circumstances, had no vested right to be imposed a particular punishment under the unamended Rules.

11. (2005) 7 SCC 396.

35. To appreciate the aforesaid stand, we think it apposite to survey certain authorities in the field. In *Roshan Lal Tandon v. Union of India and Another*[12], the Constitution Bench was dealing with the contention of the petitioner therein that he had a contractual right as regards the condition of service applicable to him at the time he entered Grade 'D' and the condition of service could not be altered to his disadvantage afterwards by the notification issued by the Railway Board. Repelling the contention, the Bench held thus: -

> "It is true that the origin of Government service is contractual. There is an offer and acceptance in every case. But once appointed to his post or office the Government servant acquires a status and his rights and obligations are no longer determined by consent of both parties, but by statute or statutory rules which may be framed and altered unilaterally by the Government. In other words, the legal position of a Government servant is more one of status than of contract. The hall-mark of status is the attachment to a legal relationship of rights and duties imposed by the public law and not by mere agreement of the parties. The emolument of the Government servant and his terms of service are governed by statute or statutory rules which may be unilaterally altered by the Government without the consent of the employee."

Thereafter, their Lordships referred to a passage from Salmond and Williams on Contracts and, eventually, ruled thus:-

> "We are therefore of the opinion that the petitioner has no vested contractual right in regard to the terms of his service and that Counsel for the petitioner has been unable to make good his submission on this aspect of the case."

12. AIR 1967 SC 1889.

36. In *Raj Kumar v. Union of India and Others*[13], the larger Bench overruled the decision in *Senior Superintendent, R.M.S. Cochin and Another v. K.V. Gopinath, Sorter*[14] and observed that the rules made under the proviso to Article 309 of the Constitution are legislative in character and, therefore, can be given effect to retrospectively.

37. In *Ex-Capt. K.C. Arora and Another v. State of Haryana and Others*[15], a notification was issued on August 19, 1976 amending the definition clause of 'military service' in Rule 2 of the Rules. The notification was issued with retrospective effect from November 1, 1966 and it restricted the benefits of military service upto January 10, 1968. A question arose whether the vested rights which had accrued to the petitioner therein in 1969, 1970 and 1971 had been taken away. Dealing with the controversy, the three-Judge Bench referred to the Constitution Bench decision in *State of Gujarat v. Raman Lal Keshav Lal Soni*[16] and, eventually, pronounced thus: -

> "In view of this latest pronouncement by the Constitution Bench of this Court, the law appears to be well settled and the Haryana Government cannot take away the accrued rights of the petitioners and the appellants by making amendment of the rules with retrospective effect."

38. In *Raman Lal Keshav Lal Soni* (supra), the Court had observed that the amending Act which has been made retrospective to navigate around the obstacles of Article 311 and Article 14 of the Constitution to bring about an artificial situation could not be allowed to stand. The Constitution Bench had posed a question whether a law could be made to destroy today's accrued constitutional rights by artificially reverting to a situation which existed 17 years before and answered it in

13. AIR 1975 SC 1116.

14. AIR 1972 SC 1487.

15. (1984) 3 SCC 281.

16. (1983) 2 SCC 33.

the negative. It may be noted with profit that in the said case, the Constitution Bench has ruled thus: -

> "The legislature is undoubtedly competent to legislate with retrospective effect to take away or impair any vested right acquired under existing laws but since the laws are made under a written Constitution, and have to conform to the dos and don'ts of the Constitution, neither prospective nor retrospective laws can be made so as to contravene fundamental rights. The law must satisfy the requirements of the Constitution today taking into account the accrued or acquired rights of the parties today. The law cannot say, 20 years ago the parties had no right, therefore, the requirements of the Constitution will be satisfied if the law is dated back by 20 years. We are concerned with today's rights and not yesterday's. A legislature cannot legislate today with reference to a situation that obtained 20 years ago and ignore the march of events and the constitutional rights accrued in the course of the 20 years."

From the aforesaid Constitution Bench decision, it is graphically clear that a vested right cannot be impaired by bringing a law as that is likely to contravene the Constitutional Rights. As stated there, the law is required to satisfy the requirements of the Constitution today taking into account the accrued or acquired rights of the parties today. The Bench has emphasized that a legislature cannot legislate today with reference to a situation that obtained 20 years before and ignore the march of events and the constitutional rights accrued in the course of two decades. Thus, vested and accrued rights are not to be impaired.

39. To understand what is precisely meant by vested right in the context of a service rule, it is necessary to understand and appreciate how this Court has viewed the said right in that conspectus. The Constitution Bench in *Chairman, Railway Board and Others v. C.R. Rangadhamaiah and Others*[17] was

17. (1997) 6 SC 623.

dealing with the validity of the notification dated 5.12.1988 issued by the Railway Administration under the proviso to Article 309 of the Constitution whereby Rule 2544 of the Indian Railway Establishment Code, Volume II (Fifth Reprint) had been amended with retrospective effect. By virtue of the amendment, the quantum of percentage of the running allowance for the purpose of retirement and other benefits was reduced with effect from 1.1.1973. The notification was challenged before the Delhi High Court which transferred it to the Central Administrative Tribunal after coming into force of the Administrative Tribunals Act, 1985. The Tribunal treated the said notification as an executive instruction and opined that the same could not be accepted to be a statutory amendment of the existing rules governing the running allowance. The said order was not challenged by the Railway Administration. However, a notification was issued on 5.12.1988, the validity of which was challenged in some pending petitions. As various Benches of the Tribunal rendered conflicting decisions, the matter was referred to a larger Bench and the Full Bench of the Tribunal opined that though under the proviso to Article 309 of the Constitution the President has power to promulgate rules with retrospective effect, yet it is subject to the condition that the rules do not offend any constitutional rights or deprive an employee of his valuable vested right like pension after retirement as such deprivation of vested right is violative of Article 14 of the Constitution being unreasonable and arbitrary. A three-Judge Bench of this Court referred the matter to the larger Bench by passing the following order: -

> "Two questions arise in the present case, viz., (i) what is the concept of vested or accrued rights so far as the government servant is concerned, and (ii) whether vested or accrued rights can be taken away with retrospective effect by rules made under the proviso to Article 309 or by an Act made under that article, and which of them and to what extent.

We find that the Constitution Bench decisions in *Roshan Lal Tandon v. Union of India*[18], *B.S. Vadera v. Union of India*[19] and *State of Gujarat v. Raman Lal Keshav Lal Soni*[20] have been sought to be explained by two three-Judge Bench decisions in *K.C. Arora v. State of Haryana*[21] and *K. Nagaraj v. State of A.P.*[22] in addition to the two-Judge Bench decisions in *P.D. Aggarwal v. State of U.P.*[23] and *K. Narayanan v. State of Karnataka*[24]. Prima facie, these explanations go counter to the ratio of the said Constitution Bench decisions. It is not possible for us sitting as a three-Judge Bench to resolve the said conflict. It has, therefore, become necessary to refer the matter to a larger Bench. We accordingly refer these appeals to a Bench of five learned Judges."

The Constitution Bench analysed the decisions which have been mentioned in the referral order and observed as follows:-

"24. In many of these decisions the expressions "vested rights" or "accrued rights" have been used while striking down the impugned provisions which had been given retrospective operation so as to have an adverse effect in the matter of promotion, seniority, substantive appointment, etc., of the employees. The said expressions have been used in the context of a right flowing under the relevant rule which was sought to be altered with effect from an anterior date and thereby taking away the benefits available under the rule in force at that time. It has been held that such an amendment having retrospective operation which has the

18. AIR 1967 SC 1889.
19. AIR 1969 SC 118.
20. (1983) 2 SCC 33.
21. (1984) 3 SCC 281.
22. (1985) 1 SCC 523.
23. (1987) 1 SCC 622.
24. 1994 Supp. (1) SCC 44.

effect of taking away a benefit already available to the employee under the existing rule is arbitrary, discriminatory and violative of the rights guaranteed under Articles 14 and 16 of the Constitution. We are unable to hold that these decisions are not in consonance with the decisions in *Roshan Lal Tandon, B.S. Yadav* and *Raman Lal Keshav Lal Soni*."

40. After so stating, the Constitution Bench stated that in the said case, the Court was concerned with the pension payable to the employees after their retirement. It took note of the fact that the respondents were no longer in service on the date of issuance of the impugned notification and the amendments in the rules were not restricted in their application in futuro. It was further observed that the amendments applied to employees who had already retired and are no longer in service on the date when the notifications were issued. After referring to the pronouncements in *Deokinandan Prasad v. State of Bihar*[25], *D.S. Nakara v. Union of India*[26] and *Indian Ex-Services League v. Union of India*[27], it has been ruled thus:-

"33. Apart from being violative of the rights then available under Articles 31(1) and 19(1)(f), the impugned amendments, insofar as they have been given retrospective operation, are also violative of the rights guaranteed under Articles 14 and 16 of the Constitution on the ground that they are unreasonable and arbitrary since the said amendments in Rule 2544 have the effect of reducing the amount of pension that had become payable to employees who had already retired from service on the date of issuance of the impugned notifications, as per the provisions contained in Rule 2544 that were in force at the time of their retirement."

25. (1971) 2 SCC 330.
26. (1983) 1 SCC 305.
27. (1991) 2 SCC 104.

41. We have referred to the aforesaid verdict in detail as it deals with the vested and accrued right in service jurisprudence and how the same cannot be affected by retrospective amendments. We have already opined that the amendment to the rules is not retrospective. Therefore, the fulcrum of the controversy is whether the respondent had a vested or accrued right to be visited with a particular punishment engrafted under Rules 9 of the unamended Rules. As has been held earlier, the disciplinary proceeding had been initiated under the unamended rules. Under the unamended rule 9(vii), the punishment provided was reduction to a lower rank in the seniority list or to a lower stage in the seniority list or to a lower stage in the timescale of pay or to a lower time scale of pay not being lower than that to which he was directly recruited or to lower grade or post not being lower than that to which he was directly recruited. After the amendment, Rule 9(vii) has been bifurcated into two parts. Under Rule 9(vii)(a), the punishment that is provided is reduction to a lower stage in the time scale of pay for a specified period with further directions as to whether or not the Government servant would earn increments of pay during the period of such reduction and whether on the expiry of such period, the reduction would or would not have the effect of postponing the future increments of his pay. Rule 9(vii)(b) deals with reduction to lower time-scale of pay, grade, post or service which shall ordinarily be a bar for promotion with or without further direction regarding conditions of restoration to the grade or post or service from which the Government servant was reduced and his seniority and pay on such restoration to that grade, post or service. When both the rules are read in juxtaposition, it is luculent that though the earlier Rule 9(vii) provided for reduction to lower grade or post, yet it did not stipulate imposition of condition on restoration as regards his seniority and pay to the original grade or post. It is noticeable that after the amendment, Rule 9(vii)(a) only provides reduction to a lower stage in the time scale of pay for a specified period and empowers the disciplinary authority to issue a direction, if necessary, whether the delinquent would

earn increment of pay during the period of such reduction and whether such reduction will or will not have the effect of postponement in future increments of pay. Rule 9(vii)(b) deals with reduction to lower timescale of pay and other reductions which we have already stated. There is a distinction between reduction to a lower stage in the time scale of pay and reduction to a lower time scale of pay. Needless to say, in clause (vii)(a), there is no provision for reduction to a lower rank or lower grade or post. That is separately provided in clause (vii)(b). Whenever there is a reduction to a lower scale in the timescale of pay for a specified period, the employee remains in the said post and cadre but the scale of pay is reduced to a lower stage. Reduction to a lower time scale of pay has more serious impact than the reduction in the stage of pay itself. Reduction to a lower post has a severe consequence. Similarly, reduction in lower rank in the seniority has a different concept.

42. Bestowing our thoughtful considerations we find that as far as the major penalty under Rule 9(vii) is concerned, the rule making authority, under the amended rule, has bifurcated/ compartmentalized the punishment into two compartments - one slightly lesser than the other. Under the old rule, there was a singular punishment and there was no stipulation as regards the earning of increments or imposition of conditions on restoration to the grade or post or service concerned. It is worth noting that under the unamended rule, there were three other categories of punishments, namely, compulsory retirement, removal from service and dismissal from service. The said punishments have been maintained in the new rules. In the case at hand, the disciplinary proceeding was initiated by serving a charge-sheet for the purpose of imposition of a major penalty and, therefore, the maximum punishment of dismissal could have been imposed on the respondent.

43. The thrust of the matter is whether the respondent could have been imposed punishment under Rule 9(vii) of the unamended rules and no other punishment. The rules have

been framed under Article 309 of the Constitution. There can be no cavil that by amending the rule, a punishment cannot be imposed in respect of a misconduct or delinquency which was not a misconduct or a ground to proceed in a departmental enquiry before the amended rules came into force. Further, a person cannot be subjected to a penalty greater than which might have been inflicted under the rule in force at the time of commission of delinquency or misconduct.

44. We have already referred to the decision in *Pyare Lal Sharma* (supra) wherein this Court had opined that no one can be penalised on the ground of a conduct which was not penal on the date it was committed. We have also referred to the view of the learned author, Justice *G.P. Singh, i*n the book, "Principles of Statutory Interpretation", wherein he has stated that the case of *Pyare Lal Sharma* (supra) shows that the rule of construction against retroactivity of penal laws is not restricted to Acts providing for criminal offences but applies also to laws which provide for other penal consequences of a severe nature, namely, termination of service. In the said case, unauthorized absence was not a condition for passing an order of termination. The same was incorporated later on. In that backdrop, the view was expressed by this Court in *Pyare Lal Sharma* (supra).

45. Before we proceed to scan the rule position, we would like to refer to certain authorities rendered in the context of clause (1) of Article 20 of the Constitution. We are absolutely conscious that there are certain authorities of this Court wherein it has been laid down that Article 20(1) of the Constitution is not applicable to civil consequences but only to criminal offences. However, by way of analogy, we will be referring to certain authorities for the purpose of understanding what constitutes retrospective penal consequence in its conceptual essentiality.

46. In *K. Satwant Singh v. The State of Punjab*[28], the

28. AIR 1960 SC 266.

question arose with regard to the penalty imposed under Section 420 of the Indian Penal Code. At the time of occurrence, Section 420 of the Indian Penal Code did not provide for minimum sentence of fine. By virtue of an amendment, imposition of minimum fine became compulsory. The Constitution Bench, dealing with the said facet, opined thus:-

> "In the present case a sentence of imprisonment was, in fact, imposed and the total of fines imposed, whether described as "ordinary" or "compulsory", was not less than the amount of money procured by the appellant by means of his offence. Under S. 420 of the Indian Penal Code an unlimited amount of fine could be imposed. Article 20(1) of the Constitution is in two parts. The first part prohibits a conviction of any person for any offence except for violation of law in force at the time of the commission of the act charged as an offence. The latter part of the Article prohibited the imposing of a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence. The offence with which the appellant had been charged was cheating punishable under S. 420 of the Indian Penal Code which was certainly a law in force at the time of the commission of the offence. The sentence of imprisonment which was imposed upon the appellant was certainly not greater than that permitted by S. 420. The sentence of fine also was not greater than that which might have been inflicted under the law which had been in force at the time of the commission of the offence, as a fine unlimited in extent could be imposed under the section."

47. In *Smt. Maya Rani Punj v. Commissioner of Income-tax, Delhi*[29], a three-Judge Bench was dealing with the provisions of imposition of penalty under the Income-tax Act, 1961. The question before the Court was that under Section

29. AIR 1986 SC 293.

28 of the Income-tax Act, 1922, the upper limit of penalty was provided and there was no prescription of any particular rate as confined under Section 271(1)(a) of the 1961 Act. The Court observed that the penalty contemplated in the respective sections of the two Acts is quasi-criminal in character. Reference was made to Article 20(1) of the Constitution and it was opined that under the said Article, no person is to be subjected to a penalty greater than which might have been inflicted under the law in force at the time of commission of the offence. The contention that the penalty should have been levied in accordance with Section 28 of the 1922 Act and not under Section 271(1)(a) of the 1961 Act was not accepted by the Court. The three-Judge Bench referred to the pronouncement in *K. Satwant Singh* (supra) and, eventually, after quoting a passage from there, observed as follows: -

> "It is conceded that under section 28 of the 1922 Act in the facts of the case a fine of more than Rs.4,060 (being within the limit of 1½ times of the tax amount) could have been levied. While conceding to that extent, Mr. Dholakia submits that the decision of the Constitution Bench of this Court in Satwant Singh's case requires reconsideration as it has not taken into account the ratio of an important decision of the United States Supreme Court in the case of *Elbert B. Lindsay v. State of Washington,* (1937) 81 Law Ed 1182. We are bound by the decision of the Constitution Bench. It has held the field for a quarter of a century without challenge and non-consideration of an American decision which apparently was not than cited before this Court does not at all justify the submission at the Bar for a reconsideration of the decision of this Court in *Satwant Singh's* case (AIR 1960 SC 266)."

48. In *Tiwari Kanhaiyalal etc. v. The Commissioner of Income-tax, Delhi*[30], while dealing with a penal provision under the Income-tax Act, 1922 and Income-tax Act, 1961 in the

30. AIR 1975 SC 902.

backdrop of clause (1) of Article 20 of the Constitution, this Court opined that the punishment provided under the 1961 Act being greater than the one engrafted under the provisions under the 1922 Act, the appellant therein was not entitled to press into the service the second part of clause (1) of Article 20 of the Constitution.

49. At this juncture, we may state that an ex post facto law may be retrospective, if it is ameliorative. But in the present context, delineation on the said score is not warranted. We confine our analysis pertaining to the vested or accrued right and imposition of higher punishment that was not permissible at the time of initiation of departmental proceeding.

50. In the case at hand, under the unamended rule, there were, apart from stoppage of increment with cumulative effect and reduction in rank, grade, post or service, three major punishments, namely, compulsory retirement, removal and dismissal from service by which there was severance of service. The maximum punishment that could have been imposed on an employee after conducting due departmental enquiry was dismissal from service. The rule making authority, by way of amendment, has bifurcated the rule 9(vii) into two parts, namely, 9(vii)(a) and 9(vii)(b). As is evincible, the charge-sheet only referred to the imposition of major penalty or to be dealt with under the said rules relating to major penalty. In this backdrop, it would be difficult to say that the employee had the vested right to be imposed a particular punishment as envisaged under the unamended rules. Once the charges have been proven, he could have been imposed the punishment of compulsory retirement or removal from service or dismissal from service. The rule making authority thought it apposite to amend the rules to introduce a different kind of punishment which is lesser than the maximum punishment or, for that matter, lesser punishment than that of compulsory retirement from service. The order of compulsory retirement is a lesser punishment than dismissal or removal as the pension of a

compulsorily retired employee, if eligible to get pension under the Pension Rules, is not affected. Rule 9(vii) was only dealing with reduction or reversion but issuance of any other direction was not a part of it. It has come by way of amendment. The same being a lesser punishment than the maximum, in our considered opinion, is imposable and the disciplinary authority has not committed any error by imposing the said punishment, regard being had to the nature of charges. It can be looked from another angle. The rule making authority has splitted Rule 9(vii) into two parts - one is harsher than the other, but, both are less severe than the other punishments, namely, compulsory retirement, removal from service or dismissal. The reason behind it, as we perceive, is not to let off one with simple reduction but to give a direction about the condition of pay on restoration and also not to impose a harsher punishment which may not be proportionate. In our view, the same really does not affect any vested or accrued right. It also does not violate any Constitutional protection.

51. In view of the aforesaid analysis, the order passed by the High Court that a double punishment has been imposed does not withstand scrutiny.

52. Consequently, the appeals are allowed. The orders passed by the High Court are set aside and the order of punishment imposed by the disciplinary authority is restored. In the facts and circumstances of the case, there shall be no order as to costs.

R.P. Appeals allowed.

SUNIL MEHTA & ANR.
v.
STATE OF GUJARAT & ANR.
(Criminal Appeal No. 327 of 2013)

FEBRUARY 20, 2013

[T.S. THAKUR AND SUDHANSU JYOTI MUKHOPADHAYA, JJ.]

CODE OF CRIMINAL PROCEDURE, 1973:

ss. 244 and 246 – Evidence for purposes of framing of charge in a complaint case – Plea of complainant that evidence adduced under Chapter XV be treated as evidence for purposes of framing of charge – Held: Is untenable – In a criminal case, using a statement of a witness at the trial, without affording to accused an opportunity to cross-examine, is tantamount to condemning him unheard – The process under Chapter XV is conducted in the absence of accused, whereas evidence within the meaning of Evidence Act and so also within the meaning of s.244, Cr.P.C. is what is recorded in the manner stipulated u/s 138 of Evidence Act – The whole object underlying recording of evidence u/s 244 after accused has appeared, is to ensure that not only does the accused have opportunity to hear the evidence adduced against him, but also to defend himself by cross-examining the witnesses – Evidence Act, 1872 – ss. 3 and 138.

In the instant appeal filed by the accused, the question for consideration before the Court was: whether depositions of the complainant and his witnesses recorded under Chapter XV of the Code of Criminal Procedure, 1973 before cognizance was taken by the Magistrate would constitute evidence for the Magistrate to frame charges against the accused under Part B of Chapter XIX of the Code.

Allowing the appeal, the Court

HELD: 1.1. In a criminal case, using a statement of a witness at the trial, without affording to the accused an opportunity to cross-examine, is tantamount to condemning him unheard. Life and liberty of an individual recognised as the most valuable rights cannot be jeopardised leave alone taken away without conceding to the accused the right to question those deposing against him from the witness box. [para 17] [69-D-E]

1.2. The schemes of Chapters XV and XIX of the Code are totally different from each other. While Chapter XV deals with the filing of complaints, examination of the complainant and the witnesses and taking of cognizance on the basis thereof with or without investigation and inquiry, Chapter XIX, Part B deals with trial of warrant cases instituted otherwise than on a police report. The trial of an accused under Chapter XIX and the evidence relevant to the same has no nexus proximate or otherwise with the evidence adduced at the initial stage where the Magistrate records depositions and examines the evidence for purposes of deciding whether a case for proceeding further has been made out. There is a qualitative difference between the approach that the court adopts and the evidence adduced at the stage of taking cognizance and summoning the accused and that recorded at the trial. The difference lies in the fact that while the former is a process that is conducted in the absence of the accused, the latter is undertaken in his presence with an opportunity to him to cross-examine the witnesses produced by the prosecution. [para 12] [65-G-H; 66-A-D]

1.3. The expression "Magistrate shall proceed to hear the prosecution and take all such evidence as may be produced in support of the prosecution" appearing in

s.244 refers to evidence within the meaning of s.3 of the Indian Evidence Act, 1872. Chapter X of the Evidence Act deals with examination of witnesses and s 137 appearing in that Chapter defines the expressions examination-in-chief, cross and re-examination while s. 138 stipulates the order of examinations.It is trite that evidence within the meaning of the Evidence Act and so also within the meaning of s.244 of the Cr.P.C. is what is recorded in the manner stipulated u/s 138 in the case of oral evidence. [para 13-15] [67-A-B, F-G; 68-D]

1.4. Under s.246, Cr.P.C., the Magistrate is required to frame in writing a charge against the accused "when such evidence has been taken" and there is ground for presuming that the accused has committed an offence which such Magistrate is competent to try and adequately punish. Evidence referred to in ss. 244, 245 and 246 must, on a plain reading of the said provisions and the provisions of the Evidence Act, be admissible only if the same is produced and, in the case of documents, proved in accordance with the procedure established under the Evidence Act which includes the rights of the parties against whom this evidence is produced to cross-examine the witnesses concerned. [para 11 and 16] [65-C; 68-E-F]

1.5. Besides, because evidence under Part B of Chapter XIX of the Code has to be recorded in the presence of the accused and if a right of cross-examination was not available to him, he would be no more than an idle spectator in the entire process. The whole object underlying recording of evidence u/s 244 after the accused has appeared is to ensure that not only does the accused have the opportunity to hear the evidence adduced against him, but also to defend himself by cross-examining the witnesses with a view to showing that the witness is either unreliable or that a statement made by him does not have any evidentiary

value or that it does not incriminate him. Section 245 of the Code empowers the Magistrate to discharge the accused if, upon taking of all the evidence referred to in s. 244, he considers that no case against the accused has been made out which may warrant his conviction. Whether or not a case is made out against the accused, can be decided only when he is allowed to cross-examine the witnesses for otherwise he may not be in a position to demonstrate that no case is made out against him and thereby claim a discharge u/s 245 of the Code. [para 17] [68-G-H; 69-A-C]

1.7. Further, because the right of cross-examination granted to an accused u/ss 244 to 246 even before framing of the charges does not, in the least, cause any prejudice to the complainant or result in any failure of justice, while denial of such a right is likely and indeed bound to prejudice the accused in his defence. The fact that after the court has found a case justifying framing of charges against the accused, he has a right to cross-examine the prosecution witnesses u/s 246(4) does not necessarily mean that such a right cannot be conceded to him before the charges are framed or that Parliament intended to take away any such right at the pre-charge stage. [para 18] [69-E-H]

Ajoy Kumar Ghose v. State of Jharkhand and Anr. **2009 (4) SCR 515 = (2009) 14 SCC 115 – relied on**

Sambhaji Nagu Koli v. State of Maharashtra **1979 Cri LJ 390 (Bom); and** *Harinarayan G. Bajaj v. State of Maharashtra & Ors.* **2010 (1) SCR 171 = (2010) 11 SCC 520 – referred to.**

Case Law Reference:

2009 (4) SCR 515	**relied on**	**para 5**
1979 Cri LJ 390 (Bom)	**referred to**	**Para 20**
2010 (1) SCR 171	**referred to**	**Para 22**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 327 of 2013.

From the Judgment & Order dated 21.11.2011 of the High Court of Gujarat at Ahmedabad in Special Criminal Application No. 1917 of 2011.

Ranjit Kumar, Uday B. Dube, R.R. Deshpande for the Appellants.

U.U. Lalit, Ajay Kumar, Chetan Pandaya, Krithika Raghvan Hemantika Wahi for the Respondents.

The Judgment of the Court was delivered by

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

2. The short question that falls for our determination in this appeal is whether depositions of the complainant and his witnesses recorded under Chapter XV of the Code of Criminal Procedure, 1973 before cognizance is taken by the Magistrate would constitute evidence for the Magistrate to frame charges against the accused under Part B of Chapter XIX of the said Code. The question arises in the following backdrop:

3. A complaint alleging commission of offences punishable under Sections 406, 420 and 114 read with Section 34 of the Indian Penal Code, 1860 was filed by respondent No.2-Company before the Chief Judicial Magistrate, Gandhi Nagar, Gujarat. The Magistrate upon examination of the complaint directed an enquiry in terms of Section 156(3) of the Cr.P.C. by the jurisdictional police station. The report received from the police suggested that the dispute between the parties was of a civil nature in which criminal proceedings were out of place. The Chief Judicial Magistrate was not, however, satisfied with the police enquiry and the conclusion, and hence conducted an enquiry in terms of Section 202 of the Cr.P.C. and issued

process against the appellants for offences punishable under Sections 406 read with 114 IPC.

4. Aggrieved, the appellants unsuccessfully questioned the summoning order before the High Court in Criminal Misc. Application No.10173 of 2010. Inevitably the matter came up before the trial Court under Section 244 of the Cr.P.C. where the accused appeared pursuant to the summons issued by the Court. Instead of adducing evidence in support of the prosecution as mandated by Section 244, the complainant filed a pursis (memo) stating that he did not wish to lead any additional evidence and that the evidence submitted along with the complaint may be considered as evidence for purposes of framing of the charge. The Magistrate took the pursis on record and fixed the case for arguments on framing of charges. The appellants' case is that written submissions filed by them before the Magistrate raised a specific contention that no charge could be framed against them as the complainant had not led any evidence in terms of Section 244 of the Code and that the depositions recorded before the Magistrate under Section 202 of the Cr.P.C. could not be considered as evidence for the purposes of framing of charges. The Magistrate, however, brushed aside that contention and framed charges against the appellants under Sections 406 and 420 read with Section 34 of the IPC.

5. Aggrieved by the order passed by the Magistrate, the appellants preferred Criminal Revision Application No.56 of 2011 before the Sessions Judge at Gandhi Nagar who allowed the same by his order dated 18th July, 2011 primarily on the ground that non-compliance with the provisions of Section 245(2) of the Cr.P.C. rendered the order passed by the Magistrate unsustainable. The Sessions Judge accordingly remitted the matter back to the trial Court with a direction to proceed in accordance with the provisions of Sections 244 to 247 of the Code keeping in view the decision of this Court in *Ajoy Kumar Ghose v. State of Jharkhand and Anr.* (2009) 14 SCC 115.

6. Undeterred by the revisional order the respondent-company filed Special Criminal Application No.1917 of 2011 before the High Court of Gujarat at Ahmedabad which application has been allowed by the High Court in terms of the order impugned before us. The High Court observed:

> "In the facts of the case, it is not that the witnesses of the complainant have not been examined, therefore, the evidence has been recorded. Therefore, at that stage the opportunity was available with the accused as provided under law to cross examine the witnesses, however, it is not availed of by exercising the right of cross examination. It cannot be said that the procedure, as required, is not followed. Therefore, the observation made by the learned Sessions Judge relying on this judgment are misconceived."

7. It is difficult to appreciate the logic underlying the above observations. It appears that the High Court considered the deposition of this complainant and his witnesses recorded before the appearance of the accused under Section 202 of the Cr.P.C. to be 'evidence' for purposes of framing of charges against the appellants. Not only that, the High Court by some involved process of reasoning held that the accused persons had an opportunity to cross-examine the witnesses when the said depositions were recorded. The High Court was, in our opinion, in error on both counts. We say so for reasons that are not far to seek. Chapter XV of the Code of Criminal Procedure, 1973 deals with complaints made to Magistrates. Section 200 which appears in the said Chapter inter alia provides that the Magistrate taking cognizance of an offence on a complaint shall examine upon oath the complainant and the witnesses present, if any, and the substance of such examination shall be reduced to writing and signed by the complainant and the witnesses, as also the Magistrate. An exception to that general rule is, however, made in terms of the proviso to Section 200 in cases

where the complaint is made by a public servant acting or purporting to act in the discharge of his official duties, or where a Court has made the complaint, or the Magistrate makes over the case for enquiry or trial by another Magistrate under Section 192 of the Cr.P.C.

8. Section 201 deals with the procedure which a Magistrate not competent to take cognizance of the case is required to follow. Section 202 empowers the Magistrate to postpone the issue of process against the accused either to inquire into the case himself or direct an investigation to be made by a police officer for the purpose of deciding whether or not there is sufficient ground for proceeding. Sub-section (2) of Section 202 empowers the Magistrate to take evidence of witnesses on oath in an inquiry under sub-section (1) thereof. Section 203, which is the only other provision appearing in Chapter XV, empowers the Magistrate to dismiss the complaint if he is of the opinion that no sufficient ground for proceeding with the same is made out.

9. There is no gainsaying that a Magistrate while taking cognizance of an offence under Section 200, whether such cognizance is on the basis of the statement of the complainant and the witnesses present or on the basis of an inquiry or investigation in terms of Section 202, is not required to notify the accused to show cause why cognizance should not be taken and process issued against him or to provide an opportunity to him to cross-examine the complainant or his witnesses at that stage.

10. In contra distinction, Chapter XIX of the Code regulates trial of warrant cases by Magistrates. While Part A of that Chapter deals with cases instituted on a police report, Part B deals with cases instituted otherwise than on a police report. Section 244 that appears in Part B of Chapter XIX requires the Magistrate to "proceed to hear the prosecution" and "take all such evidence as may be produced in support of the

prosecution" once the accused appears or is brought before him. Section 245 empowers the Magistrate to discharge the accused upon taking all the evidence referred to in Section 244, if he considers that no case against the accused has been made out which if unrebutted would warrant his conviction. Sub-section (2) of Section 245 empowers the Magistrate to discharge an accused even "at any previous stage" if for reasons to be recorded by such Magistrate the charges are considered to be "groundless". In cases where the accused is not discharged, the Magistrate is required to follow the procedure under Section 246 of the Code. That provision may at this stage be extracted:

"246. Procedure where accused is not discharged -

(1) If, when such evidence has been taken, or at any previous stage of the case, the Magistrate is of opinion that there is ground for presuming that the accused has committed an offence triable under this Chapter, which such Magistrate is competent to try and which, in his opinion, could be adequately punished by him, he shall frame in writing a charge against the accused.

(2) The charge shall then be read and explained to the accused, and he shall be asked whether he pleads guilty or has any defence to make.

(3) If the accused pleads guilty, the Magistrate shall record the plea, and may, in his discretion, convict him thereon.

(4) If the accused refuses to plead, or does not plead or claims to be tried or if the accused is not convicted under sub-section (3), he shall be required to state, at the commencement of the next hearing of the case, or, if the Magistrate for reasons to be recorded in writing so thinks fit, forthwith, whether he wishes to cross-examine any, and, if so, which, of the witnesses for the prosecution whose evidence has been taken.

(5) If he says he does so wish, the witnesses named by him shall be recalled and, after cross-examination and re-examination (if any), they shall be discharged.

(6) The evidence of any remaining witnesses for the prosecution shall next be taken, and after cross-examination and re-examination (if any), they shall also be discharged."

11. A simple reading of the above would show that the Magistrate is required to frame in writing a charge against the accused "when such evidence has been taken" and there is ground for presuming that the accused has committed an offence triable under this Chapter which such Magistrate is competent to try and adequately punish.

12. Sections 244 to 246 leave no manner of doubt that once the accused appears or is brought before the Magistrate the prosecution has to be heard and all such evidence as is brought in support of its case recorded. The power to discharge is also under Section 245 exercisable only upon taking all of the evidence that is referred to in Section 244, so also the power to frame charges in terms of Section 246 has to be exercised on the basis of the evidence recorded under Section 244. The expression "when such evidence has been taken" appearing in Section 246 is significant and refers to the evidence that the prosecution is required to produce in terms of Section 244(1) of the Code. There is nothing either in the provisions of Sections 244, 245 and 246 or any other provision of the Code for that matter to even remotely suggest that evidence which the Magistrate may have recorded at the stage of taking of cognizance and issuing of process against the accused under Chapter XV tantamounts to evidence that can be used by the Magistrate for purposes of framing of charges against the accused persons under Section 246 thereof without the same being produced under Section 244 of the Code. The scheme of the two Chapters is totally different. While Chapter XV deals with the filing of complaints, examination of the

complainant and the witnesses and taking of cognizance on the basis thereof with or without investigation and inquiry, Chapter XIX Part B deals with trial of warrant cases instituted otherwise than on a police report. The trial of an accused under Chapter XIX and the evidence relevant to the same has no nexus proximate or otherwise with the evidence adduced at the initial stage where the Magistrate records depositions and examines the evidence for purposes of deciding whether a case for proceeding further has been made out. All that may be said is that evidence that was adduced before a Magistrate at the stage of taking cognizance and summoning of the accused may often be the same as is adduced before the Court once the accused appears pursuant to the summons. There is, however, a qualitative difference between the approach that the Court adopts and the evidence adduced at the stage of taking cognizance and summoning the accused and that recorded at the trial. The difference lies in the fact that while the former is a process that is conducted in the absence of the accused, the latter is undertaken in his presence with an opportunity to him to cross-examine the witnesses produced by the prosecution.

13. Mr. U.U. Lalit, learned senior counsel appearing for the respondent-complainant strenuously argued that Section 244 does not envisage, leave alone provide for in specific terms, cross-examination of witnesses produced by the prosecution by the accused. He submitted that since the provision of Section 244 did not recognise any such right of an accused before framing of charges, it did not make any difference whether the Court was evaluating evidence adduced at the stage of cognizance and summoning of the accused or that adduced after he had appeared before the Magistrate under Section 244. He particularly drew our attention to sub-section (4) to Section 246 which requires the Magistrate to ask the accused whether he wishes to cross-examine any, and if so, which of the witnesses for the prosecution whose evidence has been taken. It was contended by Mr. Lalit that the provision of sub-section (4) to Section 246 provides for cross-examination by

the accused only after charges have been framed and not before. There is, in our opinion, no merit in that contention which needs to be noticed only to be rejected. We say so for reasons more than one. In the first place, the expression "Magistrate shall proceed to hear the prosecution and take all such evidence as may be produced in support of the prosecution" appearing in Section 244 refers to evidence within the meaning of Section 3 of the Indian Evidence Act, 1872. Section 3 reads as under:

3. Interpretation clause -

In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context:-

xx xx xx

"Evidence".-"Evidence" means and includes-

(1) all statements which the Court permits or requires to be made before it by witnesses, in relation to matters of fact under inquiry,

such statements are called oral evidence;

(2) all documents including electronic records produced for the inspection of the Court,

such documents are called documentary evidence."

14. We may also refer to Chapter X of the Evidence Act which deals with examination of witnesses. Section 137 appearing in that Chapter defines the expressions examination-in-chief, cross and re-examination while Section 138 stipulates the order of examinations and reads as under:

"138. Order of examinations.- Witnesses shall be first examined-in-chief, then (if the adverse party so desires) cross-examined, then (if the party calling him so desires) re-examined.

The examination and cross-examination must relate to relevant facts, but the cross-examination need not be confined to the facts to which the witness testified on his examination-in-chief.

Direction of re-examination.- The re-examination shall be directed to the explanation of matters referred to in cross-examination; and, if new matter is, by permission of the Court, introduced in re-examination, the adverse party may further cross-examine upon that matter."

15. It is trite that evidence within the meaning of the Evidence Act and so also within the meaning of Section 244 of the Cr.P.C. is what is recorded in the manner stipulated under Section 138 in the case of oral evidence. Documentary evidence would similarly be evidence only if the documents are proved in the manner recognised and provided for under the Evidence Act unless of course a statutory provision makes the document admissible as evidence without any formal proof thereof.

16. Suffice it to say that evidence referred to in Sections 244, 245 and 246 must, on a plain reading of the said provisions and the provisions of the Evidence Act, be admissible only if the same is produced and, in the case of documents, proved in accordance with the procedure established under the Evidence Act which includes the rights of the parties against whom this evidence is produced to cross-examine the witnesses concerned.

17. Secondly, because evidence under Chapter XIX (B) has to be recorded in the presence of the accused and if a right of cross-examination was not available to him, he would be no more than an idle spectator in the entire process. The whole object underlying recording of evidence under Section 244 after the accused has appeared is to ensure that not only does the

accused have the opportunity to hear the evidence adduced against him, but also to defend himself by cross-examining the witnesses with a view to showing that the witness is either unreliable or that a statement made by him does not have any evidentiary value or that it does not incriminate him. Section 245 of the Code, as noticed earlier, empowers the Magistrate to discharge the accused if, upon taking of all the evidence referred to in Section 244, he considers that no case against the accused has been made out which may warrant his conviction. Whether or not a case is made out against him, can be decided only when the accused is allowed to cross-examine the witnesses for otherwise he may not be in a position to demonstrate that no case is made out against him and thereby claim a discharge under Section 245 of the Code. It is elementary that the ultimate quest in any judicial determination is to arrive at the truth, which is not possible unless the deposition of witnesses goes through the fire of cross-examination. In a criminal case, using a statement of a witness at the trial, without affording to the accused an opportunity to cross-examine, is tantamount to condemning him unheard. Life and liberty of an individual recognised as the most valuable rights cannot be jeopardised leave alone taken away without conceding to the accused the right to question those deposing against him from the witness box.

18. Thirdly, because the right of cross-examination granted to an accused under Sections 244 to 246 even before framing of the charges does not, in the least, cause any prejudice to the complainant or result in any failure of justice, while denial of such a right is likely and indeed bound to prejudice the accused in his defence. The fact that after the Court has found a case justifying framing of charges against the accused, the accused has a right to cross-examine the prosecution witnesses under Section 246(4) does not necessarily mean that such a right cannot be conceded to the accused before the charges are framed or that the Parliament intended to take away any such right at the pre-charge stage.

19. We are supported in the view taken by us by the decision of this Court in *Ajoy Kumar Ghose* (supra). That was a case where the trial Court had framed charges against the accused without the prosecution having any evidence whatsoever in terms of Section 244 of the Cr.P.C. This Court held that the procedure adopted by the trial Court was not correct because the language of Section 246(1) Cr.P.C. itself sufficiently indicated that charges have to be framed against the accused on the basis of some evidence offered by the complainant at the stage of Section 244(1). This Court observed:

> "The language of the Section clearly suggests that it is on the basis of the evidence offered by the complainant at the stage of Section 244(1) Cr.P.C., that the charge is to be framed, if the Magistrate is of the opinion that there is any ground for presuming that the accused has committed an offence triable under this Chapter. Therefore, ordinarily, when the evidence is offered under Section 244 Cr.P.C. by the prosecution, the Magistrate has to consider the same, and if he is convinced, the Magistrate can frame the charge."

20. This Court further clarified that the expression "or at any previous stage of the case" appearing in Section 246(1) did not imply that a Magistrate can frame charges against an accused even before any evidence was led under Section 24. This Court approved the decision of the High Court of Bombay in *Sambhaji Nagu Koli v. State of Maharashtra* 1979 Cri LJ 390 (Bom), where the High Court has explained the purport of the expression "at any previous stage of the case". The said expression, declared this Court, only meant that the Magistrate could frame a charge against the accused even before all the evidence which the prosecution proposed to adduce under Section 244(1) was recorded and nothing more. This Court observed:

"44. In Section 246 Cr.P.C. also, the phraseology is "if,

when such evidence has been taken", meaning thereby, a clear reference is made to Section 244 Cr.P.C. The Bombay High Court came to the conclusion that the phraseology would, at the most, mean that the Magistrate may prefer to frame a charge, even before all the evidence is completed. The Bombay High Court, after considering the phraseology, came to the conclusion that the typical clause did not permit the Magistrate to frame a charge, unless there was some evidence on record. For this, the Learned Single Judge in that matter relied on the ruling in *Abdul Nabi v. Gulam Murthuza Khan* 1968 Cri LJ 303 (AP)."

21. More importantly, this Court recognised the right of cross-examination as a salutary right to be exercised by the accused when witnesses are offered by the prosecution at the stage of Section 244(1) of the Code and observed:

"51. The right of cross-examination is a very salutary right and the accused would have to be given an opportunity to cross-examine the witnesses, who have been offered at the stage of Section 244(1) Cr.P.C. The accused can show, by way of the cross-examination, that there is no justifiable ground against him for facing the trial and for that purpose, the prosecution would have to offer some evidence. While interpreting this Section, the prejudice likely to be caused to the accused in his losing an opportunity to show to the Court that he is not liable to face the trial on account of there being no evidence against him, cannot be ignored."

22. In *Harinarayan G. Bajaj v. State of Maharashtra & Ors.* (2010) 11 SCC 520, this Court reiterated the legal position stated in *Ajoy Kumar Ghose* (supra) and held that the right of an accused to cross-examine witnesses produced by the prosecution before framing of a charge against him was a valuable right. It was only through cross-examination that the accused could show to the Court that there was no need for a

trial against him and that the denial of the right of cross-examination under Section 244 would amount to denial of an opportunity to the accused to show to the Magistrate that the allegations made against him were groundless and that there was no reason for framing a charge against him. The following passages are in this regard apposite:

"18. This Court has already held that right to cross-examine the witnesses who are examined before framing of the charge is a very precious right because it is only by cross-examination that the accused can show to the Court that there is no need of a trial against him. It is to be seen that before framing of the charge under Section 246, the Magistrate has to form an opinion about there being ground for presuming that the accused had committed offence triable under the Chapter. If it is held that there is no right of cross-examination under Section 244,. then the accused would have no opportunity to show to the Magistrate that the allegations are groundless and that there is no scope for framing a charge against him.

xx xx xx

20. Therefore, the situation is clear that under Section 244, Cr. P.C. the accused has a right to cross-examine the witnesses and in the matter of Section 319, Cr.P.C. when a new accused is summoned, he would have similar right to cross-examine the witness examined during the inquiry afresh. Again, the witnesses would have to be re-heard and then there would be such a right. Merely presenting such witnesses for cross-examination would be of no consequence."

23. In the light of what we have said above, we have no hesitation in holding that the High Court fell in palpable error in interfering with the order passed by the Revisional Court of Sessions Judge, Gandhi Nagar. The High Court was particularly in error in holding that the appellant had an

opportunity to cross-examine the witnesses or that he had not availed of the said opportunity when the witnesses were examined at the stage of proceedings under Chapter XV of the Code. The High Court, it is obvious, has failed to approach the issue from the correct perspective while passing the impugned order.

24. In the result we allow this appeal with costs assessed at Rs.50,000/-, set aside the order passed by the High Court and restore that passed by the Sessions Judge. The costs shall be deposited by respondent No.2-company in the SCBA Lawyers' Welfare Fund within two weeks of the pronouncement of this order.

R.P. Appeal allowed.

THOMSON PRESS (INDIA) LTD.

v.

NANAK BUILDERS & INVESTORS P. LTD. & ORS.

(Civil Appeal No. 1518 of 2013)

FEBRUARY 21, 2013

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

Code of Civil Procedure, 1908:

O. 1, r.10, O.22, r.10 – Suit for specific performance of contract – During pendency of the suit defendant transferring the property – Application by appellant-transferee for impleadment as defendant – HELD: Appellant entered into a clandestine transaction with the defendants and got the property transferred in its favour – Therefore, the appellant cannot be held to be a bonafide purchaser, without notice – It is true that the application which the appellant made was only under O. I r.10 CPC but the enabling provision of O.22, r. 10 CPC could always be invoked if the fact situation so demanded – In the facts and circumstances of the case and also for the ends of justice, the appellant is to be added as party-defendant in the suit –Specific Relief Act, 1963– s. 19 – Transfer of Property Act, 1882 – s.52 – Doctrine of lis pendens.

The plaintiff-respondent no. 1 filed a suit on 1.11.1991 against the defendants-respondents for specific performance of the agreement dated 29.5.1986, whereunder the defendants had agreed to sell the suit property to the plaintiff-respondent no. 1. Appearance was put on behalf of the defendants and on the basis of the statement made on their behalf court on 4.11.1991 passed an interim order not to alienate the suit property. However, between 31.1.2001 and 3.4.2001 five sale deeds were executed by the defendants in favour of the

appellant. On the basis of these sale deeds the appellant moved an application under O.1, r.10. CPC, for impleadment as defendant in the suit for specific performance filed by the plaintiff-respondent no. 1. The Single Judge of the High Court rejected the application. The FAO filed by the appellant was also dismissed by the Division Bench of the High Court.

In the instant appeal, the question for consideration before the Court was: "whether the appellant who is the transferee pendente lite having notice and knowledge about the pendency of the suit for specific performance and order of injunction can be impleaded as party under Order 1 Rule 10 on the basis of sale deeds executed in its favour by the defendants"

Allowing the appeal, the Court

HELD: (Per M.Y. Eqbal, J)

1.1 Order 1 Rule 10 of the Code of Civil Procedure, 1908 which empowers the court to add any person as party at any stage of the proceedings if the presence of such person before the court is necessary or proper for effective adjudication of the issue involved in the suit. Sub-rule (2) of Rule 10 gives a wider discretion to the court to meet every case or defect of a party and to proceed with a person who is either a necessary party or a proper party whose presence in the court is essential for effective determination of the issues involved in the suit. [para 27 & 28] [100-B-C; 101--D-E]

Ramesh Hirachand Kundanmal v. Municipal Corporation of Greater Bombay & Ors. **1992 (2) SCR 1 = 1992 (2) SCC 524 - referred to.**

1.2 From a bare reading of s.19 of the Specific Relief Act, it is manifest that a contract for specific performance

may be enforced against the parties to the contract and the persons mentioned in the said section. Clause (b) of s.19 makes it very clear that a suit for specific performance cannot be enforced against a person who is a transferee from the vendor for valuable consideration and without notice of the original contract which is sought to be enforced in the suit. [para 31] [103-E-F]

1.3 In the instant case, even before the institution of suit for specific performance when the plaintiff came to know about the activities of the defendants to deal with the property, a public notice was published at the instance of the plaintiff in a newspaper on 12.02.1990 informing the public in general about the agreement with the plaintiffs. In response to the said notice the sister concern of the appellant served a legal notice dated 24.06.1990 on the defendants referring to the 'agreement to sell' entered into between the plaintiffs and the defendants. Even after the institution of the suit, the counsel who appeared for the defendants gave an undertaking not to transfer and alienate the suit property. Notwithstanding the order passed by the court regarding the undertaking given on behalf of the defendants, and having full notice and knowledge of all these facts, the sister concern of the appellant entered into series of transactions and finally the appellant got the sale deeds executed in its favour by the defendants in respect of suit property. Taking into consideration all these facts, this Court holds that the appellant entered into a clandestine transaction with the defendants and got the property transferred in their favour. Therefore, the appellant cannot be held to be a bonafide purchaser, without notice. [para 33, 34 and 35] [103-D-H; 104-A-E]

1.4 A decree for specific performance of a contract may be enforced against a person claiming under the plaintiff, and title acquired subsequent to the contract.

There is no dispute that such transfer made in favour of the subsequent purchaser is subject to the rider provided u/s 52 of the Transfer of Property Act and the restrain order passed by the court. Section 52 of the Transfer of Property Act, 1882 speaks about the doctrine of lis pendens. The doctrine is based on the ground that it is necessary for the administration of justice that the decision of a court in a suit should be binding not only on the litigating parties but on those who derive title pendente lite. The provision of this Section does not indeed annul the conveyance or the transfer otherwise, but renders it subservient to the rights of the parties to a litigation. [Para 23-24 and 37] [97-G; 98-E-F; 104-G-H; 105-A]

Kasturi v. Iyyamperumal & Ors. **2005 (3) SCR 864 = 2005(6) SCC 733;** *Vidhur Impex and Traders Pvt. Ltd. v. Tosh Apartments Pvt. Ltd. & Ors.* **2012 (8) SCC 384;** *Surjit Singh and Others v. Harbans Singh and Others* **1995 (3) Suppl. SCR 354 = (1995) 6 SCC 50;** *Anil Kumar Singh vs. Shivnath Mishra alias Gadasa Guru* **1994 (5) Suppl. SCR 135 = (1995) 3 SCC 147;** *Savitri Devi v. District Judge, Gorakhpur and Others* **1999 (1) SCR 725 = (1999) 2 SCC 577;** *Vijay Pratap and Others v. Sambhu Saran Sinha and Others* **1996 (4) Suppl. SCR 173 = (1996) 10 SCC 53;** *Gouri Dutt Maharaj v. Sukur Mohammed & Ors.* **AIR (35) 1948;** *Kedar Nath Lal & Anr. v. Ganesh Ram & Ors.* **1970 (2) SCR 204 = AIR 1970 SC 1717; and** *Rajender Singh & Ors. v. Santa Singh & Ors.* **1974 (1) SCR 381 =AIR 1973 SC 2537;** *Kafiladdin and Others vs. Samiraddin and Others,* **AIR 1931 Calcutta 67;** *Durga Prasad and Another v. Deep Chand and Others* **1954 SCR 360 = AIR (1954) SC 75** *Ramesh Chandra v. Chunil Lal* **1971 (2) SCR 573 = AIR (1971) SC 1238;** *Dwarka Prasad Singh and Others vs. Harikant Prasad Singh and Others* **(1973) SC 655 – referred to.**

1.5 In the facts and circumstances of the case and

also for the ends of justice, the appellant is to be added as party-defendant in the suit. The impugned orders passed by the High Court are set aside. It is clarified that the appellant after impledment as party-defendant shall be permitted to take all such defences which are available to the vendors as the appellant derived title, if any, from the vendor on the basis of purchase of the suit property subsequent to the agreement with the plaintiff and during the pendency of the suit. [para 42-43] [107-C-E]

Per T.S. Thakur, J. (Concurring)

1.1 Sale of immovable property in the teeth of an earlier agreement to sell is immune from specific performance of an earlier contract of sale only if the transferee has acquired the title for valuable consideration, in good faith and without notice of the original contract. In the instant case, the appellant was not protected against specific performance of the contract in favour of the plaintiff, for even though the transfer in favour of the appellant was for valuable consideration it was not in good faith nor was it without notice of the original contract. The appellant is not a bona fide purchaser and is, therefore, not protected against specific performance of the contract between the plaintiffs and the owner defendants in the suit. [para 3, 4 and 14(1)] [108-E-F; 109-C-D; 115-C]

Nagubai Ammal & Ors. v. B. Shama Rao & Ors. **AIR 1856 SC 593;** *Vinod Seth v. Devinder Bajaj* **2010 (7) SCR 424 = (2010) 8 SCC 1;** *Nawab John & Ors. v. V.N. Subramanyam* **2012 (6) SCR 369 = (2012) 7 SCC 738;** *Jayaram Mudaliar v. Ayyaswami and Ors.* **1973 (1) SCR 139 = (1972) 2 SCC 200 – referred to.**

1.2 Therefore, the transfer of the suit property pendete lite is not void ab initio and that the purchaser of any such property takes the bargain subject to the

rights of the plaintiff in the pending suit. Even where the sale deed is executed in breach of an injunction issued by a competent court, there is no reason why the breach of any such injunction should render the transfer whether by way of an absolute sale or otherwise ineffective. The party committing the breach may doubtless incur the liability to be punished for the breach committed by it but the sale by itself may remain valid as between the parties to the transaction subject only to any directions which the competent court may issue in the suit against the vendor. The transfer in favour of the appellant pendente lite is effective in transferring title to the appellant but such title shall remain subservient to the rights of the plaintiff in the suit and subject to any direction which the Court may eventually pass therein. [para 9 and 14] [111-C-E; 115-D]

1.3 As regards the right of a transferee pendete lite, to seek addition as a party defendant to the suit under O. I, r.10 of the Code of Civil Procedure, 1908, it is well settled that no one other than parties to an agreement to sell is a necessary and proper party to a suit. [para 10] [111-F]

1.4 However, the prayer made by the appellant can be allowed under O. 22, r. 10 CPC. A simple reading of O.22, r.10 would show that in cases of assignment, creation or devolution of any interest during the pendency of a suit, the suit may, by leave of the court, be continued by or against the person to or upon whom such interest has come or devolved. It is true that the application which the appellant made was only under O. I r.10 CPC but the enabling provision of O.22, r. 10 CPC could always be invoked if the fact situation so demanded. [para 11] [112-C-E]

1.5 This Court has held that a transferee pendete lite can be added as a party to the suit lest the transferee suffered prejudice on account of the transferor losing interest in the litigation post transfer. [para 12] [112-G-H]

Khemchand Shanker Choudhary v. Vishnu Hari Patil **1983 (1) SCR 898 = (1983) 1 SCC 18; and** *Amit Kumar Shaw v. Farida Khatoon* **2005 (3) SCR 509 = (2005) 11 SCC 403;** *Rikhu Dev, Chela Bawa Harjug Dass v. Som Dass (deceased) through his Chela Shiama Dass,* **1976 (1) SCR 487 = (1976) 1 SCC 103 – relied on.**

1.6 Since the appellant has purchased the entire estate that forms the subject matter of the suit, the appellant is entitled to be added as a party defendant to the suit. The appellant shall as a result of his addition raise and pursue only such defenses as were available and taken by the original defendants and none other. [para 14] [115-E-F]

Case Law Reference:

As per M.Y. Eqbal, J.

2005 (3) SCR 864	**referred to**	**para 7**
2012 (8) SCC 384	**referred to**	**para 9**
1995 (3) Suppl. SCR 354	**referred to**	**para 10**
1994 (5) Suppl. SCR 135	**referred to**	**para 15**
1999 (1) SCR 725	**referred to**	**para 17**
1996 (4) Suppl. SCR 173	**referred to**	**para 20**
AIR (35) 1948	**referred to**	**para 24**
1970 (2) SCR 204	**referred to**	**para 25**
1974 (1) SCR 381	**referred to**	**para 26**
1992 (2) SCR 1	**referred to**	**para 29**
AIR 1931 Calcutta 67	**referred to**	**para 38**
1954 SCR 360	**referred to**	**para 39**

1971 (2) SCR 573	**referred to**	**para 40**

As per T.S. Thakur, J.

AIR 1986 SC 593	**referred to**	**para 5**
2010 (7) SCR 424	**referred to**	**para 6**
2012 (6) SCR 369	**referred to**	**para 7**
1973 (1) SCR 139	**referred to**	**para 8**
1983 (1) SCR 898	**relied on**	**para 12**
2005 (3) SCR 509	**relied on**	**para 13**
1976 (1) SCR 487	**relied on**	**para 14**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1518 of 2013.

From the Judgment & Orders dated 15.12.2008 of the High Court of Delhi at New Delhi in FAO (OS) No. 295 of 2008.

Sunil Gupta, Pramod Dayal, Nikuknj Dayal, S.D. Salwan, Aditya Garg for the Appellant.

Mahender Rana, Ramesh N. Keshwani, Ram Lal Roy, Deevesh Nagrath, Utkarsha Kohli, Nitish K. Sharma, Dr. Vipin Gupta for the Respondents.

The Judgments of the Court were delivered by

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

2. This appeal is directed against the order passed by the division bench of the High Court of Delhi in FAO No. 295 of 2008 affirming the order of the Single Judge and rejecting the petition filed by the appellant under Order 1 Rule 10 of CPC for impleadment as defendants in a suit for specific performance of contract being Suit No. 3426 of 1991 filed by plaintiff-Respondent No.1.

3. Although the case has a chequered history, the brief facts of the case can be summarized as under :-

4. Mrs. Lakhbir Sawhney, Respondent No. 2 and son Mr. H.S. Sawhney, the predecessor of Respondent No. 3 (a) to (d) were the owners of the property known as “Ojha House” / “Sawhney Mansion”, F-Block, Connaught Place, New Delhi. (These respondents shall be referred as “the Sawhneys” for the sake of convenience). M/s Nanak Builders and Investors Pvt. Ltd., Respondent No.1 is the plaintiff in the Suit. The plaintiff-Respondent No.1 filed a suit in the High Court of Delhi being Suit No. 3426 of 1991 against the defendants-respondents Sawhneys’ for a decree for specific performance of agreement. The case of the plaintiff-respondent is that on 29.05.1986 the defendant-respondent entered into an agreement with the plaintiff-respondent for sale of an area measuring about 4000 sq.ft. on the 1st Floor of F-26, Connaught Place, New Delhi on the consideration of Rs. 50 lakhs. Out of the said consideration, a sum of Rs. 1 lakh was paid by the plaintiffs to the defendants vide cheque no. 0534224 drawn from Union Bank of India, New Delhi. The aforesaid property shall be referred to as the “suit property” which was in the tenancy of M/s Peerless General Finance Company Limited. In the said agreement it was agreed inter alia that if the premises is vacated and the plaintiff did not complete the sale on the defendant, getting all permissions, sanctions etc., the defendant shall have the right to forfeit the money. Plantiff’s further case was that M/s Peerless General Finance Company Limited has given a security deposit of Rs. 25 lakhs approximately and did not vacate the premises and called upon the defendants that they will vacate the premises only when the defendants make the payment, that too on the expiry of the lease which expired around September, 1990. It is alleged by the plaintiff that during the intervening period, it has been making part payments from time to time out of the said consideration amount. In May 1991, the defendants got the said suit premises vacated from M/s Peerless General Finance Company Limited. The plaintiffs

have immediately approached the defendants to receive the balance consideration but the same was avoided by the defendant. A public notice was, therefore, issued in 'The Hindustan Times' , New Delhi so that the defendants 'Sawhneys' do not sell, transfer or alienate the said property to any other person. Lastly, it was alleged by the plaintiff that despite being always ready and willing to complete the transaction, the defendant avoided to obtain requisite permission / sanction and clearance, hence the suit was filed. During the intervening period some more development took place. One Living Media India Limited, (in short LMI), said to be a group company of the Appellant M/s Thomson Press (India) Limited offered the defendant-respondent to take the suit premises on lease, some time in the year 1988. The defendants Sawhneys' assured the LMI that lease would be granted after M/s Peerless vacated the suit property. LMI, accordingly, sent a cheque to the defendants-Sawhneys' as earnest money in respect of the lease. However, when Sawhneys' wanted to resile from the agreed terms with LMI, a suit was filed by LMI being Suit No. 2872 of 1990 against Sawhneys' in Delhi High Court for perpetual injunction restraining the Sawhneys' from parting with possession of the premises to any third party. The High Court passed the restrain order on 19.09.1990 with regard to the suit property and appointed a commissioner to report as to who is in possession of suit premises. It appears that the aforesaid suit filed by LMI was compromised and an order was passed on 08.04.1991 whereby, as per the compromise, the suit property was leased out by defendant-Sawhneys' in favour of LMI and possession of the property was given to it.

5. On 01.11.1991, the plaintiff-M/s Nanak Builders in the meantime filed a suit against the defendant-respondent Sawhneys' being suit no. 3426/1991 for specific performance of agreement to sell dated 29.05.1986. In the said suit pursuant to summons issued against the defendants– Sawhneys' one Mr. Raj Panjwani, Advocate accepted notice

on behalf of Sawhneys' and stated before the Court that possession of the flat in question is not with the defendants, rather with M/s LMI which delivered to them by virtue of the lease. Mr. Panjwani further stated that till disposal of the suit the property in question would not be transferred or alienated by the defendants. The defendants- Sawhneys' also filed a written statement in the said suit. It appears that the defendants-Sawhneys' took loan from Vijaya Bank and to secure the loan, equitable mortgage was created in respect of the suit property. In 1977 a suit was filed by the Bank in Delhi High Court for recovery and redemption of the mortgaged property. The said suit was decreed on 14.10.1998 and recovery certificate was issued by DRT, Delhi. LMI, a group of the appellant Company intervened and settled the decree by agreeing to deposit the loan amount of Rs.1.48 crores. The LMI cleared all the dues, income tax liability etc., of Sawhneys' for sale of the property in favour of LMI and its associates. Finally, in between 31.01.2001 and 03.04.2001 five sale deeds were executed by defendants-Sawhneys' in favour of the present appellant herein M/s Thomson Press India Limited. On the basis of those sale deeds the appellant moved an application under Order 1 Rule 10 CPC for impleadment as defendants in a suit for specific performance filed by Respondent No.1 herein M/s Nanak Builders and Investors Pvt. Ltd.

6. The learned Single Judge of the Delhi High Court after hearing the parties dismissed the application on the ground that there was an injunction order passed way back on 04.11.1991 in the suit for specific performance restraining the defendants-Sawhneys' from transferring or alienating the suit property passed, the purported sale deeds executed by the defendants in favour of the appellant was in violation of the undertaking given by the respondents which was in the nature of injunction. Aggrieved by the said order, the appellant filed an appeal being FAO No.295 of 2008 which was heard by a Division Bench. The Division Bench affirmed the order of the Single Judge and

held that in view of the injunction in the form of undertaking given by the respondents-Sawhneys' and recorded in the suit proceedings, how the property could be purchased by the appellants in the year 2008. The appellant aggrieved by the aforesaid orders filed this Special Leave Petition.

7. Mr. Sunil Gupta, learned senior counsel appearing for the appellant assailed the impugned orders as being illegal, erroneous in law and without jurisdiction. Learned senior counsel firstly contended that the appellant being the purchaser of the suit property is a necessary and proper party for the complete and effective adjudication of the suit. According to him, the denial of impleadment will be contrary to the principles governing Order 1 Rule 10 (2) of the CPC though he submitted that impleadment as a party is not a matter of right but a matter of judicial discretion to be exercised in favour of a necessary and proper party. Ld. Senior counsel further submitted that where a subsequent purchaser has purchased a suit property and is deriving its title through the same vendor then he would be a necessary party provided it has purchased with or without notice of the prior contract. He further submitted that after one transaction a pendency of the suit arising there from, Section 52 of the Transfer of Property Act does not prohibit the subsequent transaction of transfer of property nor even declares the same to be null and void. Ld. Senior counsel, however, has not disputed the legal proposition that the court would be justified in denying impleadment at the instance of the applicant who has entered a subsequent transaction knowing that there is a court injunction in a pending suit restraining and prohibiting further transaction or alienation of the property. Ld. Senior counsel put heavy reliance on the decisions of the Supreme Court in *Kasturi v. Iyyamperumal & Ors.* 2005(6) SCC 733, for the proposition that an application by the subsequent purchaser for impleadment in a suit for specific performance by a prior transferee does not alter the nature and character of the suit and such a transferee has a right and interest to be protected and deserves to be impleaded in the suit.

8. Mr. Gupta, strenuously argued that High Court has not considered the question whether the appellant-purchaser had any knowledge of the order of injunction dated 04.11.1991 before entering the sale transaction in 2001. He has submitted that even assuming that Sawhneys' had such a knowledge, the same cannot be held as an objection to the exercise of judicial discretion in favour of the appellant being impleaded in the suit on the application of the appellant itself.

9. Per contra, Mr. Mahender Rana, learned counsel appearing for Respondent No.1 firstly contended that the suit is at the stage of final hearing and almost all the witnesses have been examined and at this stage the petition for impleadment cannot be and shall not be allowed. Ld. Counsel drew our attention to the legal notice dated 24.06.1990 and the notice dated 12.02.1990 published in the newspaper and submitted that not only the Sawhneys' but the appellant and its sister concern had full notice and knowledge of the pendency of the suit and the order of injunction on the basis of the undertaking given by Sawhneys' that the suit property shall not be assigned or alienated during the pendency of the suit. Learned counsel further contended that as a matter of fact the vendor Sawhneys' had committed fraud by incorporating in the sale deed that there was no agreement or any injunction passed in any suit or proceedings. In that view of the matter the application for impleadment has been rightly rejected by the High Court. He placed reliance on *Vidhur Impex and Traders Pvt. Ltd. v. Tosh Apartments Pvt. Ltd. & Ors.* 2012 (8) SCC 384 and *Surjit Singh and Others v. Harbans Singh and Others* (1995) 6 SCC 50.

10. Before discussing the decision of the Supreme Court relied upon by the parties, we would like to highlight some of the important facts and developments in the case which are not disputed by the parties.

11. As noted above, plaintiff-respondent No.1 filed the suit for specific performance on 01.11.1991 against the defendants

Sawhneys for the specific performance of the agreements dated 29.05.1986. In the said suit, the defendants Sawhneys through Mr. Raj Panjwani, Advocate accepted summons on their behalf and filed vakalatnama. The said Advocate Mr. Panjwani, inter-alia, stated before the Court that the defendants would not transfer or alienate the flat in question. The order dated 04.11.1991 was incorporated in the order sheet as under:

> "Mr. Panjwani accepts notice. Mr. Panjwani states that the possession of the flat in question is not with the defendants. The possession is with M/s. Living Media India Limited which was delivered to them under the orders of this Court. Mr. Panjwani states that till the disposal of this application the defendants would not transfer or alienate the flat in question. Let the reply be filed within 6 weeks with advance copy to the counsel for the plaintiff, who may file the rejoinder within 2 weeks thereafter. List this I.A. for disposal on 10.3.1992."

12. It is also not in dispute that before the institution of the suit the plaintiff-respondent got a notice published in the newspaper on 12.02.1990 in Hindustan Times, Delhi Edition. When this came to the notice of the appellant, the sister concern of the appellant, namely, M/s. Living Media India Limited sent a legal notice to the defendants Sawhneys' dated 24.06.1990 and called upon him to execute the lease deed in respect of the suit property in terms of the agreement. In the said notice dated 24.06.1990 the sister concern of the appellant in paragraph 8 stated as under:

> "That a Public Notice appeared in the Hindustan Times Delhi Edition on 12.2.1990. As per this notice one M/s Nanak Buildings and Investor Pvt.Ltd. claim that you have entered into an Agreement to sell the premises in question to them. A copy of this notice is being endorsed to their counsel mentioned in the Public Notice. My client further learns that you have approached a number of property brokers also for the disposal of the property."

13. The question, therefore, that falls for consideration is as to whether if the appellant who is the transferee pendente lite having notice and knowledge about the pendency of the suit for specific performance and order of injunction can be impleaded as party under Order 1 Rule 10 on the basis of sale deeds executed in their favour by the defendants Sawhneys'.

14. Before coming to the question involved in the case, we would like to discuss the decisions of this Court relied upon by the parties.

15. In the case of *Anil Kumar Singh vs. Shivnath Mishra alias Gadasa Guru* (1995) 3 SCC 147, in a suit for specific performance of contract a petition was filed under Order 6 Rule 17 CPC seeking leave to amend the plaint by impleading the respondent as party defendant in the suit. The contention of the petitioner was that the vendor had colluded with his sons and wife and obtained a collusive decree in a suit under the U.P. Zamindari Abolition and Land Reforms Act. It was contended that by operation of law they became the co-sharers of the property to be conveyed under the Agreement and, therefore, he is a necessary party. The trial court dismissed the petition and on revision the High Court of Allahabad affirmed the order. In an appeal this Court, refused to interfere with the order and observed.

> "In this case, since the suit is based on agreement of sale said to have been executed by Mishra, the sole defendant in the suit, the subsequent interest said to have been acquired by the respondent by virtue of a decree of the court is not a matter arising out of or in respect of the same act or transaction or series of acts or transactions in relation to the claim made in the suit."

> "The question is whether the person who has got his interest in the property declared by an independent decree

but not a party to the agreement of sale, is a necessary and proper party to effectually and completely adjudicate upon and settle all the question involved in the suit. The question before the court in a suit for the specific performance is whether the vendor had executed the document and whether the conditions prescribed in the provisions of the Specific Relief Act have been complied with for granting the relief of specific performance."

"Sub-rule(2) of Rule 10 of Order 1 provides that the Court may either upon or without an application of either party, add any party whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the suit. Since the respondent is not a party to the agreement of sale, it cannot be said that without his presence the dispute as to specific performance cannot be determined. Therefore, he is not a necessary party."

16. In the case of *Surjit Singh* (Supra) a similar question arose for consideration before this Court. In that case, on the death of one Janak Singh, being the head of the family a suit for partition and separate possession was filed by and between the parties. A preliminary decree was passed and while proceeding for final decree was pending, the trial court passed an order restraining all the parties from alienating or otherwise transferring in any manner any part of the property involved in the suit. In spite of the aforesaid order one of the party assigned the right under the preliminary decree involving wife of his lawyer. On the basis of the assigned deed the assignee made an application under Order 22 Rule 10 CPC for impleadment as party to the proceeding. The petition was allowed by the trial court and affirmed in appeal by the Additional District Judge and then in revision by the High Court. The matter came before this Court allowing the appeal and set aside the orders passed by the courts below. This Court observed :-

"As said before, the assignment is by means of a

registered deed. The assignment had taken place after the passing of the preliminary decree in which Pritam Singh has been allotted 1/3rd share. His right to property to that extent stood established. A decree relating to immovable property worth more than hundred rupees, if being assigned, was required to be registered. That has instantly been done. It is per se property, for it relates to the immovable property involved in the suit. It clearly and squarely fell within the ambit of the restraint order. In sum, it did not make any appreciable difference whether property per se had been alienated or a decree pertaining to that property. In defiance of the restraint order, the alienation/assignment was made. If we were to let it go as such, it would defeat the ends of justice and the prevalent public policy. When the Court intends a particular state of affairs to exist while it is in seisin of a lis, that state of affairs is not only required to be maintained, but it is presumed to exist till the Court orders otherwise. The Court, in these circumstances has the duty, as also the right, to treat the alienation/assignment as having not taken place at all for its purposes. Once that is so, Pritam Singh and his assignees, respondents herein, cannot claim to be impleaded as parties on the basis of assignment. Therefore, the assignees-respondents could not have been impleaded by the trial court as parties to the suit, in disobedience of its orders. The principles of lis pendens are altogether on a different footing. We do not propose to examine their involvement presently. All what is emphasised is that the assignees in the present facts and circumstances had no cause to be impleaded as parties to the suit. On that basis, there was no cause for going into the question of interpretation of paragraphs 13 and 14 of the settlement deed. The path treaded by the courts below was, in our view, out of their bounds. Unhesitatingly, we upset all the three orders of the courts below and reject the application of the assignees for impleadment under Order 22 Rule 10 CPC."

17. In the case of *Savitri Devi v. District Judge, Gorakhpur and Others* (1999) 2 SCC 577, a 3 Judges' Bench of this Court considered a similar question under Order 1 Rule 10 CPC. The fact of the case was that the appellant filed a suit for maintenance and for creation of charge over the ancestral property. She also applied for an interim order of injunction restraining her sons from alienating the property during the pendency of the suit. But a vakalatnama was filed on behalf of the defendants and 4th defendant also filed an affidavit purporting to be on behalf of the defendants, expressing their concern that during the pendency of the case the suit property will not be sold. In the light of consent of the counsel the Court passed an order on 18.08.1992 directing the parties not to transfer the disputed property till the disposal of the suit. In spite of the aforesaid order one of the defendants sold 1/4th share of the land to the 3rd respondent and 1/4th share in another land to the 4th respondent on 19.08.1992 and further sold 1/4th share to the 5th respondent. On the basis of this transfer the transferee-Respondent Nos.3-5 filed an application under Order 1 Rule 10 CPC for impleading them as parties to the suit. The application was allowed at all stages. This court noticed the relevant facts which has been incorporated in paragraph 4 of the decision which is reproduced hereunder :-

> "The trial court passed a detailed order on 14-7-1997 granting the application of Respondents 3 to 5 and directed the plaintiff to implead them as defendants in the suit. In the order of the trial court, reference has been made to an application filed by the first defendant to the effect that he was not earlier aware of the case and the 4th defendant had forged his signature and filed a bogus vakalatnama. He had also alleged that the order of injunction was obtained fraudulently on 18-8-1992. The trial court has also referred to an application under Section 340 CrPC filed by the first defendant and observed that the same had been dismissed by order dated 20-12-1992. There is also a reference in the order of the trial court in the High Court

> filed by the plaintiff for quashing orders dated 10-11-1995 and 19-4-1996 passed in the suit and a miscellaneous civil appeal arising from the suit wherein Respondents 3 to 5 had been impleaded as parties. It is seen from the order of the trial court that certain proceedings under Order XXXIX Rule 2-A CPC concerning the question of attachment of the properties sold were also pending. It is only after taking note of all those facts, the trial court allowed the application of Respondents 3 to 5 to implead them as parties to the suit."

18. This Court further noticed the point taken by the appellant based on the principles laid down in *Surjit Singh's* case (supra). Allowing the application this Court held :-

> "The facts set out by us in the earlier paragraphs are sufficient to show that there is a dispute as to whether the first defendant in the suit was a party to the order of injunction made by the Court on 18-8-1992. The proceedings for punishing him for contempt are admittedly pending. The plea raised by him that the first respondent had played a fraud not only against him but also on the Court would have to be decided before it can be said that the sales effected by the first defendant were in violation of the order of the Court. The plea raised by Respondents 3 to 5 that they were bona fide transferees for value in good faith may have to be decided before it can be held that the sales in their favour created no interest in the property. The aforesaid questions have to be decided by the Court either in the suit or in the application filed by Respondents 3 to 5 for impleadment in the suit. If the application for impleadment is thrown out without a decision on the aforesaid questions, Respondents 3 to 5 will certainly come up with a separate suit to enforce their alleged rights which means a multiplicity of proceedings. In such circumstances, it cannot be said that Respondents 3 to 5 are neither necessary nor proper parties to the suit."

19. While referring *Surjit Singh's* case this Court noticed that in that case there was no dispute that the assignors and the assignees had knowledge of the order of injunction passed by the Court. On those facts, this Court held that the deed of assignment was not capable of conveying any right to the assignee and the order of impleadment of the assignees as parties was unsustainable.

20. In the case of *Vijay Pratap and Others v. Sambhu Saran Sinha and Others* (1996) 10 SCC 53 a petition was filed under Order 1 Rule 10 of the CPC in suit for specific performance for impleading him as party in place of his father on the ground that the father during his lifetime alleged to have entered into a compromise. The trial court rejecting the petition held that the petitioners are neither necessary or proper parties to the suit. On revision this Court dismissing the same held as under :-

> "The trial court accordingly held that the petitioners are neither necessary nor proper parties to the suit. On revision, the High Court upheld the same. Shri Sanyal, the learned counsel for the petitioners contended that their father had not signed the relinquishment deed and the signatures appended to it were not that of him. The deed of relinquishment said to have been signed by the father of the petitioners was not genuine. These questions are matters to be taken into consideration in the suit before the relinquishment deed and compromise memo between the other contesting respondents were acted upon and cannot be done in the absence of the petitioners. The share of the petitioners will be affected and, therefore, it would prejudice their right, title and interest in the property. We cannot go into these questions at this stage. The trial court has rightly pointed that the petitioners are necessary and proper parties so long as the alleged relinquishment deed said to have been signed by the deceased father of the petitioners is on record. It may not bind petitioners but

> whether it is true or valid or binding on them are all questions which in the present suit cannot be gone into. Under those circumstances, the courts below were right in holding that the petitioners are not necessary and proper parties but the remedy is elsewhere. If the petitioners have got any remedy it is open to them to avail of the same according to law."

21. In *Kasturi's* case (supra) a three Judges' Bench of this Court said that in a suit for specific performance of contract for sale an impleadment petition was filed for addition as party defendant on the ground that the petitioners were claiming not under the vendor but adverse to the title of the vendor. In other words, on the basis of independent title in the suit property the petitioner sought to be added as a necessary party in the suit. Rejecting the petition this Court held as under :-

> "As noted herein earlier, two tests are required to be satisfied to determine the question who is a necessary party, let us now consider who is a proper party in a suit for specific performance of contract for sale. For deciding the question who is a proper party in the suit for specific performance the guiding principle is that the presence of such a party is necessary to adjudicate the controversies involved in the suit for specific performance of the contract for sale. Thus, the question is to be decided keeping in mind the scope of the suit. The question that is to be decided in a suit for specific performance of the contract for sale is to the enforceability of the contract entered into between the parties to the contract. If the person seeking addition is added in such a suit, the scope of the suit for specific performance would be enlarged and it would be practically converted into a suit for title. Therefore, for effective adjudication of the controversies involved in the suit, presence of such parties cannot be said to be necessary at all. *Lord Chancellor Cottenham in Tasker v. Small* 1834 (40) English Report 848 made the following

observations :

> "It is not disputed that, generally, to a *bill for specific performance of a contract for sale, the parties to the contract only are the proper parties;* and, when the ground of this jurisdiction of Courts of Equity in suits of that kind is considered it could not properly be otherwise. The Court assumes jurisdiction in such case, because a Court of law, giving damages only for the non-performance of the contract, in many cases does not afford an adequate remedy. *But, in equity, as well as in law, the contract constitutes the right and regulates the liabilities of the parties; and the object of both proceedings is to place the party complaining as nearly as possible in the same situation as the defendant had agreed that he should be placed in. It is obvious that persons, strangers to the contract, and, therefore, neither entitled to the right, nor subject to the liabilities which arise out of it, are as much strangers to a proceeding to enforce the execution of it as they are to a proceeding to recover damages for the breach of it."*
>
> (Emphasis supplied)

……..

"Keeping the principles as stated above in mind, let us now, on the admitted facts of this case, first consider whether the respondent Nos.1 and 4 to 11 are necessary parties or not. In our opinion, the respondent Nos. 1 and 4 to 11 are not necessary parties effective decree could be passed in their absence as they had not purchased the contracted property from the vendor after the contract was entered into. They were also not necessary parties as they would not be affected by the contract entered into between the appellant and the respondent Nos. 2 and 3. In the case

of *Anil Kumar Singh v. Shivnath Mishra alias Gadasa Guru,* 1995 (3) SCC 147, it has been held that since the applicant who sought for his addition is not a party to the agreement for sale, it cannot be said that in his absence, the dispute as to specific performance cannot be decided. In this case at paragraph 9, the Supreme Court while deciding whether a person is a necessary party or not in a suit for specific performance of a contract for sale made the following observation:

> "Since the respondent is not a party to the agreement for sale, it cannot be said that without his presence the dispute as to specific performance cannot be determined. Therefore, he is not a necessary party."
>
> (Emphasis Supplied)

22. In the case of *Vidhur Impex* (supra), the Supreme Court again had the opportunity to consider all the earlier judgments. The fact of the case was that a suit for specific performance of agreement was filed. The appellants and Bhagwati Developers though totally strangers to the agreement, came into picture only when all the respondents entered into a clandestine transaction with the appellants for sale of the property and executed an agreement of sale which was followed by sale deed. Taking note all the earlier decisions, the Court laid down the broad principles governing the disposal of application for impleadment. Paragraph 36 is worth to be quoted hereinbelow:

> "Though there is apparent conflict in the observations made in some of the aforementioned judgments, the broad principles which should govern disposal of an application for impleadment are:
>
> 1. The Court can, at any stage of the proceedings, either on an application made by the parties or otherwise,

direct impleadment of any person as party, who ought to have been joined as Plaintiff or Defendant or whose presence before the Court is necessary for effective and complete adjudication of the issues involved in the Suit.

2. A necessary party is the person who ought to be joined as party to the Suit and in whose absence an effective decree cannot be passed by the Court.

3. A proper party is a person whose presence would enable the Court to completely, effectively and properly adjudicate upon all matters and issues, though he may not be a person in favour of or against whom a decree is to be made.

4. If a person is not found to be a proper or necessary party, the Court does not have the jurisdiction to order his impleadment against the wishes of the Plaintiff.

5. In a Suit for specific performance, the Court can order impleadment of a purchaser whose conduct is above board, and who files Application for being joined as party within reasonable time of his acquiring knowledge about the pending litigation.

However, if the applicant is guilty of contumacious conduct or is beneficiary of a clandestine transaction or a transaction made by the owner of the suit property in violation of the restraint order passed by the Court or the Application is unduly delayed then the Court will be fully justified in declining the prayer for impleadment."

23. It would also be worth to discuss some of the relevant laws in order to appreciate the case on hand. Section 52 of the Transfer of Property Act speaks about the doctrine of lis pendens. Section 52 reads as under:

"52. Transfer of property pending suit relating thereto. – During the [pendency] in any Court having authority [within

the limits of India excluding the State of Jammu and Kashmir] or established beyond such limits] by [the Central Government] [***] of [any] suit or proceedings which is not collusive and in which any right to immovable property is directly and specifically in question, the property cannot be transferred or otherwise dealt with by any party to the suit or proceeding so as to affect the rights of any other party thereto under any decree or order which may be made therein, except under the authority of the Court and on such terms as it may impose.

[Explanation – For the purposes of this section, the pendency of a suit or proceeding shall be deemed to commence from the date of the presentation of the plaint or the institution of the proceeding in a Court of competent jurisdiction, and to continue until the suit or proceeding has been disposed of by a final decree or order and complete satisfaction or discharge of such decree or order has been obtained, or has become unobtainable by reason of the expiration of any period of limitation prescribed for the execution thereof by any law for the time being in force."

24. It is well settled that the doctrine of lis pendens is a doctrine based on the ground that it is necessary for the administration of justice that the decision of a court in a suit should be binding not only on the litigating parties but on those who derive title pendente lite. The provision of this Section does not indeed annul the conveyance or the transfer otherwise, but to render it subservient to the rights of the parties to a litigation. Discussing the principles of lis pendens, the Privy Council in the case of *Gouri Dutt Maharaj v. Sukur Mohammed & Ors.* AIR (35) 1948, observed as under:

"The broad purpose of Section 52 is to maintain the status quo unaffected by the act of any party to the litigation pending its determination. The applicability of the section cannot depend on matters of proof or the strength or weakness of the case on one side or the other in bona fide

proceedings. To apply any such test is to misconceive the object of the enactment and in the view of the Board, the learned Subordinate Judge was in error in this respect in laying stress, as he did, on the fact that the agreement of 8.6.1932, had not been registered."

25. In the case of *Kedar Nath Lal & Anr. v. Ganesh Ram & Ors.* AIR 1970 SC 1717, this Court referred the earlier decision (1967 (2) SCR 18) and observed:

"The purchaser pendente lite under this doctrine is bound by the result of the litigation on the principle that since the result must bind the party to it so it must bind the person driving his right, title and interest from or through him. This principle is well illustrated in Radhamadhub Holder vs. Monohar 15 I.A. 97 where the facts were almost similar to those in the instant case. It is true that Section 52 strictly speaking does not apply to involuntary alienations such as court sales but it is well-established that the principle of lis pendens applies to such alienations.(See *Nilkant v. Suresh Chandra* 12 I.A.171 and *Moti Lal v. Karrab-ul-Din* 24 I.A.170."

26. The aforesaid Section 52 of the Transfer of Property Act again came up for consideration before this Court in the case of *Rajender Singh & Ors. v. Santa Singh & Ors.* AIR 1973 SC 2537 and Their Lordship with approval of the principles laid down in 1973 (1) SCR 139 reiterated:

"The doctrine of *lis pendens* was intended to strike at attempts by parties to a litigation to circumvent the jurisdiction of a court, in which a dispute on rights or interests in immovable property is pending, by private dealings which may remove the subject matter of litigation from the ambit of the court's power to decide a pending dispute of frustrate its decree. Alienees acquiring any immovable property during a litigation over it are held to be bound, by an application of the doctrine, by the decree

passed in the suit even though they may not have been impleaded in it. The whole object of the doctrine of lis pendens is to subject parties to the litigation as well as others, who seek to acquire rights in immovable property which are the subject matter of a litigation, to the power and jurisdiction of the Court so as to prevent the object of a pending action from being defeated."

27. In the light of the settled principles of law on the doctrine of lis pendens, we have to examine the provisions of Order 1 Rule 10 of the Code of Civil Procedure. Order 1 Rule 10 which empowers the Court to add any person as party at any stage of the proceedings if the person whose presence before the court is necessary or proper for effective adjudication of the issue involved in the suit. Order 1 Rule 10 reads as under:

"10. Suit in name of wrong plaintiff.-

(1) Where a suit has been instituted in the name of the wrong person as plaintiff or where it is doubtful whether it has been instituted in the name of the right plaintiff, the Court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute so to do, order any other person to be substituted or added as plaintiff upon such terms a the Court thinks just.

(2) Court may strike out or add parties.-The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all the questions involved in the

suit, be added.

(3) No person shall be added as a plaintiff suing without a next friend or as the next friend of a plaintiff under any disability without his consent.

(4) Where defendant added, plaint to be amended.- Where a defendant is added, the plaint shall, unless the Court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaint shall be served on the new defendant and, if the Court thinks fit, on the original defendant.

(5) Subject to the provisions of the Indian Limitation Act, 1877 (15 of 1877), section 22, the proceedings as against any person added as defendant shall be deemed to have begun only on the service of the summons."

28. From the bare reading of the aforesaid provision, it is manifest that sub-rule (2) of Rule 10 gives a wider discretion to the Court to meet every case or defect of a party and to proceed with a person who is a either necessary party or a proper party whose presence in the Court is essential for effective determination of the issues involved in the suit.

29. Considering the aforesaid provisions, this Court in the case of *Ramesh Hirachand Kundanmal v. Municipal Corporation of Greater Bombay & Ors.* 1992 (2) SCC 524 held as under:

"It cannot be said that the main object of the rule is to prevent multiplicity of actions though it may incidentally have that effect. But that appears to be a desirable consequence of the rule rather than its main objectives. The person to be joined must be one whose presence is necessary as a party. What makes a person a necessary party is not merely that he has relevant evidence to give on some of the questions involved; that would only make him a necessary witness. It is not merely that he has an

interest in the correct solution of some questions involved and has thought of relevant arguments to advance. The only reason which make it necessary to make a person a party to an action is that he should be bound by the result of the action and the question to be settled, therefore, must be a question in the action which cannot be effectually and completely settled unless he is a party. The line has been drawn on a wider construction of the rule between the direct interest or the legal interest and commercial interest. It is, therefore, necessary that the person must be directly or legally interested in the action in the answer, i.e., he can say that the litigation may lead to a result which will affect him legally that is by curtailing his legal rights. It is difficult to say that the rule contemplates joining as a defendant whose only object is to prosecute his own cause of action. Similar provision was considered in *Amon v. Raphael Tuck & Sons Ltd.* (1956) 1 All E.R. 273, wherein after quoting the observations of Wynn-Parry,J. in *Dollfus Mieget Compagnie S.A. v. Bank of England* (1950) 2 All E.R. 611, that the true test lies not so much in an analysis of what are the constituents of the applicants' rights, but rather in what would be the result on the subject matter of the action if those rights could be established, Devlin,J. has stated:

The test is 'May the order for which the plaintiff is asking directly affect the intervener in the enjoyment of his legal rights."

30. At this juncture, we would also like to refer Section 19 of the Specific Relief Act which reads as under:

"19. Relief against parties and persons claiming under them by subsequent title. – Except as otherwise provided by this Chapter, specific performance of a contract may be enforced against-

(a) either party thereto;

(b) any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract;

(c) any person claiming under a title which, though prior to the contract and known to the plaintiff, might have been displaced by the defendant;

(d) when a company has entered into a contract and subsequently becomes amalgamated with another company, the new company which arises out of the amalgamation;

(e) when the promoters of a company have, before its incorporation, entered into a contract for the purpose of the company and such contract is warranted by the terms of the incorporation, the company;

Provided that the company has accepted the contract and communicated such acceptance to the other party to the contract."

31. From the bare reading of the aforesaid provision, it is manifest that a contract for specific performance may be enforced against the parties to the contract and the persons mentioned in the said section. Clause (b) of Section 19 makes it very clear that a suit for specific performance cannot be enforced against a person who is a transferee from the vendor for valuable consideration and without notice of the original contract which is sought to be enforced in the suit.

32. In the light of the aforesaid discussion both on facts and law, we shall now examine some of the relevant facts in order to come to right conclusion.

33. As noticed above, even before the institution of suit for specific performance when the plaintiff came to know about the activities of the Sawhneys' to deal with the property, a public

notice was published at the instance of the plaintiff in a newspaper "The Hindustan Times" dated 12.02.1990 (Delhi Edn.) informing the public in general about the agreement with the plaintiffs. In response to the said notice the sister concern of the appellant M/s Living Media India Limited served a legal notice on the defendants- Sawhneys' dated 24.06.1990 whereby he has referred the 'agreement to sell' entered into between the plaintiffs and the defendants- Sawhneys'.

34. Even after the institution of the suit, the counsel who appeared for the defendants-Sawhneys' gave an undertaking not to transfer and alienate the suit property. Notwithstanding the order passed by the Court regarding the undertaking given on behalf of the defendants- Sawhneys', and having full notice and knowledge of all these facts, the sister concern of the appellant namely Living Media India Ltd. entered into series of transaction and finally the appellant M/s. Thomson Press got a sale deed executed in their favour by Sawhneys' in respect of suit property.

35. Taking into consideration all these facts, we have no hesitation in holding that the appellant entered into a clandestine transaction with the defendants-Sawhneys' and got the property transferred in their favour. Hence the appellant – M/s Thomson Press cannot be held to be a bonafide purchaser, without notice.

36. On perusal of the two orders passed by the single judge and the Division Bench of the High Court, it reveals that the High Court has not gone into the question as to whether if a person who purchases the suit property in violation of the order of injunction, and having sufficient notice and knowledge of the Agreement, need to be added as party for passing an effective decree in the suit.

37. As discussed above, a decree for specific performance of a contract may be enforced against a person claimed under the plaintiff, and title acquired subsequent to the

contract. There is no dispute that such transfer made in favour of the subsequent purchaser is subject to the rider provided under Section 52 of the Transfer of Property Act and the restrain order passed by the Court.

38. The aforesaid question was considered by the Calcutta High Court in the case of *Kafiladdin and Others vs. Samiraddin and Others,* AIR 1931 Calcutta 67 where Lordship referred the English Law on this point and quoted one of the passage of the Book authored by Dart, on "Vendors and Purchasers" Edn.8, Vol.2, which reads as under :-

> "Equity will enforce specific performance of the contract for sale against the vendor himself and against all persons claiming under him by a title arising subsequently to the contract except purchaser for valuable consideration who have paid their money and taken a conveyance without notice to the original contract."

Discussing elaborately, the Court finally observed:-

> "The statement of the law is exactly what is meant by the first two clauses of S.27, Specific Relief Act. It is not necessary to refer to the English cases in which decrees have been passed against both the contracting party and the subsequent purchaser. It is enough to mention some of them : Daniels v. Davison (2), Potters v. Sanders (3), Lightfoot v. Heron(4). The question did not pertinently arise in any reported case in India; but decrees in case of specific performance of contract have been passed in several cases in different forms. In Chunder Kanta Roy v. Krishna Sundar Roy (5) the decree passed against the contracting party only was upheld. So it was in Kannan v. Krishan (6). In Himmatlal Motilal v. Basudeb(7) the decree passed against the contracting defendant and the subsequent purchaser was adopted. In Gangaram v. Laxman(9) the suit was by the subsequent purchaser and the decree was that he should convey the property to the

> person holding the prior agreement to sale. It would appear that the procedure adopted in passing decrees in such cases is not uniform. But it is proper that English procedure supported by the Specific Relief Act should be adopted. The apparent reasoning is that unless both the contracting party and the subsequent purchaser join in the conveyance it is possible that subsequently difficulties may arise with regard to the plaintiff's title."

39. The Supreme Court referred the aforementioned decision of the Calcutta High Court in the case of *Durga Prasad and Another v. Deep Chand and Others* AIR (1954) SC 75, and finally held:-

> "In our opinion, the proper form of decree is to direct specific performance of the contract between the vendor and the plaintiff and direct the subsequent transferee to join in the conveyance so as to pass on the title which resides in him to the plaintiff. He does not join in any special convenants made between plaintiff and his vendor; all he does is to pass on his title to the plaintiff. This was the course followed by the Calcutta High Court in – *Kafiladdin v. Samiraddin,* AIR 1931 Cal 67 (C) and appears to be the English practice. See Fry on Specific Performance, 6th Ed. Page 90, paragraph 207; also – *'Potter v. Sanders',* (1846) 67 ER. We direct accordingly."

40. Again in the case of *Ramesh Chandra v. Chunil Lal* (1971) SC 1238, this Court referred their earlier decision and observed:-

> "It is common ground that the plot in dispute has been transferred by the respondents and therefore the proper form of the decree would be the same as indicated at page 369 in *Lala Durga Prasad v. Lala Deep Chand,* 1954 SCR 360 = (AIR 1954 SC 75) viz., "to direct specific performance of the contract between the vendor and the plaintiff and direct the subsequent transferee to join in the

conveyance so as to pass on the title which resides in him to the plaintiff. He does not join in any special covenants made between the plaintiff and his vendor; all he does is to pass on his title to the plaintiff". We order accordingly. The decree of the courts below is hereby set aside and the appeal is allowed with costs in this court and the High Court."

41. This Court again in the case of *Dwarka Prasad Singh and Others vs. Harikant Prasad Singh and Others* (1973) SC 655 subscribed its earlier view and held that in a suit for specific performance against a person with notice of a prior agreement of sale is a necessary party.

42. Having regard to the law discussed hereinabove and in the facts and circumstances of the case and also for the ends of justice the appellant is to be added as party-defendant in the suit. The appeal is, accordingly, allowed and the impugned orders passed by the High Court are set aside.

43. Before parting with the order, it is clarified that the appellant after impledment as party-defendant shall be permitted to take all such defences which are available to the vendor Sawhneys' as the appellant derived title, if any, from the vendor on the basis of purchase of the suit property subsequent to the agreement with the plaintiff and during the pendency of the suit.

T.S. THAKUR, J.

1. I have had the advantage of going through the order proposed by my Esteemed Brother M.Y. Eqbal, J. While I entirely agree with the conclusion that the appellant ought to be added as a party-defendant to the suit, I wish to add a few lines of my own.

2. There are three distinct conclusions which have been drawn by Eqbal, J. in the judgment proposed by his Lordship.

The first and foremost is that the appellant was aware of the "agreement to sell" between the plaintiff and the defendants in the suit. Publication of a notice in the Hindustan Times, Delhi Edition, and the legal notice which Living Media India Limited, appellant's sister concern, sent to the defendants indeed left no manner of doubt that the appellant was aware of a pre-existing agreement to sell between the plaintiff and the defendants. It is also beyond dispute that the sale of the suit property in favour of the appellant was in breach of a specific order of injunction passed by the trial Court. As a matter of fact, the sale deeds executed by the defendants falsely claimed that there was no impediment in their selling the property to the appellant even though such an impediment in the form of a restraint order did actually exist forbidding the defendants from alienating the suit property. The High Court was in that view justified in holding that the sale in favour of the appellant was a clandestine transaction which finding has been rightly affirmed in the order proposed by my Esteemed Brother, and if I may say so with great respect for good and valid reasons.

3. In the light of the above finding it is futile to deny that the specific performance prayed for by the plaintiff was and continues to be enforceable not only against the original owner defendants but also against the appellant their transferee. Sale of immovable property in the teeth of an earlier agreement to sell is immune from specific performance of an earlier contract of sale only if the transferee has acquired the title for valuable consideration, in good faith and without notice of the original contract. That is evident from Section 19(b) of the Specific Relief Act which is to the following effect:

> "19.**Relief against parties and persons claiming under them by subsequent title -** Except as otherwise provided by this Chapter, specific performance of a contract may be enforced against -
>
> (a) either party thereto;

(b) any other person claiming under him by a title arising subsequently to the contract, except a transferee for value who has paid his money in good faith and without notice of the original contract;

(c) xxxxxxxx

(d) xxxxxxxx

(e) xxxxxxxx

4. There is thus no gainsaying that the appellant was not protected against specific performance of the contract in favour of the plaintiff, for even though the transfer in favour of the appellant was for valuable consideration it was not in good faith nor was it without notice of the original contract.

5. The second aspect which the proposed judgment succinctly deals with is the effect of a sale pendete lite. The legal position in this regard is also fairly well settled. A transfer pendete lite is not illegal ipso jure but remains subservient to the pending litigation. In *Nagubai Ammal & Ors. v. B. Shama Rao & Ors.* AIR 1856 SC 593, this Court while interpreting Section 52 of the Transfer of Property Act observed:

> "…The words "so as to affect the rights of any other party thereto under any decree or order which may be made therein", make it clear that the transfer is good except to the extent that it might conflict with rights decreed under the decree or order. It is in this view that transfers pendente lite have been held to be valid and operative as between the parties thereto."

6. To the same effect is the decision of this Court in *Vinod Seth v. Devinder Bajaj* (2010) 8 SCC 1 where this Court held that Section 52 does not render transfers affected during the pendency of the suit void but only render such transfers subservient to the rights as may be eventually determined by

the Court. The following passage in this regard is apposite:

> "42. It is well settled that the doctrine of lis pendens does not annul the conveyance by a party to the suit, but only renders it subservient to the rights of the other parties to the litigation. Section 52 will not therefore render a transaction relating to the suit property during the pendency of the suit void but render the transfer inoperative insofar as the other parties to the suit. Transfer of any right, title or interest in the suit property or the consequential acquisition of any right, title or interest, during the pendency of the suit will be subject to the decision in the suit."

7. The decision of this Court in *A. Nawab John & Ors. v. V.N. Subramanyam* (2012) 7 SCC 738 is a recent reminder of the principle of law enunciated in the earlier decisions. This Court in that case summed up the legal position thus:

> "18 ……..The mere pendency of a suit does not prevent one of the parties from dealing with the property constituting the subject-matter of the suit. The section only postulates a condition that the alienation will in no manner affect the rights of the other party under any decree which may be passed in the suit unless the property was alienated with the permission of the court."

8. We may finally refer to the decision of this Court in *Jayaram Mudaliar v. Ayyaswami and Ors.* (1972) 2 SCC 200 in which were extracted with approval observations made on the doctrine of lis pendens in "Commentaries of Laws of Scotland, by Bell". This Court said:

> "43……..Bell, in his commentaries on the Laws of Scotland said that it was grounded on the maxim: "Pendente lite nibil innovandum". He observed:
>
> It is a general rule which seems to have been

recognised in all regular systems of jurisprudence, that during the pendence of an action, of which the object is to vest the property or obtain the possession of real estate, a purchaser shall be held to take that estate as it stands in the person of the seller, and to be bound by the claims which shall ultimately be pronounced."

9. There is, therefore, little room for any doubt that the transfer of the suit property pendete lite is not void ab initio and that the purchaser of any such property takes the bargain subject to the rights of the plaintiff in the pending suit. Although the above decisions do not deal with a fact situation where the sale deed is executed in breach of an injunction issued by a competent Court, we do not see any reason why the breach of any such injunction should render the transfer whether by way of an absolute sale or otherwise ineffective. The party committing the breach may doubtless incur the liability to be punished for the breach committed by it but the sale by itself may remain valid as between the parties to the transaction subject only to any directions which the competent Court may issue in the suit against the vendor.

10. The third dimension which arises for consideration is about the right of a transferee pendete lite to seek addition as a party defendant to the suit under Order I, Rule 10 CPC. I have no hesitation in concurring with the view that no one other than parties to an agreement to sell is a necessary and proper party to a suit. The decisions of this Court have elaborated that aspect sufficiently making any further elucidation unnecessary. The High Court has understood and applied the legal propositions correctly while dismissing the application of the appellant under Order I, Rule 10 CPC. What must all the same be addressed is whether the prayer made by the appellant could be allowed under Order XXII Rule 10 of the CPC, which is as under:

"Procedure in case of assignment before final order in suit. - (1) In other cases of an assignment, creation or devolution of any interest during the pendency of a suit, the suit may, by leave of the court, be continued by or against the person to or upon whom such interest has come or devolved.

(2) The attachment of a decree pending an appeal therefrom shall be deemed to be an interest entitling the person who procured such attachment to the benefit of sub-rule (1)."

11. A simple reading of the above provision would show that in cases of assignment, creation or devolution of any interest during the pendency of a suit, the suit may, by leave of the Court, be continued by or against the person to or upon whom such interest has come or devolved. What has troubled us is whether independent of Order I Rule 10 CPC the prayer for addition made by the appellant could be considered in the light of the above provisions and, if so, whether the appellant could be added as a party-defendant to the suit. Our answer is in the affirmative. It is true that the application which the appellant made was only under Order I Rule 10 CPC but the enabling provision of Order XXII Rule 10 CPC could always be invoked if the fact situation so demanded. It was in any case not urged by counsel for the respondents that Order XXII Rule 10 could not be called in aid with a view to justifying addition of the appellant as a party-defendant. Such being the position all that is required to be examined is whether a transferee pendete lite could in a suit for specific performance be added as a party defendant and, if so, on what terms.

12. We are not on virgin ground in so far as that question is concerned. Decisions of this Court have dealt with similar situations and held that a transferee pendete lite can be added as a party to the suit lest the transferee suffered prejudice on account of the transferor losing interest in the litigation post transfer. In *Khemchand Shanker Choudhary v. Vishnu Hari*

Patil (1983) 1 SCC 18, this Court held that the position of a person on whom any interest has devolved on account of a transfer during the pendency of a suit or a proceeding is somewhat similar to the position of an heir or a legatee of a party who dies during the pendency of a suit or a proceeding. Any such heir, legatee or transferee cannot be turned away when she applies for being added as a party to the suit. The following passage in this regard is apposite:

> "6… Section 52 of the Transfer of Property Act no doubt lays down that a transferee pendente lite of an interest in an immovable property which is the subject matter of a suit from any of the parties to the suit will be bound in so far as that interest is concerned by the proceedings in the suit. Such a transferee is a representative in interest of the party from whom he has acquired that interest. Rule 10 of Order 22 of the Code of Civil Procedure clearly recognises the right of a transferee to be impleaded as a party to the proceedings and to be heard before any order is made. It may be that if he does not apply to be impleaded, he may suffer by default on account of any order passed in the proceedings. But if he applies to be impleaded as a party and to be heard, he has got to be so impleaded and heard. He can also prefer an appeal against an order made in the said proceedings but with the leave of the appellate court where he is not already brought on record. The position of a person on whom any interest has devolved on account of a transfer during the pendency of any suit or a proceeding is somewhat similar to the position of an heir or a legatee of a party who dies during the pendency of a suit or a proceeding, or an official receiver who takes over the assets of such a party on his insolvency. An heir or a legatee or an official receiver or a transferee can participate in the execution proceedings even though their names may not have been shown in the decree, preliminary or final. If they apply to

> the court to be impleaded as parties they cannot be turned out."
>
> (emphasis supplied)

13. To the same effect is the decision of this Court in *Amit Kumar Shaw v. Farida Khatoon* (2005) 11 SCC 403 where this Court held that a transferor pendente lite may not even defend the title properly as he has no interest in the same or collude with the plaintiff in which case the interest of the purchaser pendente lite will be ignored. To avoid such situations the transferee pendente lite can be added as a party defendant to the case provided his interest is substantial and not just peripheral. This is particularly so where the transferee pendente lite acquires interest in the entire estate that forms the subject matter of the dispute. This Court observed:

> "16… The doctrine of lis pendens applies only where the lis is pending before a court. Further pending the suit, the transferee is not entitled as of right to be made a party to the suit, though the court has a discretion to make him a party. But the transferee pendente lite can be added as a proper party if his interest in the subject-matter of the suit is substantial and not just peripheral. A transferee pendente lite to the extent he has acquired interest from the Defendant is vitally interested in the litigation, where the transfer is of the entire interest of the Defendant; the latter having no more interest in the property may not properly defend the suit.He may collude with the Plaintiff. Hence, though the Plaintiff is under no obligation to make a lis pendens transferee a party, under Order 22 Rule 10 an alienee pendente lite may be joined as party. As already noticed, the court has discretion in the matter which must be judicially exercised and an alienee would ordinarily be joined as a party to enable him to protect his interests. The Court has held that a transferee pendente lite of an interest in immovable property is a representative-in-interest of the

party from whom he has acquired that interest. He is entitled to be impleaded in the suit or other proceedings where the transferee pendente lite is made a party to the litigation; he is entitled to be heard in the matter on the merits of the case"

14. To the same effect is the decision of this Court in *Rikhu Dev, Chela Bawa Harjug Dass v. Som Dass (deceased) through his Chela Shiama Dass,* (1976) 1 SCC 103.

To sum up:

(1) The appellant is not a *bona fide* purchaser and is, therefore, not protected against specific performance of the contract between the plaintiffs and the owner defendants in the suit.

(2) The transfer in favour of the appellant pendente *lite* is effective in transferring title to the appellant but such title shall remain subservient to the rights of the plaintiff in the suit and subject to any direction which the Court may eventually pass therein.

(3) Since the appellant has purchased the entire estate that forms the subject matter of the suit, the appellant is entitled to be added as a party defendant to the suit.

(4) The appellant shall as a result of his addition raise and pursue only such defenses as were available and taken by the original defendants and none other.

15. With the above additions, I agree with the order proposed by my Esteemed Brother, M.Y. Eqbal, J. that this appeal be allowed and the appellant added as party defendant to the suit in question.

R.P. Appeal allowed.

M/S BAGAI CONSTRUCTION THR. ITS PROPRIETOR MR. LALIT BAGAI

v.

M/S GUPTA BUILDING MATERIAL STORE

(Civil Appeal No. 1787 of 2013)

FEBRUARY 22, 2013.

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

Code of Civil Procedure, 1908 - Or. 7 r. 14 r/w s. 151 and Or. 18 r. 17 r/w. s. 151 - Applications under - By the plaintiff - To place documents on record and to recall witness to prove those documents - Filed after the arguments were over and case was adjourned for judgment - Held: The power under Order 18 r. 17 has to be sparingly exercised and not as a general rule to overcome lacunae in the plaint, pleadings and evidence - Therefore the applications are liable to be rejected - The plaintiff filed the applications to improve its case - The plaintiff did not file those documents at earlier stage despite the same were available with him throughout the trial - Therefore, the applications cannot be allowed even by exercise of jurisdiction u/s. 151.

Respondent filed a recovery suit against the appellant. After the arguments were concluded and the case was adjourned for judgment, he filed two applications u/Or. 7 r. 14 r/w s. 151 CPC and u/Or. 18 r. 17 r/w s. 151 CPC for production of documents (Bills) and recalling the witness to prove those documents respectively. Trial court dismissed the applications. High Court, in revision, set aside the order of trial court and allowed the applications. Hence the present appeal.

Allowing the appeal, the Court

HELD: 1. The power under the provisions of Order 18 Rule 17 CPC is to be sparingly exercised and in

appropriate cases and not as a general rule merely on the ground that his recall and re-examination would not cause any prejudice to the parties. That is not the scheme or intention of Order 18 Rule 17 CPC. The power to recall any witness under Order 18 Rule 17 CPC can be exercised by the court either on its own motion or on an application filed by any of the parties to the suit, but such power is to be invoked not to fill up the lacunae in the evidence of the witness which has already been recorded but to clear any ambiguity that may have arisen during the course of his examination. Hence the application filed by the plaintiff has to be rejected. [Paras 8 and 9] [122-E-G; 123-B]

Vadiraj Naggappa Vernekar (dead) through LRs. vs. SharadchandraPrabhakar Gogate **(2009) 4 SCC 410: 2009 (2) SCR 1071 - relied on.**

2. The plaintiff has filed the two applications before the trial Court in order to overcome the lacunae in the plaint, pleadings and evidence. It is not the case of the plaintiff that it was not given adequate opportunity. In fact, the materials placed show that the plaintiff has filed both the applications after more than sufficient opportunity had been granted to it to prove its case. During the entire trial, those documents have remained in exclusive possession of the plaintiff, still plaintiff has not placed those bills on record. It further shows that final arguments were heard on number of times and judgment was reserved and only thereafter, in order to improve its case, the plaintiff came forward with such an application to avoid the final judgment against it. The High Court taking note of the words "at any stage" occurring in Order 18 Rule 17 CPC casually set aside the order of the trial court, allowed those applications and permitted the plaintiff to place on record certain bills and also granted permission to recall PW-1 to prove those bills. Though power u/s. 151 CPC can be exercised if

ends of justice so warrant and to prevent abuse of process of the court and court can exercise its discretion to permit reopening of evidence or recalling of witness for further examination/cross-examination after evidence led by the parties, in the light of the fact that those documents were very well available throughout the trial, even by exercise of Section 151 of CPC, the plaintiff cannot be permitted. [Paras 11 and 12] [124-F-H; 125-A-E-F]

K.K. Velusamy vs. N. Palanisamy **(2011) 11 SCC 275: 2011 (4) SCR 31 - referred to.**

3. After change of various provisions by way of amendment in the CPC, it is desirable that the recording of evidence should be continuous and followed by arguments and decision thereon within a reasonable time. The courts should constantly endeavour to follow such a time schedule. If the same is not followed, the purpose of amending several provisions in CPC would get defeated. In fact, applications for adjournments, reopening and recalling are interim measures, could be as far as possible avoided and only in compelling and acceptable reasons, those applications are to be considered. [Para 12] [125-B-D]

Case Law Reference:

2009 (2) SCR 1071	**Relied on**	**Para 8**
2011 (4) SCR 31	**Referred to**	**Para 9**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1787 of 2013.

From the Judgment & Order dated 23.08.2011 of the High Court of Delhi at New Delhi in CM(M) No. 707 of 2010.

Siddharth Yadav, Praveen Swarup, K.B. Thakur, Wasim Ashraf for the Appellant.

Jitendra Jain, Ajay jain, Ravi Shankar Garg, Ram Pratap for the Respondent.

The Judgment of the Court was delivered by

P. SATHASIVAM, J. 1. Leave granted.

2. This appeal is directed against the order dated 23.08.2011 passed by the High Court of Delhi at New Delhi in C.M.(M) No. 707 of 2010 (Civil Revision No. 707 of 2010) whereby the learned single Judge of the High Court allowed the revision filed by the respondent herein and set aside the order dated 25.02.2010 of the Additional District Judge, Delhi.

3. **Brief facts:**

(a) The appellant is a proprietorship concern dealing in interior decoration and construction work and Mr. Lalit Bagai is the sole proprietor of the said concern. The respondent is a partnership firm registered with the Registrar of Firms vide Registration No. 1237/93 dated 07.06.1993 and is engaged in the business of sale and supply of building materials.

(b) Admittedly, the appellant and respondent have often transacted with each other. According to the respondent, the appellant made various purchases on credit from them for which payments were made in parts and the same were credited to his account maintained by them. It is alleged by the respondent that after adjusting all the payments being made by the appellant, an amount of Rs.4,35,250.18 is due against his firm. Despite repeated demands, requests, and reminders, the appellant has not cleared the outstanding amount. Therefore, the respondent sent legal notice dated 11.04.2005 to the appellant through his counsel calling upon him to pay the outstanding dues along with interest @ 2% per month. Despite notice, the appellant did not pay any amount, therefore, the respondent instituted a suit against him for recovery of sum of Rs.4,35,250.18 along with interest accrued thereon. After the arguments were concluded in the suit on 27.10.2009, the matter

was adjourned for judgment on 03.11.2009.

(c) In the meantime, on 31.10.2009 the respondent moved two applications, one under Order VII Rule 14 read with Section 151 of the Code of Civil Procedure, 1908 (in short "CPC") for placing on record certain documents and the other under Order XVIII Rule 17 read with Section 151 of CPC for seeking permission to recall PW-1 for proving certain documents by leading his additional evidence. By order dated 25.02.2010, the Additional District Judge, Delhi dismissed both the applications.

(d) Dissatisfied with the said order, the respondent filed revision petition being CM (M) No. 707 of 2010 (Civil Revision No. 707 of 2010) before the High Court of Delhi. The learned single Judge of the High Court by impugned order dated 23.08.2011 allowed the revision and set aside the order dated 25.02.2010 passed by the Additional District Judge, Delhi.

(e) Aggrieved by the said order, the appellant has preferred this appeal by way of special leave.

4. Heard Mr. Siddharth Yadav, learned counsel for the appellant and Mr. Jinendra Jain, learned counsel for the respondent.

5. The only point for consideration in this appeal is whether the plaintiff has made out a case for allowing the applications one filed under Order XVIII Rule 17 read with Section 151 CPC and another application under Order VII Rule 14 read with Section 151 CPC? The trial Court dismissed both the applications, however, the High Court by the impugned order set aside the order of the trial Court and directed taking on record the bills which are proposed to be filed by the plaintiff, granted permission to recall PW-1 to prove those bills. The High Court passed such order in favour of the plaintiff subject to payment of cost of Rs.5,000/-

6. In order to find out the acceptability of the impugned

order or not, it is useful to refer the relevant provisions of the CPC which read thus:

"Order VII Rule 14

14. Production of document on which plaintiff sues or relies.- (1) Where a plaintiff sues upon a document or relies upon document in his possession or power in support of his claim, he shall enter such documents in a list, and shall produce it in Court when the plaint is presented by him and shall, at the same time deliver the document and a copy thereof, to be filed with the plaint.

(2) Where any such document is not in the possession or power of the plaintiff, he shall, wherever possible, state in whose possession or power it is.

(3) A document which ought to be produced in Court by the plaintiff when the plaint is presented, or to be entered in the list to be added or annexed to the plaint but is not produced or entered accordingly, shall not, without the leave of the Court, be received in evidence on his behalf at the hearing of the suit.

(4) Nothing in this rule shall apply to document produced for the cross examination of the plaintiff's witnesses, or, handed over to a witness merely to refresh his memory."

Order XVIII Rule 17

"17. Court may recall and examine witness.- The Court may at any stage of a suit recall any witness who has been examined and may (subject to the law of evidence for the time being in force) put such questions to him as the Court thinks fit."

Section 151 of CPC

"151. Saving of inherent powers of Court.- Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse

of the process of the Court."

7. Before going into the merits of claim of both the parties, let us recapitulate the views expressed by this Court through recent decisions.

8. In *Vadiraj Naggappa Vernekar (dead) through LRs. vs. Sharadchandra Prabhakar Gogate,* (2009) 4 SCC 410, this Court had an occasion to consider similar claim, particularly, application filed under Order XVIII Rule 17 and held as under:

"25. In our view, though the provisions of Order 18 Rule 17 CPC have been interpreted to include applications to be filed by the parties for recall of witnesses, the main purpose of the said Rule is to enable the court, while trying a suit, to clarify any doubts which it may have with regard to the evidence led by the parties. The said provisions are not intended to be used to fill up omissions in the evidence of a witness who has already been examined.

28. The power under the provisions of Order 18 Rule 17 CPC is to be sparingly exercised and in appropriate cases and not as a general rule merely on the ground that his recall and re-examination would not cause any prejudice to the parties. That is not the scheme or intention of Order 18 Rule 17 CPC.

29. It is now well settled that the power to recall any witness under Order 18 Rule 17 CPC can be exercised by the court either on its own motion or on an application filed by any of the parties to the suit, but as indicated hereinabove, such power is to be invoked not to fill up the lacunae in the evidence of the witness which has already been recorded but to clear any ambiguity that may have arisen during the course of his examination.

31. Some of the principles akin to Order 47 CPC may be applied when a party makes an application under the provisions of Order 18 Rule 17 CPC, but it is ultimately within the court's discretion, if it deems fit, to allow such

an application. In the present appeal, no such case has been made out."

9. If we apply the principles enunciated in the above case and the limitation as explained with regard to the application under Order XVIII Rule 17, the applications filed by the plaintiff have to be rejected. However, learned counsel for the respondent by placing heavy reliance on a subsequent decision, namely, *K.K. Velusamy vs. N. Palanisamy,* (2011) 11 SCC 275, submitted that with the aid of Section 151 CPC, the plaintiff may be given an opportunity to put additional evidence and to recall PW-1 to prove those documents and if need arises other side may be compensated. According to him, since the High Court has adopted the said course, there is no need to interfere with the same.

10. In *Velusamy* (supra) even after considering the principles laid down in *Vadiraj Naggappa Vernekar* (supra) and taking note of Section 151 CPC, this Court concluded that in the interests of justice and to prevent abuse of the process of the Court, the trial Court is free to consider whether it was necessary to reopen the evidence and if so, in what manner and to what extent. Further, it is observed that the evidence should be permitted in exercise of its power under Section 151 of the Code. The following principles laid down in that case are relevant:

> **"19.** We may add a word of caution. The power under Section 151 or Order 18 Rule 17 of the Code is not intended to be used routinely, merely for the asking. If so used, it will defeat the very purpose of various amendments to the Code to expedite trials. But where the application is found to be bona fide and where the additional evidence, oral or documentary, will assist the court to clarify the evidence on the issues and will assist in rendering justice, and the court is satisfied that non-production earlier was for valid and sufficient reasons, the court may exercise its discretion to recall the witnesses or permit the fresh

> evidence. But if it does so, it should ensure that the process does not become a protracting tactic. The court should firstly award appropriate costs to the other party to compensate for the delay. Secondly, the court should take up and complete the case within a fixed time schedule so that the delay is avoided. Thirdly, if the application is found to be mischievous, or frivolous, or to cover up negligence or lacunae, it should be rejected with heavy costs.

With these principles, let us consider the merits of the case in hand.

11. The perusal of the materials placed by the plaintiff which are intended to be marked as bills have already been mentioned by the plaintiff in its statement of account but the original bills have not been placed on record by the plaintiff till the date of filing of such application. It is further seen that during the entire trial, those documents have remained in exclusive possession of the plaintiff but for the reasons known to it, still the plaintiff has not placed these bills on record. In such circumstance, as rightly observed by the trial Court at this belated stage and that too after the conclusion of the evidence and final arguments and after reserving the matter for pronouncement of judgment, we are of the view that the plaintiff cannot be permitted to file such applications to fill the lacunae in its pleadings and evidence led by him. As rightly observed by the trial Court, there is no acceptable reason or cause which has been shown by the plaintiff as to why these documents were not placed on record by the plaintiff during the entire trial. Unfortunately, the High Court taking note of the words "at any stage" occurring in Order XVIII Rule 17 casually set aside the order of the trial Court, allowed those applications and permitted the plaintiff to place on record certain bills and also granted permission to recall PW-1 to prove those bills. Though power under Section 151 can be exercised if ends of justice so warrant and to prevent abuse of process of the court and Court can exercise its discretion to permit reopening of evidence or recalling of witness for further examination/cross-

examination after evidence led by the parties, in the light of the information as shown in the order of the trial Court, namely, those documents were very well available throughout the trial, we are of the view that even by exercise of Section 151 of CPC, the plaintiff cannot be permitted.

12. After change of various provisions by way of amendment in the CPC, it is desirable that the recording of evidence should be continuous and followed by arguments and decision thereon within a reasonable time. This Court has repeatedly held that courts should constantly endeavour to follow such a time schedule. If the same is not followed, the purpose of amending several provisions in the Code would get defeated. In fact, applications for adjournments, reopening and recalling are interim measures, could be as far as possible avoided and only in compelling and acceptable reasons, those applications are to be considered. We are satisfied that the plaintiff has filed those two applications before the trial Court in order to overcome the lacunae in the plaint, pleadings and evidence. It is not the case of the plaintiff that it was not given adequate opportunity. In fact, the materials placed show that the plaintiff has filed both the applications after more than sufficient opportunity had been granted to it to prove its case. During the entire trial, those documents have remained in exclusive possession of the plaintiff, still plaintiff has not placed those bills on record. It further shows that final arguments were heard on number of times and judgment was reserved and only thereafter, in order to improve its case, the plaintiff came forward with such an application to avoid the final judgment against it. Such course is not permissible even with the aid of Section 151 CPC.

13. Under these circumstances, the impugned order of the High Court dated 23.08.2011 in C.M. No. 707 of 2010 (Civil Revision No. 707 of 2010) is set aside and the order dated 25.02.2010 of the trial Court is restored.

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

K.K.T. Appeal allowed.

K. SRINIVAS RAO

v.

D.A. DEEPA

(Civil Appeal No. 1794 of 2013)

FEBRUARY 22, 2013

[AFTAB ALAM AND RANJANA PRAKASH DESAI, JJ.]

Hindu Marriage Act, 1955:

ss.13(1)(i-a) and (b) – Petition for dissolution of marriage on grounds of cruelty and desertion – 'Cruelty' – Explained – Held: In the instant case, the conduct of respondent-wife in filing a complaint making unfounded, indecent and defamatory allegation against her mother-in-law, in filing revision seeking enhancement of the sentence awarded to the appellant-husband, and filing and pursuing litigations against appellant-husband and his parents indicates that she made all attempts to ensure that he and his parents are put in jail and he is removed from his job – There is no manner of doubt that this conduct has caused mental cruelty to appellant-husband – The parties are living separately for more than ten years – This separation has created an unbridgeable distance between the two – The marriage has irretrievably broken down – In the circumstances, the marriage between the appellant-husband and the respondent-wife is dissolved by a decree of divorce – Keeping in view the circumstances of both, the appellant is directed to pay to the respondent-wife permanent alimony.

Alternative Dispute Resolution:

Mediation – Held: Mediation as a method of alternative dispute resolution has got legal recognition – Therefore, at the earliest stage i.e. when the dispute is taken up by the Family Court or by the court of first instance for hearing, it

must be referred to mediation centres – Matrimonial disputes particularly those relating to custody of child, maintenance, etc. are preeminently fit for mediation – s.9 of Family Courts Act enjoins upon Family Court to make efforts to settle the matrimonial disputes – Family Courts shall make all efforts to settle matrimonial disputes through mediation – In appropriate cases, criminal courts should also direct parties to explore possibility of settlement through mediation – In suitable cases of non-compoundable offences u/s 498 -A IPC, parties can approach High Court and get the complaint quashed – Mediation Centers shall also set up pre-litigation desks/clinics – Fmily Courts Act, 1984 – s.9.

The marriage between the appellant-husband and the respondent-wife was solemnized on 25.4.1999 as per Hindu rites and customs. On the following day disputes arose between the elders on both sides. On 27.4.1999, the respondent was taken by her parents to their house. On 4.10.1999, the respondent lodged a complaint against the appellant before the Women Protection Cell alleging *inter alia,* that he was harassing her for more dowry. In the said complaint a defamatory allegation was made against the mother of the appellant. The said complaint and the subsequent protest petitions led to the conviction of the appellant for the offence punishable u/s 498-A IPC. His parents were, however, acquitted. The appellant filed an appeal. However, the respondent kept on to pursue the proceedings at higher forums. The respondent also filed a petition u/s 9 of the Hindu Marriage Act, 1955 for restitution of conjugal rights before the Family Court. The appellant filed a counter-claim seeking dissolution of marriage on the ground of cruelty and desertion u/s 13(1)(i-a) and (b) of the Hindu Marriage Act, 1955. The Family Court dismissed the petition for restitution of conjugal rights and granted decree of divorce. However, the High Court allowed the appeal of the wife and set aside the decree of divorce granted in favour of the husband.

Disposing of the appeal, the Court

HELD: 1.1 Under s.13(1)(i-a) of the Hindu Marriage Act, 1955, a marriage can be dissolved by a decree of divorce on a petition presented either by the husband or the wife on the ground that the other party has, after solemnization of the marriage, treated the petitioner with cruelty. Cruelty is evident where one spouse has so treated the other and manifested such feelings towards her or him as to cause in her or his mind reasonable apprehension that it will be harmful or injurious to live with the other spouse. Cruelty may be physical or mental. In a given case, while staying away, a spouse can cause mental cruelty to the other spouse by sending vulgar and defamatory letters or notices or filing complaints containing indecent allegations or by initiating number of judicial proceedings making the other spouse's life miserable. This is what has happened in the instant case. [para 10 and 24] [136-G-H; 144-F-G]

V. Bhagat v. D. Bhagat **1993 (3) Suppl. SCR 796 = 1994 (1) SCC 337;** *Vijayakumar R. Bhate vs. Neela Vijayakumar Bhate* **2003 (3) SCR 607 = 2003 (6) SCC 334; and** *Naveen Kohli vs. Neelu Kohli* **2006 (3) SCR 53 = 2006 (4) SCC 558 – referred to.**

1.2 The first instance of mental cruelty is seen in the scurrilous, vulgar and defamatory statement made by the respondent-wife in her complaint dated 4.10.1999 addressed to the Superintendent of Police, Women Protection Cell stating that the mother of the appellant asked him to sleep with his father. It is the case of the appellant-husband that this humiliation of his parents caused great anguish to him. He and his family were traumatized by the false and indecent statement made in the complaint. His grievance appears to be justified. This

complaint is a part of the record. It is a part of the pleadings. That the statement made in the complaint is false is evident from the evidence of the mother of the respondent-wife. It is well settled that such statements cause mental cruelty. By sending this complaint, the respondent-wife has caused mental cruelty to the appellant-husband. [para 22] [143-B-F]

1.3 The conduct of the respondent-wife in filing a complaint making unfounded, indecent and defamatory allegation against her mother-in-law, in filing revision seeking enhancement of the sentence awarded to the appellant-husband, in filing appeal questioning the acquittal of the appellant-husband and acquittal of his parents indicates that she made all attempts to ensure that he and his parents are put in jail and he is removed from his job. There is no manner of doubt that this conduct has caused mental cruelty to the appellant-husband. [para 23] [144-D-E]

1.4 It is also to be noted that the appellant-husband and the respondent-wife are staying apart since 27/4/1999. Thus, they are living separately for more than ten years. This separation has created an unbridgeable distance between the two. As held in *Samar Ghosh*, if court refuses to severe the tie, it may lead to mental cruelty. [para 25] [145-A-B]

Samar Ghosh vs. Jaya Ghosh **2007 (4) SCR 428 = 2007 (4) SCC 511 – relied on.**

1.5 This Court is also satisfied that the marriage between the parties has irretrievably broken down. Irretrievable breakdown of marriage is not a ground for divorce under the Hindu Marriage Act, 1955. But, where marriage is beyond repair on account of bitterness created by the acts of the husband or the wife or of both, the courts have always taken irretrievable breakdown of

marriage as a very weighty circumstance amongst others necessitating severance of marital tie. Dissolution of marriage will relieve both sides of pain and anguish. In this Court the respondent-wife has expressed that she wants to go back to the appellant-husband, but, that is not possible now. The appellant-husband is not willing to take her back. Besides, the claim of the wife appears to be too desolate, merely born out of despair rather than based upon any real, concrete or genuine purpose or aim. [para 26, 28 and 29] [145-B-C; 146-B-C-E]

1.6 While this Court is of the opinion that decree of divorce must be granted, it is alive to the plight of the respondent-wife. The appellant-husband is getting a good salary. The respondent-wife fought the litigation for more than 10 years. She appears to be entirely dependent on her parents and brother. Therefore, her future must be secured by directing the appellant-husband to give her permanent alimony. In the result, the impugned judgment is set aside. The marriage between the appellant-husband and the respondent-wife is dissolved by a decree of divorce. The appellant-husband shall pay to the respondent-wife permanent alimony in the sum of Rs.15,00,000/-, in three instalments. [para 30] [146-F-G; 147-A-B]

2.1 In the instant case, the matrimonial dispute started with a quarrel between the elders of both sides. The ego battle of the elders took an ugly turn. Parties were dragged to the court and relations between the two families got strained. Even the efforts of this Court could not bring about a settlement. [para 8] [136-A-B]

2.2 Quite often, the cause of the misunderstanding in a matrimonial dispute is trivial and can be sorted. Mediation as a method of alternative dispute resolution has got legal recognition. Therefore, at the earliest stage i.e. when the dispute is taken up by the Family Court or

by the court of first instance for hearing, it must be referred to mediation centres. Matrimonial disputes, particularly, those relating to custody of child, maintenance, etc. are preeminently fit for mediation. Section 9 of the Family Courts Act enjoins upon the Family Court to make efforts to settle the matrimonial disputes and in these efforts, Family Courts are assisted by Counsellors. Though a complaint u/s 498-A IPC presents difficulty because the said offence is not compoundable except in the State of Andhra Pradesh, in suitable cases, parties can approach the High Court and get the complaint quashed. This Court has always adopted a positive approach and encouraged settlement of matrimonial disputes and discouraged their escalation. Accordingly, directions are issued in the judgment to settle matrimonial disputes through mediation and to deal with complaints involving offences punishable u/s 498-A IPC; as also to set up pre-litigation desks/clinics. [para 32, 34, 35 and 36] [148-B-C-E, 149-A-B-D; 150-H; 151-E-H; 152-C]

Ramgopal & Anr. v. State of Madhya Pradesh & Anr. **2010 (9) SCR 354 = 2010 (13) SCC 540;** *G.V. Rao v. L.H.V. Prasad & Ors.* **2000 (2) SCR 123 = 2000 (3) SCC 693,** B.S. *Joshi & Ors. v. State of Haryana & Anr.* **2003 (2) SCR 1104 = 2003 AIR 1386;** *Gian Singh v. State of Punjab & Anr.* **2012 (10) SCC 303- referred to.**

G.V.N. Kameswara Rao vs. G. Jabilli **2002 (1) SCR 153 = 2002 (2) SCC 296;** *Parveen Mehta vs. Inderjit Mehta* **2002 (5) SCC 706; and** *Durga Prasanna Tripathy vs. Arundhati Tripathy* **2005 (2) Suppl. SCR 833 = 2005 (7) SCC 353– cited**

Case Law Reference:

2002 (1) SCR 153	**cited**	**para 6**
2002 (5) SCC 706	**cited**	**para 6**
2003 (3) SCR 607	**referred to**	**para 6**
2005 (2) Suppl. SCR 833	**cited**	**para 6**
2006 (3) SCR 53	**referred to**	**para 6**
2007 (4) SCR 428	**relied on**	**para 6**
1993 (3) Suppl. SCR 796	**referred to**	**para 12**
2010 (9) SCR 354	**referred to**	**para 34**
2000 (2) SCR 123	**referred to**	**para 34**
2003 (2) SCR 1104	**referred to**	**para 34**
2012 (10) SCC 303	**referred to**	**para 34**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1794 of 2013.

From the Judgment & Orders dated 08.11.2006 of the High Court of Judicature, Andhra Pradesh ar Hyderabad in A.A.O. No. 797 of 2003/C.M.A. No. 797 of 2003.

Jayanth Muth Raj (for C.K. Sasi) for the Appellant.

D. Rama Krishna Reddy (for D. Bharathi Reddy) for the Respondent.

The Judgment of the Court was delivered by

(SMT.) RANJANA PRAKASH DESAI, J. 1. Leave granted.

2. This appeal, by special leave, has been filed by the appellant-husband, being aggrieved by the judgment and order dated 8/11/2006 passed by the Andhra Pradesh High Court in Civil Miscellaneous Appeal No.797/03, setting aside the decree of divorce granted in his favour.

3. The appellant-husband is working as Assistant Registrar in the Andhra Pradesh High Court. The marriage between the appellant-husband and the respondent-wife was solemnized on

25/4/1999 as per Hindu rites and customs. Unfortunately, on the very next day disputes arose between the elders on both sides which resulted in their abusing each other and hurling chappals at each other. As a consequence, on 27/4/1999, the newly married couple got separated without consummation of the marriage and started living separately. On 4/10/1999, the respondent-wife lodged a criminal complaint against the appellant-husband before the Women Protection Cell alleging inter alia that the appellant-husband is harassing her for more dowry. This complaint is very crucial to this case. We shall advert to it more in detail a little later. Escalated acrimony led to complaints and counter complaints. The respondent-wife filed a petition under Section 9 of the Hindu Marriage Act, 1955 for restitution of conjugal rights before the Family Court, Secunderabad. The appellant-husband filed a counter-claim seeking dissolution of marriage on the ground of cruelty and desertion under Section 13(1)(i-a) and (b) of the Hindu Marriage Act, 1955.

4. The Family Court while dismissing the petition for restitution of conjugal rights and granting decree of divorce inter alia held that the respondent-wife stayed in the appellant-husband's house only for a day, she admitted that she did not have any conversation with anyone and hence any amount of oral evidence adduced by her will not support her plea that she was harassed and driven out of the house; that the story that the appellant-husband made a demand of dowry of Rs.10,00,000/- is false; that by filing false complaint against the appellant-husband and his family, alleging offence under Section 498-A of the IPC in the Metropolitan Magistrate Court, Hyderabad and by filing complaints against the appellant-husband in the High Court where he is working, the respondent-wife caused mental cruelty to the appellant-husband and that reunion was not possible. The Family Court directed the appellant-husband to repay Rs.80,000/- given by the respondent-wife's father to him with interest at 8% per annum from the date of the marriage till payment.

5. By the impugned judgment the High Court allowed the appeal carried by the respondent-wife against the said judgment and set aside the decree of divorce granted in favour of the appellant-husband. The High Court inter alia observed that the finding of the Family Court that lodging a complaint with the police against the appellant-husband amounts to cruelty is perverse because it is not a ground for divorce under the Hindu Marriage Act, 1955. The High Court further held that the appellant-husband and the respondent-wife did not live together for a long time and, therefore, the question of their treating each other with cruelty does not arise. According to the High Court, the conclusion that the respondent-wife caused mental cruelty to the appellant-husband is based on presumptions and assumptions.

6. Mr. Jayanth Muth Raj, learned counsel for the appellant-husband assailed the conduct of the respondent-wife and submitted that it disentitles her from getting any relief from this Court. Counsel took us through the complaint lodged by the respondent-wife with the Superintendent of Police, Women Protection Cell, Hyderabad, making defamatory allegations against the mother of the appellant-husband and drew our attention to the various legal proceedings initiated by her against the appellant-husband and his family. Counsel submitted that she also lodged complaints with the High Court asking for the removal of the appellant-husband from his job. Counsel submitted that by lodging such false complaints the respondent-wife caused extreme mental cruelty to the appellant-husband. Counsel submitted that the High Court fell into a grave error in observing that because the respondent-wife did not live with the appellant-husband for long she could not have caused mental cruelty to him. Counsel submitted that this observation is erroneous and is contrary to the law laid down by this Court. False and defamatory allegations made in the pleadings can also cause mental cruelty. Counsel submitted that the marriage has irretrievably broken down and, therefore, it is necessary to dissolve it by a decree of divorce.

In support of his submissions counsel placed reliance on *G.V.N. Kameswara Rao vs. G. Jabilli*[1], *Parveen Mehta vs. Inderjit Mehta*[2], *Vijayakumar R. Bhate vs. Neela Vijayakumar Bhate*[3], *Durga Prasanna Tripathy vs. Arundhati Tripathy*[4], *Naveen Kohli vs. Neelu Kohli*[5] and *Samar Ghosh vs. Jaya Ghosh*[6].

7. Mr. D. Rama Krishna Reddy, learned counsel for the respondent-wife, on the other hand, submitted that the father of the respondent-wife had given Rs.80,000/- and 15 tolas of gold as dowry to the appellant-husband's family. However, they demanded additional cash of Rs.10,00,000/-. Because this demand could not be met, the respondent-wife and her family was humiliated and ill-treated. Therefore, the parents of the respondent-wife had to return to their house along with her immediately after marriage. The father of the respondent-wife made efforts to talk to the appellant-husband's family, but, they did not respond to his efforts. They persisted with their demands and, therefore, the respondent-wife had no alternative but to lodge complaint against them under Section 498-A of the IPC before the Metropolitan Magistrate, Hyderabad. The appellant-husband thereafter gave a false assurance that he will not harass her and, therefore, she withdrew the complaint and went to the matrimonial house. However, the approach of the appellant-husband and his family did not change. She had to therefore renew her complaint. Counsel submitted that only because of the obstinate and uncompromising attitude of the appellant-husband and his family that the respondent-wife had to take recourse to court proceedings. Counsel submitted that the respondent-wife values the matrimonial tie. She wants to lead a happy married life with the appellant-husband. She had,

1. (2002) 2 SCC 296.
2 (2002) 5 SCC 706.
3. (2003) 6 SCC 334.
4. (2005) 7 SCC 353.
5. (2006) 4 SCC 558.
6. (2007) 4 SCC 511.

therefore, filed a petition for restitution of conjugal rights which should have been allowed by the Family Court. Counsel submitted that after properly evaluating all the circumstances the High Court has rightly set aside the decree of divorce and granted a decree of restitution of conjugal rights. The High Court's judgment, therefore, merits no interference.

8. The matrimonial dispute started with a quarrel between the elders of both sides in which initially the appellant-husband and the respondent-wife were not involved. The ego battle of the elders took an ugly turn. Parties were dragged to the court and the inevitable happened. The relations between the two families got strained. With a fond hope that we could bring about a settlement we requested the counsel to talk to the parties and convey our wishes that they should bury the hatchet and start living together. We also tried to counsel them in the court. The respondent-wife appears to be very keen to go back to the matrimonial home and start life afresh, but the appellant-husband is adamant. He conveyed to us through his counsel that by filing repeated false complaints against him and his family the respondent-wife has caused extreme cruelty to them and therefore it will not be possible to take her back. In view of this we have no option but to proceed with the case.

9. The High Court has taken a view that since the appellant-husband and the respondent-wife did not stay together, there is no question of their causing cruelty to each other. The High Court concluded that the conclusion drawn by the Family Court that the respondent-wife caused mental cruelty to the appellant-husband is erroneous. We are unable to agree with the High Court.

10. Under Section 13(1)(i-a) of the Hindu Marriage Act, 1955, a marriage can be dissolved by a decree of divorce on a petition presented either by the husband or the wife on the ground that the other party has, after solemnization of the marriage, treated the petitioner with cruelty. In a series of judgments this Court has repeatedly stated the meaning and

outlined the scope of the term 'cruelty'. Cruelty is evident where one spouse has so treated the other and manifested such feelings towards her or him as to cause in her or his mind reasonable apprehension that it will be harmful or injurious to live with the other spouse. Cruelty may be physical or mental.

11. In *Samar Ghosh* this Court set out illustrative cases where inference of 'mental cruelty' can be drawn. This list is obviously not exhaustive because each case presents it's own peculiar factual matrix and existence or otherwise of mental cruelty will have to be judged after applying mind to it. We must quote the relevant paragraph of *Samar Ghosh*. We have reproduced only the instances which are relevant to the present case.

> "101. No uniform standard can ever be laid down for guidance, yet we deem it appropriate to enumerate some instances of human behaviour which may be relevant in dealing with the cases of "mental cruelty". The instances indicated in the succeeding paragraphs are only illustrative and not exhaustive:
>
> (i) On consideration of complete matrimonial life of the parties, acute mental pain, agony and suffering as would not make possible for the parties to live with each other could come within the broad parameters of mental cruelty.
>
> (ii) On comprehensive appraisal of the entire matrimonial life of the parties, it becomes abundantly clear that situation is such that the wronged party cannot reasonably be asked to put up with such conduct and continue to live with other party.
>
> (iii) xxx xxx xxx
>
> (iv) Mental cruelty is a state of mind. The feeling of deep anguish, disappointment, frustration in one spouse caused by the conduct of other for a long time may lead to mental cruelty.

> (v) A sustained course of abusive and humiliating treatment calculated to torture, discommode or render miserable life of the spouse.
>
> (vi) Sustained unjustifiable conduct and behaviour of one spouse actually affecting physical and mental health of the other spouse. The treatment complained of and the resultant danger or apprehension must be very grave, substantial and weighty.
>
> (vii) xxx xxx xxx
>
> (viii) xxx xxx xxx
>
> (ix) xxx xxx xxx
>
> (x) The married life should be reviewed as a whole and a few isolated instances over a period of years will not amount to cruelty. The ill conduct must be persistent for a fairly lengthy period, where the relationship has deteriorated to an extent that because of the acts and behaviour of a spouse, the wronged party finds it extremely difficult to live with the other party any longer, may amount to mental cruelty.
>
> (xi) xxx xxx xxx
>
> (xii) xxx xxx xxx
>
> (xiii) xxx xxx xxx
>
> (xiv) Where there has been a long period of continuous separation, it may fairly be concluded that the matrimonial bond is beyond repair. The marriage becomes a fiction though supported by a legal tie. By refusing to sever that tie, the law in such cases, does not serve the sanctity of marriage; on the contrary, it shows scant regard for the feelings and emotions of the parties. In such like situations, it may lead to mental cruelty."

It is pertinent to note that in this case the husband and wife had lived separately for more than sixteen and a half years. This fact was taken into consideration along with other facts as leading to the conclusion that matrimonial bond had been ruptured beyond repair because of the mental cruelty caused by the wife. Similar view was taken in Naveen Kohli.

12. In *V. Bhagat v. D. Bhagat*[7] in the divorce petition filed by the husband the wife filed written statement stating that the husband was suffering from mental hallucination, that his was a morbid mind for which he needs expert psychiatric treatment and that he was suffering from 'paranoid disorder'. In cross-examination her counsel put several questions to the husband suggesting that several members of his family including his grandfather were lunatics. This court held that these assertions cannot but constitute mental cruelty of such a nature that the husband cannot be asked to live with the wife thereafter. Such pleadings and questions it was held, are bound to cause immense mental pain and anguish to the husband. In *Vijaykumar Bhate* disgusting accusations of unchastity and indecent familiarity with a neighbour were made in the written statement. This Court held that the allegations are of such quality, magnitude and consequence as to cause mental pain, agony and suffering amounting to the reformulated concept of cruelty in matrimonial law causing profound and lasting disruption and driving the wife to feel deeply hurt and reasonably apprehend that it would be dangerous to live with her husband. In *Naveen Kohli* the respondent-wife got an advertisement issued in a national newspaper that her husband was her employee. She got another news item issued cautioning his business associates to avoid dealing with him. This was treated as causing mental cruelty to the husband.

13. In *Naveen Kohli* the wife had filed several complaints and cases against the husband. This Court viewed her conduct

7. (1994) 1 SCC 337.

as a conduct causing mental cruelty and observed that the finding of the High Court that these proceedings could not be taken to be such which may warrant annulment of marriage is wholly unsustainable.

14. Thus, to the instances illustrative of mental cruelty noted in *Samar Ghosh*, we could add a few more. Making unfounded indecent defamatory allegations against the spouse or his or her relatives in the pleadings, filing of complaints or issuing notices or news items which may have adverse impact on the business prospect or the job of the spouse and filing repeated false complaints and cases in the court against the spouse would, in the facts of a case, amount to causing mental cruelty to the other spouse.

15. We shall apply the above principles to the present case. Firstly, it is necessary to have a look at the legal proceedings initiated by both sides against each other. The facts on record disclose that after the marriage, due to some dispute which arose between the elders, both sides abused and virtually attacked each other. The respondent-wife was taken by her parents to their house. According to the respondent-wife, her father made efforts to bring about an amicable settlement but the other side did not respond favourably and, therefore, on 4/10/1999 she lodged a complaint with the Superintendent of Police, Women Protection Cell against the appellant-husband and members of his family. In our opinion, this complaint is, to a large extent, responsible for widening the rift between the parties. In this complaint, after alleging ill-treatment and harassment for dowry, it is alleged that mother of the appellant-husband asked the respondent-wife to sleep with the father of the appellant-husband. When she was cross-examined in the Family Court during the hearing of her petition for restitution of conjugal rights the respondent-wife admitted that she had lodged the complaint. PW-2 her mother, in her cross-examination stated that though they had asked her not to lodge the complaint, the respondent-wife lodged it. She told them that she had lodged the complaint because the

appellant-husband was not listening to her. Thus, it appears that this complaint was lodged out of frustration and anger and was a reaction to the appellant-husband's refusal to live with her. It was, perhaps, felt by her that because of the pressure of such a complaint the appellant-husband would take her back to his house. Far from helping the respondent-wife, the complaint appears to have caused irreparable harm to her. It increased the bitterness. Perhaps, the respondent-wife was misguided by someone. But, such evidence is not on record. Even in this court, this complaint appears to us to be a major factor amongst others impeding settlement. Pursuant to the said complaint, Crime No.8/2000 was registered by C.I.D., Hyderabad, in the Metropolitan Magistrate (Mahila Court), Hyderabad against the appellant-husband and his family under Section 498-A of the IPC. It is the respondent-wife's case that the appellant-husband gave an assurance before the police that he will not harass her. She, therefore, withdrew the complaint. The police then filed a closure report. According to the respondent-wife, the appellant-husband did not abide by the promise made by him and, therefore, she filed a protest petition. The Magistrate Court, Hyderabad, then, took cognizance of the case and renumbered the case as C.C.No.62/2002.

16. In the meantime, the respondent-wife filed O.P.No.88/2001 in the Family Court, Secunderabad, for restitution of conjugal rights. The appellant-husband filed a counter claim for divorce on 27/12/2002. The Family Court dismissed the petition for restitution of conjugal rights and allowed the counter claim for divorce filed by the appellant-husband. The respondent-wife challenged the Family Court judgment in the High Court. On 8/12/2006 the High Court reversed the Family Court's order and allowed the petition for restitution of conjugal rights. The present appeal is filed by the appellant-husband against the said judgment.

17. According to the respondent-wife, on 17/9/2007 when she, along with her mother, came out of the court after a case

filed by her against the appellant-husband was adjourned, the appellant-husband beat her mother and kicked her on her stomach. Both of them received injuries. She, therefore, filed complaint for the offence punishable under Section 324 of the IPC against the appellant-husband (C.C.No. 79/2009). It may be stated here that on 19/10/2009 the appellant-husband was acquitted in this case.

18. On 24/6/2008 the judgment was delivered by Additional Chief Metropolitan Magistrate, Hyderabad in C.C.No. 62/2002. The appellant-husband was convicted under Section 498-A of the IPC and was sentenced to undergo six months simple imprisonment. He and his parents were acquitted of the offences under the Dowry Prohibition Act. His parents were acquitted of the offence under Section 498-A of the IPC. After this judgment the respondent-wife and her parents filed a complaint in the High Court saying that since the appellant-husband was convicted he should be dismissed from service. Similar letters were sent to the High Court by the maternal uncle of the respondent-wife.

19. On 14/7/2008 the appellant-husband filed Criminal Appeal No.186/2008 challenging his conviction under Section 498-A of the IPC before the Metropolitan Sessions Judge. It is pertinent to note that the respondent-wife filed Criminal Appeal No.1219/2008 in the High Court questioning the acquittal of the appellant-husband and his parents of the offences under the Dowry Prohibition Act and also the acquittal of his parents of the offence punishable under Section 498-A of the IPC. This appeal is pending in the High Court. Not being content with this, the respondent-wife filed Criminal Revision Case No.1560/2008 in the High Court seeking enhancement of punishment awarded to the appellant-husband for offence under Section 498-A of the IPC.

20. According to the appellant-husband on 6/12/2009 the brother of the respondent-wife came to their house and attacked his mother. His mother filed a complaint and the

police registered a complaint under Section 354 of the IPC. The brother of the respondent-wife also lodged a complaint and an offence came to be registered. Both the cases are pending.

21. On 29/6/2010 Criminal Appeal No. 186/2010 filed by the appellant-husband challenging his conviction for the offence under Section 498-A of the IPC was allowed by the Metropolitan Sessions Judge and he was acquitted. The respondent-wife has filed criminal appeal in the High Court challenging the said acquittal which is pending.

22. We need to now see the effect of the above events. In our opinion, the first instance of mental cruelty is seen in the scurrilous, vulgar and defamatory statement made by the respondent-wife in her complaint dated 4/10/1999 addressed to the Superintendent of Police, Women Protection Cell. The statement that the mother of the appellant-husband asked her to sleep with his father is bound to anger him. It is his case that this humiliation of his parents caused great anguish to him. He and his family were traumatized by the false and indecent statement made in the complaint. His grievance appears to us to be justified. This complaint is a part of the record. It is a part of the pleadings. That this statement is false is evident from the evidence of the mother of the respondent-wife, which we have already quoted. This statement cannot be explained away by stating that it was made because the respondent-wife was anxious to go back to the appellant-husband. This is not the way to win the husband back. It is well settled that such statements cause mental cruelty. By sending this complaint the respondent-wife has caused mental cruelty to the appellant-husband.

23. Pursuant to this complaint, the police registered a case under Section 498-A of the IPC. The appellant-husband and his parents had to apply for anticipatory bail, which was granted to them. Later, the respondent-wife withdrew the complaint. Pursuant to the withdrawal, the police filed a closure report. Thereafter, the respondent-wife filed a protest petition. The trial

court took cognizance of the case against the appellant-husband and his parents (CC No. 62/2002). What is pertinent to note is that the respondent-wife filed criminal appeal in the High Court challenging the acquittal of the appellant-husband and his parents of the offences under the Dowry Prohibition Act and also the acquittal of his parents of the offence punishable under Section 498-A of the IPC. She filed criminal revision seeking enhancement of the punishment awarded to the appellant-husband for the offence under Section 498-A of the IPC in the High Court which is still pending. When the criminal appeal filed by the appellant-husband challenging his conviction for the offence under Section 498-A of the IPC was allowed and he was acquitted, the respondent-wife filed criminal appeal in the High Court challenging the said acquittal. During this period respondent-wife and members of her family have also filed complaints in the High Court complaining about the appellant-husband so that he would be removed from the job. The conduct of the respondent-wife in filing a complaint making unfounded, indecent and defamatory allegation against her mother-in-law, in filing revision seeking enhancement of the sentence awarded to the appellant-husband, in filing appeal questioning the acquittal of the appellant-husband and acquittal of his parents indicates that she made all attempts to ensure that he and his parents are put in jail and he is removed from his job. We have no manner of doubt that this conduct has caused mental cruelty to the appellant-husband.

24. In our opinion, the High Court wrongly held that because the appellant-husband and the respondent-wife did not stay together there is no question of the parties causing cruelty to each other. Staying together under the same roof is not a pre-condition for mental cruelty. Spouse can cause mental cruelty by his or her conduct even while he or she is not staying under the same roof. In a given case, while staying away, a spouse can cause mental cruelty to the other spouse by sending vulgar and defamatory letters or notices or filing complaints containing indecent allegations or by initiating number of judicial

proceedings making the other spouse's life miserable. This is what has happened in this case.

25. It is also to be noted that the appellant-husband and the respondent-wife are staying apart from 27/4/1999. Thus, they are living separately for more than ten years. This separation has created an unbridgeable distance between the two. As held in *Samar Ghosh,* if we refuse to sever the tie, it may lead to mental cruelty.

26. We are also satisfied that this marriage has irretrievably broken down. Irretrievable breakdown of marriage is not a ground for divorce under the Hindu Marriage Act, 1955. But, where marriage is beyond repair on account of bitterness created by the acts of the husband or the wife or of both, the courts have always taken irretrievable breakdown of marriage as a very weighty circumstance amongst others necessitating severance of marital tie. A marriage which is dead for all purposes cannot be revived by the court's verdict, if the parties are not willing. This is because marriage involves human sentiments and emotions and if they are dried-up there is hardly any chance of their springing back to life on account of artificial reunion created by the court's decree.

27. In *V. Bhagat* this Court noted that divorce petition was pending for eight years and a good part of the lives of both the parties had been consumed in litigation, yet the end was not in sight. The facts were such that there was no question of reunion, the marriage having irretrievably broken down. While dissolving the marriage on the ground of mental cruelty this Court observed that irretrievable breakdown of marriage is not a ground by itself, but, while scrutinizing the evidence on record to determine whether the grounds alleged are made out and in determining the relief to be granted the said circumstance can certainly be borne in mind. In *Naveen Kohli,* where husband and wife had been living separately for more than 10 years and a large number of criminal proceedings had been initiated by the wife against the husband, this Court observed

that the marriage had been wrecked beyond the hope of salvage and public interest and interest of all concerned lies in the recognition of the fact and to declare *defunct de jure* what is already *defunct de facto*. It is important to note that in this case this Court made a recommendation to the Union of India that the Hindu Marriage Act, 1955 be amended to incorporate irretrievable breakdown of marriage as a ground for the grant of divorce.

28. In the ultimate analysis, we hold that the respondent-wife has caused by her conduct mental cruelty to the appellant-husband and the marriage has irretrievably broken down. Dissolution of marriage will relieve both sides of pain and anguish. In this Court the respondent-wife expressed that she wants to go back to the appellant-husband, but, that is not possible now. The appellant-husband is not willing to take her back. Even if we refuse decree of divorce to the appellant-husband, there are hardly any chances of the respondent-wife leading a happy life with the appellant-husband because a lot of bitterness is created by the conduct of the respondent-wife.

29. In *Vijay Kumar,* it was submitted that if the decree of divorce is set aside, there may be fresh avenues and scope for reconciliation between parties. This court observed that judged in the background of all surrounding circumstances, the claim appeared to be too desolate, merely born out of despair rather than based upon any real, concrete or genuine purpose or aim. In the facts of this case we feel the same.

30. While we are of the opinion that decree of divorce must be granted, we are alive to the plight of the respondent-wife. The appellant-husband is working as an Assistant Registrar in the Andhra Pradesh High Court. He is getting a good salary. The respondent-wife fought the litigation for more than 10 years. She appears to be entirely dependent on her parents and on her brother, therefore, her future must be secured by directing the appellant-husband to give her permanent alimony. In the facts and circumstance of this case, we are of the opinion that

the appellant-husband should be directed to pay a sum of Rs.15,00,000/- (Rupees Fifteen Lakhs only) to the respondent-wife as and by way of permanent alimony. In the result, the impugned judgment is quashed and set aside. The marriage between the appellant-husband - K. Srinivas Rao and the respondent-wife - D.A. Deepa is dissolved by a decree of divorce. The appellant-husband shall pay to the respondent-wife permanent alimony in the sum of Rs.15,00,000/-, in three instalments. The first instalment of Rs.5,00,000/- (Rupees Five Lakhs only) should be paid on 15/03/2013 and the remaining amount of Rs.10,00,000/- (Rupees Ten Lakhs only) should be paid in instalments of Rs.5,00,000/- each after a gap of two months i.e. on 15/05/2013 and 15/07/2013 respectively. Each instalment of Rs.5,00,000/- be paid by a demand draft drawn in favour of the respondent-wife "D.A. Deepa".

31. Before parting, we wish to touch upon an issue which needs to be discussed in the interest of victims of matrimonial disputes. Though in this case, we have recorded a finding that by her conduct, the respondent-wife has caused mental cruelty to the appellant-husband, we may not be understood, however, to have said that the fault lies only with the respondent-wife. In matrimonial disputes there is hardly any case where one spouse is entirely at fault. But, then, before the dispute assumes alarming proportions, someone must make efforts to make parties see reason. In this case, if at the earliest stage, before the respondent-wife filed the complaint making indecent allegation against her mother-in-law, she were to be counselled by an independent and sensible elder or if the parties were sent to a mediation centre or if they had access to a pre-litigation clinic, perhaps the bitterness would not have escalated. Things would not have come to such a pass if, at the earliest, somebody had mediated between the two. It is possible that the respondent-wife was desperate to save the marriage. Perhaps, in desperation, she lost balance and went on filing complaints. It is possible that she was misguided. Perhaps, the appellant-husband should have forgiven her indiscretion in

filing complaints in the larger interest of matrimony. But, the way the respondent-wife approached the problem was wrong. It portrays a vindictive mind. She caused extreme mental cruelty to the appellant-husband. Now the marriage is beyond repair.

32. Quite often, the cause of the misunderstanding in a matrimonial dispute is trivial and can be sorted. Mediation as a method of alternative dispute resolution has got legal recognition now. We have referred several matrimonial disputes to mediation centres. Our experience shows that about 10 to 15% of matrimonial disputes get settled in this Court through various mediation centres. We, therefore, feel that at the earliest stage i.e. when the dispute is taken up by the Family Court or by the court of first instance for hearing, it must be referred to mediation centres. Matrimonial disputes particularly those relating to custody of child, maintenance, etc. are preeminently fit for mediation. Section 9 of the Family Courts Act enjoins upon the Family Court to make efforts to settle the matrimonial disputes and in these efforts, Family Courts are assisted by Counsellors. Even if the Counsellors fail in their efforts, the Family Courts should direct the parties to mediation centres, where trained mediators are appointed to mediate between the parties. Being trained in the skill of mediation, they produce good results.

33. The idea of pre-litigation mediation is also catching up. Some mediation centres have, after giving wide publicity, set up "Help Desks" at prominent places including facilitation centres at court complexes to conduct pre-litigation mediation. We are informed that in Delhi Government Mediation and Conciliation Centres, and in Delhi High Court Mediation Centre, several matrimonial disputes are settled. These centres have a good success rate in pre-litigation mediation. If all mediation centres set up pre-litigation desks/clinics by giving sufficient publicity and matrimonial disputes are taken up for pre-litigation settlement, many families will be saved of hardship if, at least, some of them are settled.

34. While purely a civil matrimonial dispute can be amicably settled by a Family Court either by itself or by directing the parties to explore the possibility of settlement through mediation, a complaint under Section 498-A of the IPC presents difficulty because the said offence is not compoundable except in the State of Andhra Pradesh where by a State amendment, it has been made compoundable. Though in *Ramgopal & Anr. v. State of Madhya Pradesh & Anr.*[8], this Court requested the Law Commission and the Government of India to examine whether offence punishable under Section 498-A of the IPC could be made compoundable, it has not been made compoundable as yet. The courts direct parties to approach mediation centres where offences are compoundable. Offence punishable under Section 498-A being a non-compoundable offence, such a course is not followed in respect thereof. This Court has always adopted a positive approach and encouraged settlement of matrimonial disputes and discouraged their escalation. In this connection, we must refer to the relevant paragraph from *G.V. Rao v. L.H.V. Prasad & Ors.*[9], where the complaint appeared to be the result of matrimonial dispute, while refusing to interfere with the High Court's order quashing the complaint, this court made very pertinent observations, which read thus:

> "12. There has been an outburst of matrimonial disputes in recent times. Marriage is a sacred ceremony, the main purpose of which is to enable the young couple to settle down in life and live peacefully. But little matrimonial skirmishes suddenly erupt which often assume serious proportions resulting in commission of heinous crimes in which elders of the family are also involved with the result that those who could have counselled and brought about rapprochement are rendered helpless on their being arrayed as accused in the criminal case. There are many other reasons which need not be mentioned here for not encouraging matrimonial litigation so that the parties may ponder over their defaults and terminate their disputes amicably by mutual agreement instead of fighting it out in a court of law where it takes years and years to conclude and in that process the parties lose their "young" days in chasing their "cases" in different courts."

8. (2010) 13 SCC 540.

9. (2000) 3 SCC 693.

In *B.S. Joshi & Ors. v. State of Haryana & Anr.*[10], after referring to the above observations, this Court stated that the said observations are required to be kept in view by courts while dealing with matrimonial disputes and held that complaint involving offence under Section 498-A of the IPC can be quashed by the High Court in exercise of its powers under Section 482 of the Code if the parties settle their dispute. Even in *Gian Singh v. State of Punjab & Anr.*[11], this Court expressed that certain offences which overwhelmingly and predominantly bear civil flavour like those arising out of matrimony, particularly relating to dowry, etc. or the family dispute and where the offender and the victim had settled all disputes between them amicably, irrespective of the fact that such offences have not been made compoundable, the High Court may quash the criminal proceedings if it feels that by not quashing the same, the ends of justice shall be defeated.

35. We, therefore, feel that though offence punishable under Section 498-A of the IPC is not compoundable, in appropriate cases if the parties are willing and if it appears to the criminal court that there exist elements of settlement, it should direct the parties to explore the possibility of settlement through mediation. This is, obviously, not to dilute the rigour, efficacy and purport of Section 498-A of the IPC, but to locate cases where the matrimonial dispute can be nipped in bud in an equitable manner. The judges, with their expertise, must ensure that this exercise does not lead to the erring spouse using mediation process to get out of clutches of the law. During mediation, the parties can either decide to part company on

10. AIR 2003 SC 1386.

11. (2012) 10 SCC 303.

mutually agreed terms or they may decide to patch up and stay together. In either case for the settlement to come through, the complaint will have to be quashed. In that event, they can approach the High Court and get the complaint quashed. If however they chose not to settle, they can proceed with the complaint. In this exercise, there is no loss to anyone. If there is settlement, the parties will be saved from the trials and tribulations of a criminal case and that will reduce the burden on the courts which will be in the larger public interest. Obviously, the High Court will quash the complaint only if after considering all circumstances it finds the settlement to be equitable and genuine. Such a course, in our opinion, will be beneficial to those who genuinely want to accord a quietus to their matrimonial disputes. We would, however, like to clarify that reduction of burden of cases on the courts will, however, be merely an incidental benefit and not the reason for sending the parties for mediation. We recognize 'mediation' as an effective method of alternative dispute resolution in matrimonial matters and that is the reason why we want the parties to explore the possibility of settlement through mediation in matrimonial disputes.

36. We, therefore, issue directions, which the courts dealing with the matrimonial matters shall follow:

(a) In terms of Section 9 of the Family Courts Act, the Family Courts shall make all efforts to settle the matrimonial disputes through mediation. Even if the Counsellors submit a failure report, the Family Courts shall, with the consent of the parties, refer the matter to the mediation centre. In such a case, however, the Family Courts shall set a reasonable time limit for mediation centres to complete the process of mediation because otherwise the resolution of the disputes by the Family Court may get delayed. In a given case, if there is good chance of settlement, the Family Court in its discretion, can always extend the time limit.

(b) The criminal courts dealing with the complaint under Section 498-A of the IPC should, at any stage and particularly, before they take up the complaint for hearing, refer the parties to mediation centre if they feel that there exist elements of settlement and both the parties are willing. However, they should take care to see that in this exercise, rigour, purport and efficacy of Section 498-A of the IPC is not diluted. Needless to say that the discretion to grant or not to grant bail is not in any way curtailed by this direction. It will be for the concerned court to work out the modalities taking into consideration the facts of each case.

(c) All mediation centres shall set up pre-litigation desks/clinics; give them wide publicity and make efforts to settle matrimonial disputes at pre-litigation stage.

37. The appeal is disposed of in the aforestated terms.

R.P. Appeal disposed of.

STATE OF ANDHRA PRADESH
v.
STATE OF MAHARASHTRA & ORS.
(Original Suit No. 1 of 2006)

FEBRUARY 28, 2013.

[R.M. LODHA, T.S. THAKUR AND ANIL R. DAVE, JJ.]

Constitution of India, 1950:

Art. 131 of the Constitution read with O. 23, rr. 1, 2 and 3 of the Supreme Court Rules – Suit by State of Andhra Pradesh seeking to restrain the defendant State of Maharashtra from constructing Babhali barrage on river Godavari within the water spread area of Pochampad dam and utilizing the water through the proposed barrage – Held: Maharashtra can utilize waters not exceeding 60 TMC for new projects, including any additional use over and above the sanctioned or cleared utilization, as the case may be – The essence of Clause II (i) of the agreement is to put a cap on the right of Maharashtra to utilize waters of Godavari river below the three dams mentioned therein up to Pochampad dam site to the extent of 60 TMC for new projects and in no case exceeding that limit – There is no demarcation made that the utilization of waters not exceeding 60 TMC for new projects by Maharashtra shall be from the flowing water – State of Andhra Pradesh is not entitled to the reliefs as prayed for in the suit – However, a three member supervisory committee as detailed in the judgment is constituted – The committee shall surprise the operation of Babhali barrage and Balegaon barrage in terms of the judgment.

Art. 131 – suit for injunction filed by one State against other State – Guiding factors to grant injunction – Explained – Evidence – Burden of proof.

Words and Phrases:

Expressions, 'dam', 'up to dam site', 'from the waters in the area of Gadavari basin' and 'from the waters of Godavari basin' – Connotation of.

The State of Andhra Pradesh filed the instant suit against State of Maharashtra, defendant no. 1 mainly. Union of India was impleaded as defendant no. 2 and States of Karnataka, Madhya Pradesh, Chhatisgarh and Orissa were impleaded as defendants no. 3 to 6. It was the case of the plaintiff-State that pursuant to the agreement dated 6.10.1975 between the two States and the consequent award dated 27.11.1977 made by the Godavari Water Dispute Tribunal (GWDT), the plaiantiff completed Pochampad dam project on river Godavari near the border of State of Maharashtra; that the State of Maharashtra was illegally and unauthorisedly constructing Babhali barrage within the reservoir bridge of Pochampad dam and its intention was to utilize the water of Pochampad dam by invasion of reservoir water spread area by construction of Babhali barrage and allowing its farmers to utilize water for irrigation by lifting from Babhali pondage which would deprive the people of the plaintiff State of having water for irrigation and drinking purposes. The stand of defendant no. 1-State of Maharashtra was that by agreement dated 6.10.1975, it was agreed that Maharashtra could utilize waters not exceeding 60 TMC for new projects including any additional use over and above the sanctioned utilization in terms of the agreement dated 6.10.1975 from the water in the area of Godavari basin below Paithan dam site and upto Pochampad dam site on Godavari. Out of the ten issues framed in the suit, the parties felt that decision on issues nos. 5,6,7 and 8 would be crucial. Taking these issues together, the vital issue for consideration before the Court was with regard to: "Maharashtra's entitlement to construct any project within the water spread area of

Pochampad project."

Disposing of the suit, the Court

HELD: 1.1 During the pendency of earlier disputes before the Godavari Water Disputes Tribunal, the riparian states entered into bilateral and multi-lateral agreements which were endorsed by the Tribunal in its Award dated 27.11.1979 and based its decision on these agreements. The relevant agreements for the purpose of the instant case are the agreements dated 06.10.1975 and 19.12.1975. The Tribunal in Chapter IV of the award has noted that the entire area drained by the river and its tributaries is called river basin. The expressions "Godavari basin", "Godavari river basin" and "Godavari drainage basin" in the award have been explained to mean the entire area drained by the Godavari river and its tributaries. From the award, it is clear that the Tribunal put its seal of approval and endorsed the agreement dated 06.10.1975 between Maharashtra and Andhra Pradesh and the agreement dated 19.12.1975 between Karnataka, Maharashtra, Madhya Pradesh, Orissa and Andhra Pradesh and ordered that the allocation of waters in the Godavari river and Godavari river basin between Maharashtra and Andhra Pradesh and the clearance of projects for utilization of waters of the Godavari and its tributaries shall be observed and carried out as per the agreements. [para 34, 35 and 41] [181-F-H; 182-A; 184-D-F]

1.2 The award dated 27.11.1979 and the further award dated 07.07.1980 leave no manner of doubt that the Tribunal has determined the distribution of water in the Godavari river on the basis of the agreements of the parties. While doing so, the Tribunal was alive to the position that in deciding water disputes in inter-State river, the rule of equitable distribution of the benefits of the river applies so that each State gets a fair share of the water of the common river but there is no rigid formula for the

equitable distribution of waters of a river because each river system has its peculiarities. In terms of Clause I of the agreement dated 06.10.1975, Maharashtra has been given right to use for their beneficial use all waters up to Paithan dam site on the Godavari, up to Siddheswar dam site on the Purna. [para 45] [185-G-H; 186-A-B-E-F]

1.3 Clause II of the agreement is in two parts. Clause II (i) provides that 'from the waters in the area of the Godavari basin' below Paithan dam site on the Godavari and below Siddheswar dam site on the Purna and below Nizamsagar dam site on the Manjra and up to Pochampad dam site on the Godavari, Maharashtra can utilize waters not exceeding 60 TMC for new projects, including any additional use over and above the sanctioned or cleared utilization, as the case may be. Clause II (ii) enables Andhra Pradesh to build Pochampad project with FRL+1091 feet and MWL+1093 feet. Andhra Pradesh under this Clause has been given liberty to utilize all the balance waters up to Pochampad dam site in any manner it chooses for its beneficial use. [para 46-47] [186-G-H; 187-A-B]

1.4 The words "from the waters in the area of Godavari basin" in Clause II(i) have two significant expressions, one, 'Godavari basin' and the other, 'in the area of'. The expression "Godavari basin" along with the other two expressions "Godavari river basin" and "Godavari drainage basin" in the award have been explained to mean the entire area drained by the Godavari river and its tributaries. By use of the words "from the waters in the area of Godavari basin" in contradistinction to "from the waters of Godavari basin", the parties have intended to mean waters in the geographical area of Godavari basin and not confined to flowing waters of Godavari basin. If the intention of Andhra Pradesh was that Maharashtra should not utilize the waters of

Pochampad reservoir in its territory, such limitation would have been provided expressly. In the absence of any express limitation, except quantity on the use of water by Maharashtra within its territory in Clause II(i) of the agreement dated 6.10.1975, no other limitation can be read. [para 48-49] [187-E-F; 188-B-F]

1.5 Moreover, apportionment of the Godavari river was agreed to by the two States in a typical situation in as much as building of Pochampad project by Andhra Pradesh with FRL+1091 feet and MWL+1093 feet involved submergence of certain areas in the State of Maharashtra. But for Maharashtra's consent to submergence of its area, Andhra Pradesh could not have built Pochampad dam with capacity of 112 TMC; rather its capacity would have been limited to 40 TMC. Thus, in the absence of any express clause, it cannot be said that Maharashtra was given right to utilize waters not exceeding 60 TMC for new projects from the flowing waters of the Godavari basin alone. On careful reading of Clause II(ii), it is evident that this Clause gives right to Andhra Pradesh to utilize all the balance waters up to Pochampad dam site in any manner it chooses for its beneficial use. The use of the expression, "all the balance waters up to Pochampad dam site" signifies that parties agreed that on utilization of waters not exceeding 60 TMC for new projects by Maharashtra from the waters in the geographical area of the Godavari basin, all the balance waters up to Pochampad dam site is left for utilization by Andhra Pradesh for its beneficial use. [para 50] [188-G-H; 189-A-D]

2.1 The common meaning of the word "dam" is the structure across the stream, including the abutment on the sides. The dam is an obstruction to the natural flow of the water of a river or a barrier to prevent the flowing water. A dam is built across a water course to confine and keep back flowing water. [para 51] [189-E]

Morton v. Oregon Short Line Ry. Co. **87 P. 151, 153, 48 Or. 444; and** *Colwell v. May's Landing Water Power Co.* **19 N.J. Eq. (4 C.E.Green) 245, 248 – referred to.**

Indian Standard Glossary of Terms Relating To River Valley Projects, Part 8; *Dams and Dam Sections* **[First Revision], paragraph 2.27;** *Glossary of Irrigation and Hydro-Electric Terms* ***and*** *Standard Notations used in India*, **Third Edition, published by Central Board of Irrigation and Power,** *"Introduction to dams",* **Publication No. 220 by Central Board of Irrigation and Power under the Chapter** "*Dam Sites – Large Dams"* **- referred to.**

2.2 It is sound principle of interpretation that if an expression has been used in an agreement at more than one place, such expression must bear the same meaning at all places unless expressed otherwise. When the agreement dated 06.10.1975 is read carefully, it would be seen that in Clause V, it is provided that Maharashtra and Andhra Pradesh will be free to use additional quantity of 300 TMC of water each below Pochampad 'dam site' for new projects. The 'dam site' in the agreement has the same meaning in all clauses and it means the concrete structure of the dam. Therefore, Clause II (i) that provides that Maharashtra can utilize waters not exceeding 60 TMC for new projects from the waters in the area of the Godavari basin below three dam sites noted therein and up to Pochampad dam site on the Godavari gives right to Maharashtra to utilize waters of the Godavari river up to Pochampad site which may be water flowing through the river from the catchment area or the water spread area. Such utilization is not confined to the water flowing through the river from the catchment area. The thrust of the parties in Clause II (i) and the essence of this clause is to put a cap on the right of Maharashtra to utilize waters of Godavari river below the three dams mentioned therein up to Pochampad dam site to the extent of 60 TMC for

new projects and in no case exceeding that limit. There is no demarcation made that the utilization of waters not exceeding 60 TMC for new projects by Maharashtra shall be from the flowing water. While reaching the agreement, the two States must have sought to equalize the burden and benefits. [para 52 and 81 (i) and (ii)] [192-E-F, G-H; 193-A-D]

2.3 As a matter of fact, Andhra Pradesh understood the location of Pochampad dam site at particular latitude and longitude and not the reservoir. This also indicates that by Pochampad dam site what is meant in the agreement dated 06.10.1975 is the structure and not the spread area. [para 53] [193-E]

Orient Papers & Industries Ltd. and Another v. Tahsildar-cum-Irrigation Officer and Others **1998 (1) Suppl. SCR 442 = 1998 (7) SCC 303 – held inapplicable.**

2.4 In the instant case, the Court is concerned with the interpretation of the words "up to dam site" occurring in the agreement between the two states which was entered into when the dispute was already pending before the Tribunal and Andhra Pradesh was intending to construct Pochampad dam with 112 TMC that would submerge certain areas of Maharashtra. Therefore, these words have to be understood in the context of the agreement and terms thereof. In the overall context it is very difficult to hold that dam site is given meaning in the agreement as spread area of dam. [para 54.1] [194-E-G]

2.5 Generally, there cannot be a dam within a dam. This is also true that generally there cannot be lake/ pondage of a project of one State within the lake/ pondage of the project of another state. But this Court is concerned with specific water sharing agreement between the two states which has been endorsed by the Tribunal. Like any other agreement, the terms of inter-

State agreement ordinarily must be found out from the actual words employed therein. In Clause II (i), there is no limitation imposed upon Maharashtra to utilize the waters of the Godavari river from the water flowing through the river from the catchment area only in its territory. What Maharashtra has to ensure is that it does not utilize waters of Godavari river in its territory exceeding 60 TMC for new projects and it does not interfere with natural and continuous flow of water into Pochampad reservoir. [para 55] [195-A-E]

3.1 In a suit for injunction filed by one State against the other State, the burden on the complaining State is much greater than that generally required to be borne by one seeking an injunction in a suit between private parties. The complaining State has to establish that threatened invasion of rights is substantial and of a serious magnitude. In the matter between States, injunction would not follow because there is infraction of some rights of the complaining State but a case of high equity must be made out that moves the conscience of the Court in granting injunction. [para 58] [196-D-F]

State of Washington v. State of Oregon **297 US 517 – referred to**

3.2 Maharashtra has suggested without prejudice to its rights and contentions that it is willing to reimburse 0.6 TMC of water to Andhra Pradesh by releasing the same on 1st March every year. Maharashtra has submitted that the operation of Babhali barrage can be supervised by a committee consisting of representatives of Central Water Commission and of States of Andhra Pradesh and Maharashtra. This committee will supervise that the gates are lowered on the 28th October each year and will remain in operation till the end of June next year and that on the 1st of March the gates will be lifted to allow the flow of water of 0.6 TMC to Andhra Pradesh. Thus,

even 0.6 TMC will not be made use of by Maharashtra. [para 62] [198-G-H; 199-A]

3.3 The commitment of Maharashtra that the Babhali barrage project requires 2.74 TMC of water out of the allocation of 60 TMC for new projects under the agreement of which only 0.6 TMC is from the common submergence of Pochampad reservoir and Babhali barrage if accepted and its compliance is ensured, it may be conveniently held that Babhali barrage would not enable Maharashtra to draw and utilize 65 TMC of water from the storage of Pochampad project as alleged by Andhra Pradesh. [para 81(iii)] [211-E-F]

3.4 Even if the interpretation placed upon the agreement dated 06.10.1975 by Andhra Pradesh is accepted that utilization of waters to the extent of 60 TMC for new projects by Maharashtra from below the three dam sites mentioned in Clause II(i) up to Pochampad dam site can be only from water flowing through the river from the catchment area and not from the pondage/water spread area of Pochampad dam, on the basis of facts which have come on record, a case of substantial injury of a serious magnitude and high equity that moves the conscience of the Court has not been made out by Andhra Pradesh justifying grant of injunction. [para 81(iv)] [211-G-H; 212-A]

3.5 This Court, therefore, holds that Andhra Pradesh is not entitled to the reliefs, as prayed for, in the suit. [para 82] [212-B]

3.6 However, a three member supervisory Committee as detailed in the judgment is constituted. The Committee shall surprise the operation of the Babhali barrage and Balegaon barrage in terms of the judgment. [para 83] [212-C-E]

Case Law Reference:

1998 (1) Suppl. SCR 442	**held inapplicable**	**para 26**
87 P. 151, 153, 48 Or. 444	**referred to**	**para 51.1**
19 N.J. Eq. (4 C.E.Green) 245, 248	**referred to**	**para 51.2**
297 US 517	**referred to**	**para 58**

CIVIL ORIGINAL JURISDICTION : Original Suit No. 1 of 2006

Under Article 32 of the Constitution of India.

WITH

W.P. Nos. 134 of 2006, 210 & 207 of 2007.

Conmt. Pet. (C) No. 142 of 2009 in Orgnl. Suit No. 1 of 2006.

K. Parasaran, Altaf Ahmad, A.K. Ganguli, T.R. Andhyarujina, Ravindar Rao, Krishnamurthi Swami, P. Venkat Reddy, Anil Kumar Tandale, S. Udaya Kumar Sagar, Bina Madhavan, Anindita Pujari (for Lawyer's Knit & Co.), D.M. Nargolkar, Soumik Ghosal, Amey Nargolkar, R.K. Rathore, Rashmi Malhotra, D.S. Mahra, B.S. Banthia, Radha Shyam Jena, Anitha Shenoy, V.N. Raghupathy, Naresh Kumar, C.K. Sucharita, Rumi Chandar, Parekh & Co., Shakil Ahmed Syed, Asha Gopalan Nair, Guntur Prabhakar, D. Bharathi Reddy for the appearing parties.

The Judgment of the Court was delivered by

R.M. LODHA, J.

Original Suit No. 1 of 2006

1. Two riparian states – Andhra Pradesh and Maharashtra – of the inter-state Godavari river are principal parties in the

suit filed under Article 131 of the Constitution of India read with Order XXIII Rules 1,2 and 3 of the Supreme Court Rules, 1966. The suit has been filed by Andhra Pradesh (Plaintiff) complaining violations by Maharashtra (1st Defendant) of the agreements dated 06.10.1975 and 19.12.1975 which were endorsed in the report dated 27.11.1979 containing decision and final order (hereafter to be referred as "award") and further report dated 07.07.1980 (hereafter to be referred as "further award) given by the Godavari Water Disputes Tribunal (for short, 'Tribunal'). The violations alleged by Andhra Pradesh against Maharashtra are in respect of construction of Babhali barrage into their reservoir/water spread area of Pochampad project. The other four riparian states of the inter-state Godavari river – Karnataka, Madhya Pradesh, Chhattisgarh and Orissa have been impleaded as 3rd, 4th, 5th and 6th defendant respectively. Union of India is 2nd defendant in the suit.

2. The Godavari river is the largest river in Peninsular India and the second largest in the Indian Union. It originates in the Sahayadri hill ranges at an altitude of 3500 ft. near Triambakeshwar in Nasik District of Maharashtra and flows for a total length of about 1465 Km. (910 miles) through Maharashtra and Andhra Pradesh before joining the Bay of Bengal. The river has its basin area spread into other States like Karnataka, Orissa, Chhattisgarh and Madhya Pradesh. In the high rainfall zone in Sahayadris, the river is joined by Darna and Kadwa tributaries on its right and left banks respectively. Downstream at a distance of 217 Km. (135 miles), the combined waters of Pravara and Mula tributaries join the river. About 45 Km. (28 miles) downstream of Pravara confluence, Maharashtra constructed the Paithan Dam (Jaikwadi Project) to utilize the flows available up to that site. Further downstream, the river while in Maharashtra, receives waters of Sindphana, Purna and Dudhna tributaries. At the border between Maharashtra and Andhra Pradesh, Godavari receives the combined waters of Manjra (Manjira), Manar and Lendi rivers. After it enters Andhra Pradesh, at a distance of 764 Km. (475

miles) from its origin, Pochampad dam has been constructed by Andhra Pradesh.

3. The river basin is divided into 12 sub-basins. The subject matter of the present suit falls in G-1 and G-5 sub-basins, details of which are as follows:

G-1 Upper Godavari:—This sub-basin includes the reach of the river Godavari from its source to its confluence with the Manjra. The sub-basin excludes the catchment areas of the Pravara, the Purna and the Manjra but includes that of all other tributaries which fall into the Godavari in this reach.

G-2 Pravara:— This sub-basin includes the entire catchment of the Pravara from the source to its confluence with the Godavari including the catchment areas of the Mula and other tributaries of the Pravara.

G-3 Purna:—This sub-basin includes the entire catchment of the Purna and of all its tributaries.

G-4 Manjra:— This sub-basin includes the entire catchment of the Manjra from its source to its confluence with the Godavari including the catchment areas of the Tirna, the Karanja, the Haldi, the Lendi, the Manar and other tributaries.

G-5 Middle Godavari:— This sub-basin comprises the river Godavari from its confluence with the Manjra to its confluence with the Pranhita. The sub-basin includes the direct catchment of the Godavari in this reach as well as of its tributaries, except the Maner and the Pranhita.

4. Rainfall during monsoon months (i.e. June to September) is the major contribution to the Godavari river flows. Monsoon contributes about 90% of river flow. Non-monsoon season contributes only about 10% of the flows which are not

well defined and well spread as that of South West monsoon.

5. On 10.04.1969, the 2nd defendant constituted the Tribunal under the Inter-State Water Disputes Act, 1956 (for short, "1956 Act"). On the same day, disputes among the riparian states regarding the inter-state Godavari river and the river valley thereof were referred to the Tribunal for adjudication. The Tribunal investigated the matters referred to it and made its award on 27.11.1979 setting out the facts as found by it and giving its decision on the matters referred to it. The Tribunal gave further award under Section 5(3) of the 1956 Act on 07.07.1980. The bilateral and other inter-state agreements entered into by the riparian states during the period 1975 to 1980 for the distribution of water of Godavari river form the main features of the award.

6. The case of Andhra Pradesh in the plaint is that construction of irrigation project to its full potential at Pochampad, which is located close to the inter-state border of Andhra Pradesh and Maharashtra, involved submergence of area within Maharashtra. On 06.10.1975, in the course of pendency of disputes before the Tribunal, an agreement (which was endorsed by the Tribunal) was entered into between Andhra Pradesh and Maharashtra whereby Maharashtra agreed that Andhra Pradesh can go ahead with Pochampad dam project. Acting on the agreement, Andhra Pradesh constructed Pochampad dam on Godavari river at a distance of 764 km. (from its origin) near Pochampad village in its Nizamabad district. The dam is located by 5 km. upstream of Soan Bridge on Hyderabad – Nagpur Highway. The Pochampad dam is 140 feet high masonry dam, forming a reservoir with Full Reservoir Level (FRL) + 1091 feet and Maximum Water Level (MWL)+1093 feet. The storage capacity of the reservoir at FRL is 112 TMC and it has a water-spread area of about 175 square miles at MWL extending into the territory of Maharashtra. At FRL, the reservoir water spreads upstream up to 639th km. of the Godavari river from its origin.

A total length of 125 km of the Godavari river bed gets submerged when the reservoir is at FRL+1091 feet. Out of the submerged river bed length of 125 km, the river bed to a length of 55 km is located in the territory of Maharashtra. A length of 16 km of Manjira river bed before its confluence with river Godavari also gets submerged within its banks.

7. Andhra Pradesh has stated that an expenditure of about Rs.2,700 crores has been incurred on Pochampad dam project. The total irrigation potential under the Pochampad project is about 16 lac acres and a total quantity of 196 TMC is proposed to be utilized under the project to cater to the needs of the backward districts of Telangana. Andhra Pradesh is said to have reimbursed Rs. 551.11 lacs to Maharashtra for construction of five bridges at Siraskhod, Babhali, Chirli-Digras, Balegaon, Belur across the Godavari river and two bridges across the Manjira river at Machnur (Nagani) and Yesgi and the roads to provide proper transportation facilities connecting villages on either sides of the Godavari and Manjira rivers.

8. The wrongs against which redress is sought are, first, Maharashtra's illegal and unauthorised act of construction of Babhali barrage within the reservoir bridge of Pochampad dam contrary to the award and without any right and entitlement; and, second, Maharashtra's intention to utilize the water of Pochampad by invasion of reservoir water spread area by construction of Babhali barrage which would deprive Andhra Pradesh in general and its inhabitants in particular in the districts of Adilabad, Nizamabad, Karimnagar, Warangal, Nalgonda, Khammam and Medak of having water for irrigation and drinking purposes and allow its farmers to utilize water for irrigation by lifting from Babhali pondage.

9. Andhra Pradesh complains that construction of Babhali barrage will interfere with natural and continuous flow of water by stopping the freshes into Pochampad reservoir resulting in Pochampad project getting water only when the Babhali

barrage gets filled up and surpluses. According to Andhra Pradesh, Babhali barrage is being built by Maharashtra with storage capacity of 2.74 TMC. The necessity to file suit arose since all the efforts made by Andhra Pradesh in stopping construction of Babhali barrage by Maharashtra failed and despite pendency of a writ petition before this Court in the nature of Public Interest Litigation, Maharashtra continued with construction of Babhali barrage.

10. Maharashtra has traversed the claim of Andhra Pradesh. Although diverse preliminary objections have been raised by Maharashtra in its written statement (which also came to be amended) but these preliminary objections were not pressed in the course of arguments and, therefore, we do not think it necessary to refer to the preliminary objections. Maharashtra has replied that by agreement dated 06.10.1975 between the two states, which was filed before the Tribunal based on which award came to be passed, it was agreed that Maharashtra can utilize waters not exceeding 60 TMC for new projects including any additional use over and above the sanctioned or cleared utilization on 06.10.1975 from the waters in the area of the Godavari basin below Paithan dam site on the Godavari, and below Siddheswar dam site on the Purna, and below Nizamsagar dam site on the Manjira and up to Pochampad dam site on Godavari. Maharashtra says that this is an enbloc utilization permitted to it anywhere in the Godavari basin between Paithan dam site, Siddheswar dam site, Nizamsagar dam site and Pochampad dam site on the main Godavari river. There is no restriction on any projects of Maharashtra or where they are to be located. The only restriction is that Maharashtra cannot utilize more than 60 TMC. There is also no mention or restraint on location of storages in this stretch of the basin, number of storages and the sizes of such storages which Maharashtra can construct to enable it to utilize its share of 60 TMC for new projects to be sanctioned or cleared after 06.10.1975.

11. Maharashtra asserts that it has not forfeited its right to take its share of Godavari waters from any portion of its own territory as it deems fit. The rights over its own land including the submerged portion of its territory by Pochampad storage continue to vest with it and not Andhra Pradesh. No lands have been acquired in Maharashtra for Pochampad storage by Andhra Pradesh. Construction of projects for using its share of water is its prerogative; the only cap is that the utilization should not exceed 60 TMC.

12. Maharashtra has denied that the aggregate water utilisation by it is 63.018 TMC. It has asserted that aggregate planned utilization of projects sanctioned after 06.10.1975 shall be less than 60 TMC.

13. It is the case of Maharashtra that there is necessity to have storage reservoirs in the entire Godavari basin to harness the river water not only in Telangana region but also in Marathwada area of Maharashtra. According to Maharashtra, Andhra Pradesh can conveniently harness the admitted available flows by constructing storages and barrages below Sriramsagar to meet not only the reasonable needs of Telangana region in the Godavari basin but also in the adjoining Krishna basin.

14. Maharashtra has set out the features of Babhali barrage and its need. Maharashtra says that Babhali barrage is located on the main Godavari river in Nanded district; 7.0 Kms. upstream of Maharashtra – Andhra Pradesh border. The Pochampad dam on the Godavari river is 81 Kms. downstream of Babhali barrage. Pochampad storage stretches to a distance of 32 Kms. within Maharashtra territory and its submergence is contained within river banks in its territory under static conditions. According to Maharashtra, there is acute water need and no other alternate resource is available in the vast area and population of Nanded district on both the banks of Godavari over a stretch of 97 Kms. Lift irrigation

schemes had been constructed by it during 1972 to 1975 for lifting water from the main Godavari river for drinking water and some Rabi irrigation. There was no objection by Andhra Pradesh to such schemes even though the water was extracted from the submergence of the Pochampad project in Maharashtra. After some time, difficulties were experienced in getting the needed water supplies in the assured manner from these lift irrigation schemes. There was acute agitation and pressure from the local people of 58 villages to provide them with a regulating scheme to get assured supply of water for irrigation and drinking water according to their needs. To enable this requirement, it was decided in 1995 to create a small pondage at Babhali to assure and regulate the needed supplies. As Pochampad dam is 81 Kms. downstream of Babhali barrage, the level of stored water at Pochampad recedes completely away from 32 Kms. in Maharashtra territory by about December. The gates of Babhali barrage are, therefore, proposed to be kept open during monsoon period up to latter half of October as if there is no barrage and lowered thereafter to create necessary small pondage in fair-weather to meet the needs in Maharashtra out of the permitted share of 60 TMC. The barrage crest level at Babhali is at river bed level and there will be no obstructions to Godavari river flows up to Pochampad dam during monsoon period. The small pondage at Babhali having a capacity of 2.74 TMC for the use during fair-weather is a negligible fraction of Pochampad storage of 112 TMC out of which only 0.6 TMC is a common storage. By the middle of December, Pochampad storage recedes totally away from Maharashtra territory and, therefore, the pondage at Babhali during operation does not interfere with the Pochampad storage of the Andhra Pradesh. Babhali storage is a vital component for Maharashtra to use part of its share of 60 TMC where it is most needed.

15. Andhra Pradesh filed rejoinder and denied diverse facts and aspects stated by Maharashtra in its written statement.

16. On the pleadings of the parties, the issues were framed by this Court on 16.03.2007 which read as follows:

1) Whether the suit is not maintainable in view of the bar under Article 262 of the Constitution of India read with Section 11 of the ISWD Act 1956?

2) Whether the Lis in the present suit is a 'water dispute' involving merely the interpretation of the agreement dated 6.10.1975?

3) Whether the agreement dated 6.10.1975 has merged into the award and become an integral part of the Award?

4) Whether there was no adjudication of disputes between the two states by the GWDT in respect of the subject of the agreement dated 6.10.1975, though the said agreement was considered by the Tribunal and was made part of the award?

5) Whether the action of State of Maharashtra in undertaking and proceeding with the construction of Babhali Barrage on River Godavari within the water spread area of Pochampad reservoir and to utilize water from the said reservoir is contrary to the GWDT award?

6) Whether the Godavari Disputes Tribunal award enables the State of Maharashtra to construct Babhali Barrage within the water spread area of Pochampad project or utilize water upto the Pochampad dam site?

7) Is the State of Maharashtra entitled to put up its own project in the project put up by the plaintiff and draw water at all from River Godavari through that project?

8) Would the Babhali Barrage project proposed by Maharashtra enable the said State to draw and utilize 65 TMC of water from the storage of Pochampad project?

9) In any event, whether in view of several disputed

questions of fact and of a technical nature involved in the suit, the dispute should be referred to a Tribunal constituted under the Inter State River Water Disputes Act, 1956?

10) To what relief are the parties entitled?

17. Neither Andhra Pradesh nor Maharashtra desired to lead oral evidence though series of documents were filed by them. On 05.08.2008, the Court recorded that counsel on either side had agreed that there would not be any oral evidence in the suit. As both sides had filed series of documents, the Court on that day observed that the parties may file a list of documents on which they seek to place reliance and these documents may be marked in the presence of Registrar (Judicial).

18. Plaintiff initially produced as many as 59 documents. Some of these documents are: geographical and hydrological feature of Godavari river, inter-state agreement between Andhra Pradesh and Maharashtra dated 06.10.1975, inter-state agreement dated 19.12.1975 among the Godavari riparian states, copy of Godavari Water Disputes Tribunal Award, list of projects existing/cleared and contemplated projects showing demand of 91.80 TMC by Maharashtra below Paithan, below Siddheswar and below Nizamsagar put forth before Tribunal, clearance of the Pochampad Project (Sri Ramasagar Project) Stage-I by CWC, clearance of the Pochampad Project (Sri Ramasagar Project) Stage-II by CWC, summary record of discussions of the inter-state meeting between the two States held on 11.07.2005 at CWC, minutes of the inter-state meeting between the two States held on 05.10.2005 at CWC, summary record of discussions of inter-state meeting between the Chief Ministers of the two States convened by Minister, Water Resources, Government of India on 04.04.2006, statement showing the details of yearly/monthly reservoir levels of Pochampad Project for the years 1995-96 to 2006-07, note regarding Babhali and 10 other Barrages on Godavari river

submitted by Maharashtra during the inter-state meeting held on 11.07.2005 at CWC, map showing the Godavari basin, annual normal isohtetal map of Godavari basin furnished by the Director, IMD, Pune dated 23.08.2007 addressed to Chief Engineer, IS & WR, Government of Andhra Pradesh and the Statement showing details of monthly inflows 1983-84 to 2004-05.

19. On the other hand, Maharashtra initially tendered 23 documents, inter-alia, these documents are : copy of the statements showing planned use of projects, sub-valley wise before 06.10.1975, copy of schematic diagram, copy of minutes of meeting dated 21.09.2006 convened by CWC including letter dated 16.6.2006 from Chief Minister of Maharashtra to Minister of Water Resources, Government of India, detailed project report of Babhali Barrage, actual utilization of the projects in (42+60) TMC area for past 12 years by Maharashtra produced before CWC on 05.10.2005, materials showing existence of lift irrigation schemes prior to 06.10.1975, schematic diagram showing additional storage of Pochampad dam on account of permission granted by Maharashtra to submergence in its territory [Ex. D-22] and map showing area demarcating the controlling points as per Clause I of agreement dated 06.10.1975 allowing Maharashtra to use 60 TMC of water.

20. Both parties filed few documents thereafter. In the affidavits filed by Andhra Pradesh and Maharashtra in respect of the admission and denial of documents some documents tendered by either side have been admitted and some denied.

21. Learned senior counsel for the parties agreed that issue nos. 5,6,7 and 8 are crucial issues and the fate of suit is dependant upon decision on these issues. It is appropriate that the four issues are taken up together for consideration as these issues are inter-connected.

Issue nos. 5, 6, 7 and 8

22. The vital question for consideration is Maharashtra's

entitlement to construct any project within the water spread area of Pochampad project. The question must be answered in light of the award and further award given by the Tribunal which in turn depends on interpretation of the bilateral agreement entered into between Andhra Pradesh and Maharashtra on 06.10.1975.

23. Mr. K. Parasaran, learned senior counsel for Andhra Pradesh extensively referred to diverse Clauses of the agreement dated 06.10.1975, particularly, Clauses I, II(i),II(ii) and V. He also referred to the award and submitted that the award is a package and provides for all the reliefs to which the parties were entitled. Maharashtra is not entitled to put up Babhali barrage as the award exhausts all reliefs. He submitted that Andhra Pradesh had conceded in favour of Maharashtra a right to utilize entire yield to an extent of 241.5 TMC in the high rainfall zone up to Paithan and Siddheswar dam sites without any restraint taking into consideration that Maharashtra had agreed to submersion of its land for Pochampad project. To meet the demand and requirement in the defined region between Paithan and Pochampad projects, Maharashtra had agreed to a cap on its utilization to 60 TMC in addition to existing and sanctioned/cleared projects. The submergence in Maharashtra by Pochampad project was agreed to by Maharashtra subject to certain conditions like Andhra Pradesh bearing cost of acquisition, rehabilitation of displaced families, cost of roads and bridges but no rights were created in favour of Maharashtra as a condition of submergence to waters within Pochampad dam site. If Maharashtra had any right to water in Pochampad storage within its territory it would have been so recorded in the agreement but the silence in this regard leaves no manner of doubt that Maharashtra has no right to water in Pochampad storage. It is the submission of learned senior counsel for Andhra Pradesh that the apportionment incorporated in the award is in view of the peculiar basin feature in Andhra Pradesh with only one site at Pochampad being suitable for construction of irrigation project and capable of

conveying water through canals by gravity flow to meet the entire drinking and irrigation requirements of Telangana region of the State. Due to low rainfall, the Telangana region of the State of Andhra Pradesh, through which a major part of the river flows, is frequently affected by droughts and famines because of which the said region requires assured water supply for drinking purposes and the two crops – Khariff and Rabi.

24. Learned senior counsel Mr. K. Parasaran vehemently contended that the agreement dated 06.10.1975, which merged into the award, demonstrates the dichotomy between flowing waters and waters within the reservoir. The allocation of waters in Godavari basin has been made on a dichotomy of sources of waters. The expressions in the award "Godavari basin", "dam site", "below dam site" and "up to dam site" have to be construed having regard to the dichotomy between flowing waters and waters within the water spread area, concepts in water law and how the parties understood. He submitted that the award has to be interpreted as a judgment and not like a statute and the above expressions have to be construed in the context of rights of states in the inter-state river water. The expressions "Godavari river basin" and "Godavari drainage basin" used in the award mean the entire area drained by the Godavari river and its tributaries.

25. Learned senior counsel for Andhra Pradesh argued that the phrase "waters up to" would necessarily mean that there is a starting point and terminating point up to which it can go. One cannot conceive "upto" without commencing from a location and proceeding "upto". It is thus submitted that phrase "dam site" would necessarily mean entire water held on the site starting from the concrete dam structure up to the area of the water stored. He would submit that Clauses I and II(i) of the agreement deal with waters in the area of Godavari basin allotted to Maharashtra. Clause II(ii) deals with water allocated to Andhra Pradesh. 60 TMC water is allowed to Maharashtra from the Godavari basin. Godavari basin is a river basin which

means and includes the entire area drained by the mainstream and its tributaries – and balance waters in the Godavari basin up to Pochampad dam site is left for Andhra Pradesh. For the purposes of meaning of the expression, "river basin", Mr. K. Parasaran, learned senior counsel referred to Words and Phrases; Permanent Edition [Volume-V]; pages 292 and 293. He submitted that in the award, the yield of the river has not been determined and apportioned. After considering the rights in the various projects of the respective states, the rest of the water in Godavari basin is allocated to Maharashtra up to 60 TMC and Andhra Pradesh all the balance water up to Pochampad site.

26. Mr. K. Parasaran argued that the interpretation of the words "up to dam site" set up by Maharashtra that it means concrete structure was contrary to concepts in water law and underlying principle for allocation of waters in Godavari basin whose allocation has been made on dichotomy of sources of waters. According to him, "up to Pochampad dam site" means the Godavari basin water available from the catchment up to where the water spread of Pochampad project extends as the storage in Pochampad belongs to Andhra Pradesh. In this regard, he relied upon a decision of this Court in *Orient Papers & Industries Ltd. and Another v. Tahsildar-cum-Irrigation Officer and Others*[1].

27. Learned senior counsel submitted that the phrases, "below Paithan dam site and Siddheswar dam site" in Clause II(ii) and "below Pochampad dam site" in Clause V of the agreement would exclude the stored waters of such dams to give effect to the restriction imposed on utilization by the states in such Clauses. The phrases "all waters up to Paithan dam site" in Clause I and "balance waters up to Pochampad dam site" in Clause II(ii)" in the context they are used clearly contrast the flowing water and stored waters respectively in each of the dams. Seen thus, it leaves no manner of doubt that Maharashtra

1. 1998 (7) SCC 303.

will be entitled to waters mentioned in Clause II(i) and Andhra Pradesh the balance of waters which includes the storage of Pochampad up to FRL of 1091 feet.

28. Learned senior counsel for Andhra Pradesh submitted that there cannot be lake/pondage of a project of one state within the lake/pondage of the project of another state; there cannot be a dam within a dam. Similarly, there cannot be a barrage within a dam because barrage also obstructs the flow of water and creates storage when the gates are lowered. He referred to the inter-state meeting between Andhra Pradesh and Maharashtra held on 21.07.1978 with regard to construction of bridges and roads. He submitted that there was a difference of opinion with regard to the river bed level of the then proposed Balegaon project upstream of Babhali and it was decided to constitute a joint team for inspection but Maharashtra did not pursue the matter further which would show that Andhra Pradesh and Maharashtra understood the terms of the award to mean that there cannot be project within the water prism of Pochampad project and acted upon as such.

29. On the other hand, Mr. T.R. Andhyarujina, learned senior counsel for Maharashtra argued that the agreement dated 06.10.1975 between Andhra Pradesh and Maharashtra is an agreement for the equitable distribution of waters of Godavari river; in absence whereof the Tribunal would have determined the equitable shares of each state on Godavari river and its tributaries. As Andhra Pradesh had planned a major river project of the Pochampad dam with storage of 112 TMC with FRL of 1091 feet by which the territory of Maharashtra was going to be submerged, it could not be done by Andhra Pradesh without the consent of Maharashtra. By Agreement of 06.10.1975, Maharashtra agreed to allow Andhra Pradesh to have the FRL of Pochampad dam to 1091 feet and consequent submergence in the river bed in the territory of Maharashtra. In return and in consideration of this concession by Maharashtra, Andhra Pradesh agreed that Maharashtra would have a right

to utilize 60 TMC of water on Godavari river leaving the balance to be utilized by Andhra Pradesh. Under Clause II(i), the agreement provided that Maharashtra can utilize the waters of Godavari river not exceeding the limit of 60 TMC up to Pochampad dam site for new projects including additional use over and above present sanctioned or cleared utilization. Clause II(i) of the agreement places no restriction on Maharashtra to utilize any waters from the waters of Pochampad reservoir which would come into Maharashtra. If the intention of Andhra Pradesh was that Maharashtra should not utilize the waters of Pochampad reservoir in its territory, such limitation would have been provided expressly. Learned senior counsel for Maharashtra in this regard also relied upon Clause VII of the Tribunal's award and submitted that this Clause recognised the general right of a state to utilize waters within its territories and consistent with this Clause no restrictions were placed on Maharashtra save and except the cap on utilization of 60 TMC for new projects etc. There cannot be any implied limitation on the use of waters by Maharashtra and any limitation on the use of water by Maharashtra within its territory has to be made expressly.

30. In response to the contention raised by Andhra Pradesh that there is limitation on the use of the water by Maharashtra in Clause II(i) by reason of the words "up to Pochampad dam site", learned senior counsel for Maharashtra submitted that the expression "dam site" must be given the same meaning in all places of the award in which it is found, namely, in Clause II(i), II(ii) and V. According to him, "up to the dam site" means "up to the concrete structure of the dam". Any other meaning would result into absurdity and make other clauses unworkable. He submitted that Andhra Pradesh itself has understood the location of Pochampad dam site at particular latitude and longitude and not the reservoir.

31. The agreement dated 06.10.1975 was preceded by full discussions between the Chief Ministers of two states. We

reproduce the agreement as it is which reads as follows:

> "I. Maharashtra can use for their beneficial use all waters up to Paithan dam site on the Godavari and up to Siddheswar dam site on the Purna.
>
> II. (i) From the waters in the area of the Godavari basin below Paithan dam site on the Godavari and below Siddheswar dam site on the Purna and below Nizamsagar dam site on the Manjira and up to Pochampad dam site on the Godavari, Maharashtra can utilize waters not exceeding 60 TMC for new Projects including any additional use over and above the present sanctioned or cleared utilization, as the case may be.
>
> (ii) Andhra Pradesh can go ahead with building its Pochampad Project with F.R.L.+1091' and M.W.L. +1093' and is free to utilize all the balance waters up to Pochampad dam site in any manner it chooses for its beneficial use. Maharashtra will take necessary action to acquire any land or structures that may be submerged under Pochampad Project and Andhra Pradesh agrees to bear the cost of acquisition, the cost of rehabilitation of the displaced families and the cost of construction of some bridges and roads that may become necessary. Maharashtra also agrees to the submergence of the river and stream beds.
>
> III. (i) In the Manjira sub-basin above Nizamsagar dam site, Maharashtra can utilize waters not exceeding 22 TMC for new projects including any additional use over and above the present sanctioned or cleared utilization as the case may be.
>
> (ii) Andhra Pradesh can withdraw 4 TMC for drinking water supply to Hyderabad city from their proposed Singur Project on the Manjira.

(iii) Andhra Pradesh can construct Singur Project with a storage capacity of 30 TMC. Andhra Pradesh can also use 58 TMC under Nizamsagar Project.

(IV) Maharashtra concurs with the agreement arrived at between the States of Andhra Pradesh and Karnataka in regard to the use proposed by Karnataka in the Manjira sub-basin upstream of Nizamsagar dam site.

V. Maharashtra and Andhra Pradesh will be free to use additional quantity of 300 TMC of water each below Pochampad dam site for new Projects.

VI. Maharashtra and Andhra Pradesh agree in principle to the taking up of the Inchampalli Project with F.R.L. as commonly agreed to by the interested States, viz., Maharashtra, Andhra Pradesh and Madhya Pradesh.

VII. Maharashtra and Andhra Pradesh agree to take up the following Joint Projects at the appropriate time with agreed utilizations:

a). Lendi Project

b). Lower Penganga Project.

c). Pranahita Project

and to set up joint committees for this purpose.

VIII. The States of Maharashtra and Andhra Pradesh agree that this agreement will be furnished to the Government of India and also be filed before the Godavari Water Disputes Tribunal at the appropriate time."

32. The above agreement was followed by another agreement dated 19.12.1975 which was entered into between all the five riparian states, including Andhra Pradesh and Maharashtra. Both these agreements were entered into during the pendency of water disputes before the Tribunal. For proper

understanding of the controversy, it is necessary to notice the historical background of the water disputes which were referred to the Tribunal for adjudication. In 1951, a memorandum of agreement allocating the flows of river basin among the erstwhile states of Bombay, Hyderabad, Madras and Madhya Pradesh was drawn up. In the course of time, the state of Bombay became State of Maharashtra and State of Hyderabad became state of Andhra Pradesh. Godavari basin underwent extensive territorial changes by 1956. The states of Maharashtra, Mysore, Madhya Pradesh and Andhra Pradesh became the riparian states. The state of Orissa continued to be a riparian state as before. Though state of Orissa was one of the riparian states but it was not part of 1951 agreement. By 1960, the five riparian states, namely, the states of Maharashtra, Mysore, Madhya Pradesh, Andhra Pradesh and Orissa proposed important schemes for the development of water resources and there were disputes between them relating to the utilization of the waters of Godavari river system. On 01.05.1961, the Central Government appointed Krishna-Godavari Commission ("Commission"). The Commission found that without further data it was not possible to determine the dependable flow accurately. The Commission, inter alia, observed that the supplies available in the upper part of Godavari basin (G-1 to G-5 sub-basins) were inadequate to meet the demands of the projects put forward by the state governments. However, the supplies available in the lower part of the Godavari basin (G-7 to G-12 sub-basins) were in excess of the demands and, accordingly, the Commission suggested the diversion of surplus waters of the river Godavari into the Krishna river. In January 1962, the Mysore government applied to the central government for reference of the water dispute to a tribunal. In March 1963, the Union Minister for Irrigation and Power echoed the sentiments of some of the riparian states doubting the validity of the 1951 agreement in Lok Sabha. Action was taken on the recommendations of the Commission but no agreed formula was arrived at despite the fact that central government tried to settle the dispute by negotiations. Several

inter-state conferences were held but no solution could fructify. Fresh applications for reference of the disputes were made by Maharashtra, Mysore, Orissa and Madhya Pradesh in 1968. Eventually on 10.04.1969, the central government constituted the Tribunal and referred to the Tribunal for adjudication the water dispute regarding the inter-State Godavari river and river valley thereof. On 18.07.1970, the central government at the request of Maharashtra referred to the Tribunal the dispute concerning the submergence of its territories by the Pochampad, Inchampalli, Swarna and Suddavagu projects of Andhra Pradesh.

33. Before the Tribunal, Maharashtra prayed, inter alia, for a declaration that the 1951 agreement was void ab initio and/or had ceased to be operative and allocation of the equitable shares of the states in the dependable flow of the Godavari basin. Andhra Pradesh prayed for declaration that 1951 agreement was valid and binding upon the party states and for suitable directions for implementation of the agreement. In case the 1951 agreement was held to be not binding, Andhra Pradesh prayed for, inter alia, a direction that a full Godavari (Pochampad) Project, as envisaged by the erstwhile Hyderabad government, be allowed to be proceeded with without any restraint and an injunction restraining Maharashtra from utilizing Godavari waters at Jayakwadi or any other place above Pochampad in a manner detrimental to the full scope of the aforesaid project and injunction restraining Maharashtra and Mysore from undertaking any new schemes in Manjra above Nizamsagar.

34. As noted above, during the pendency of disputes before the Tribunal, the riparian states entered into bilateral and multi-lateral agreements which were endorsed by the Tribunal in its award and based its decision on these agreements. The relevant agreements for the present purpose are the agreements dated 06.10.1975 and 19.12.1975.

35. The Tribunal in Chapter IV of the award has noted that

the entire area drained by the river and its tributaries is called river basin. The expressions "Godavari basin", "Godavari river basin" and "Godavari drainage basin" in the award have been explained to mean the entire area drained by the Godavari river and its tributaries. The Tribunal noted the diverse agreements entered into between riparian states including the agreement between Maharashtra and Andhra Pradesh dated 06.10.1975 and the agreement dated 19.12.1975 between Karnataka, Maharashtra, Madhya Pradesh, Orissa and Andhra Pradesh, received them in evidence and held that by these agreements the states have adjusted their claims regarding utilization of waters of Godavari river and its tributaries and agreed to the sanction and clearance of the projects for the utilization of the waters of the Godavari river and its tributaries. With reference to the agreement dated 19.12.1975 to which all the five states were parties and the agreement dated 06.10.1975, the Tribunal observed that the entire waters of sub-basin G-2 and the waters of sub-basin G-1 up to Paithan dam site and the waters of sub-basin G-3 up to Siddheswar dam site were allotted to Maharashtra and Maharashtra was further allowed the use of the waters of the Godavari basin not exceeding 60 TMC below Paithan dam site on the Godavari river and below Siddheswar dam site on the Purna river and below Nizamsagar dam site on the Manjra river and up to Pochampad dam site on the Godavari river. Having regard to the peculiarities of the Godavari river and river basin, the Tribunal found no objection in allotting to one or more state or states water up to defined points or project sites or within certain sub-basins or reaches of the river. The Tribunal noted that every agreement need not apportion or allocate all waters of river and river basin.

36. It appears that on 16.07.1979 at the fag end of the proceedings before the Tribunal, counsel for Maharashtra contended that until a comprehensive agreement was signed by all the parties there was no complete allocation of the entire waters of the Godavari river and objected to the Tribunal's proceeding to give its decision. However, counsel for

Maharashtra admitted before the Tribunal that the agreements to which Maharashtra is a party would be binding on it. Accordingly, the Tribunal observed that there is no dispute that Maharashtra is bound by agreements to which it is a party, namely, the agreement dated 19.12.1975 and bilateral agreement dated 06.10.1975 between Maharashtra and Andhra Pradesh.

37. The Tribunal made it abundantly clear in the award that it was dividing the waters of the river Godavari on the basis of the agreements already entered into between the party states, the agreements filed by the parties have apportioned waters of Godavari river between them.

38. While giving decision on issue no. IV(b), inter alia, relating to submergence of the territories of Maharashtra by Pochampad project, the Tribunal held that the agreements between the States have settled all questions and disputes. With regard to issue no. IV(c), whether it is lawful for the Andhra Pradesh to execute project likely to submerge the territories of other states without their prior consent, the Tribunal said that generally any project of Andhra Pradesh involving submergence of the territory of other states was not permissible without the prior consent of the affected states. As regards issue no. VI, "to what relief are the parties entitled?" the Tribunal held that the agreements filed by the parties and its final order provide for all the reliefs to which the parties are entitled.

39. Clause V of the final order (in the award) passed by the Tribunal reads as follows:

> "The following agreements so far as they relate to the Godavari river and Godavari river basin be observed and carried out:—
>
> A. Agreement dated the 19th December, 1975 between the States of Karnataka, Maharashtra, Madhya Pradesh, Orissa and Andhra Pradesh annexed hereto and marked

> Annexure "A" agreeing to the clearance of projects for the utilization of waters of the Godavari river and its tributaries in accordance with:—
>
> (a) xxx xxx xxx
>
> (b) Agreement between the States of Maharashtra and Andhra Pradesh on the 6th Oct. 1975—Annexure II.
>
> (c) xxx xxx xxx
>
> (d) xxx xxx xxx"

40. Clause VII of the final order (in the award) provides that the right or power or authority of any state to regulate within its boundaries the use of water, or to enjoy the benefit of waters within that state in a manner not inconsistent with the order of the Tribunal shall not be impaired.

41. Thus, from the award, it is clear that the Tribunal put its seal of approval and endorsed the agreement dated 06.10.1975 between Maharashtra and Andhra Pradesh and the agreement dated 19.12.1975 between Karnataka, Maharashtra, Madhya Pradesh, Orissa and Andhra Pradesh and ordered that the allocation of waters in the Godavari river and Godavari river basin between Maharashtra and Andhra Pradesh and the clearance of projects for utilization of waters of the Godavari and its tributaries shall be observed and carried out as per the agreements.

42. After the award was passed by the Tribunal on 27.11.1979 under Section 5(2) of the 1956 Act the reference was filed by the central government on 25.02.1980 seeking explanation and guidance on few aspects. One of them was that the particulars of existing/sanctioned or cleared schemes have not been given nor the utilizations through them have been quantified anywhere in the final order in light of the agreements between the parties which referred to utilizations through

existing/sanctioned or cleared schemes. The central government requested the Tribunal to consider the desirability of incorporating necessary details in its final order. Andhra Pradesh and Karnataka supported the reference by the central government but Maharashtra, Madhya Pradesh and Orissa opposed it. The Tribunal clarified in the further award dated 07.07.1980 under Section 5(3) of the 1956 Act by observing that its decision was based on the agreements of the parties annexed to the final order (award) dated 27.11.1979. The Tribunal observed that none of the parties pleaded before it that these agreements should be so modified as to include particulars of the existing/sanctioned or cleared schemes of the utilizations thereunder. The Tribunal accordingly held that it was not necessary to include these particulars for the decision.

43. The other aspect on which the central government sought clarification was, "with a view to ensuring that the states, mainly, the upper states, do not exceed the stipulated allocations it may be necessary to obtain data regarding storages and utilization from one another each year. Also it would be desirable to provide for inspection of sites in a basin state by the other basin states. The Tribunal may kindly consider the desirability of providing some enabling clause in their final order to this effect so that there is no difficulty at a later stage for any state to obtain the data from the other state when the latter shows reluctance to do so".

44. Maharashtra opposed any clarification on the above point while Andhra Pradesh supported it. The Tribunal observed that as supply of such data by one state to another was not incorporated in the agreements, it cannot be done now at this stage. The Tribunal expected that there would be mutual co-operation between the states and each state will supply such data to the other state as and when required.

45. The award dated 27.11.1979 and the further award dated 07.07.1980 leave no manner of doubt that the Tribunal has determined the distribution of water in the Godavari river

on the basis of the agreements of the parties. While doing so, the Tribunal was alive to the position that in deciding water disputes in inter-state river, the rule of equitable distribution of the benefits of the river applies so that each state gets a fair share of the water of the common river but there is no rigid formula for the equitable distribution of waters of a river because each river system has its peculiarities. Although the Tribunal did not determine yield of the Godavari river in the award, but the same became unnecessary as the states agreed that the Tribunal should base its decision on the agreements of the parties. In the absence of any determination of the yield of the Godavari river in the award, it cannot be said that the Tribunal has not apportioned the Godavari river water between the riparian states. Can it be said that the two states, Andhra Pradesh and Maharashtra, were not alive to the peculiar features of Godavari river? We do not think so. Andhra Pradesh and Maharashtra must have had regard to the peculiar features of Godavari basin – the main Godavari runs in Maharashtra, forms a common boundary between Maharashtra and Andhra Pradesh, runs in Andhra Pradesh again forms a common boundary between Andhra Pradesh and Maharashtra and thereafter forms a common boundary between Andhra Pradesh and Madhya Pradesh and finally runs in Andhra Pradesh – when they entered into the agreement dated 06.10.1975. Maharashtra has been given right to use for their beneficial use all waters up to Paithan dam site on the Godavari, up to Siddheswar dam site on the Purna. This is clear from Clause I of the agreement dated 06.10.1975.

46. Clause II of the agreement is in two parts. Clause II(i) provides that from the waters in the area of the Godavari basin below Paithan dam site on the Godavari and below Siddheswar dam site on the Purna and below Nizamsagar dam site on the Manjra and up to Pochampad dam site on the Godavari, Maharashtra can utilize waters not exceeding 60 TMC for new projects, including any additional use over and above the present sanctioned or cleared utilization, as the case may be.

47. Clause II(ii) enables Andhra Pradesh to build Pochampad project with FRL+1091 feet and MWL+1093 feet. Andhra Pradesh under this Clause has been given liberty to utilize all the balance waters up to Pochampad dam site in any manner it chooses for its beneficial use. The debate has mainly centered around these two Clauses, namely, Clause II(i) and Clause II(ii). The interpretation to these Clauses by the two states differs. Andhra Pradesh says that utilization of waters not exceeding 60 TMC for new projects by Maharashtra under Clause II (i) is from water flowing through the river from the catchment area while Maharashtra says that this Clause entitles it to utilize waters of the river Godavari up to Pochampad site which may be the water flowing through the river from the catchment area or the water from within the water storage or pondage of the dam. Such utilization is not confined to the water flowing through the river from the catchment area. We have to ascertain the meaning of the expressions "from the waters in the area of the Godavari basin" and "up to Pochampad dam site". We have to also see whether the agreement dated 06.10.1975 has distributed the waters in Godavari basin between the two party states on a dichotomy of sources of waters namely, water spread area of dam/storage and the flowing waters.

48. The words "from the waters in the area of Godavari basin" in Clause II(i) have two significant expressions, one, 'Godavari basin' and the other, 'in the area of'. The expression "Godavari basin" along with the other two expressions "Godavari river basin" and "Godavari drainage basin" in the award have been explained to mean the entire area drained by the Godavari river and its tributaries. The Tribunal rightly explained so because the general meaning of river basin means entire area drained by the river and its tributaries. The question is, whether the parties to the agreement dated 06.10.1975 by use of the words "from the waters in the area of the Godavari basin" intended to mean the waters flowing in the Godavari river from the catchment area below the three dam

sites mentioned in Clause II(i) and up to Pochampad dam site on the Godavari or used these words to include all waters – flowing from the catchment area as well as the water spread area of the Pochampad dam which fell in the territory of Maharashtra. If what Andhra Pradesh contends that 60 TMC water is allowed to Maharashtra only from the flowing waters in Godavari basin is right then the agreement would have used the words "from the waters of Godavari basin" and not "from the waters in the area of Godavari basin". By use of the words "from the waters in the area of Godavari basin" in contradistinction to "from the waters of Godavari basin", the parties have intended to mean waters in the geographical area of Godavari basin and not confined to flowing waters of Godavari basin.

49. We are in agreement with Mr. T.R. Andhyarujina that if the intention of Andhra Pradesh was that Maharashtra should not utilize the waters of Pochampad reservoir in its territory, such limitation would have been provided expressly. When an agreement is entered into between two or more states, they have assistance of competent legal and technical minds available with them. The states do not have lack of drafting ability. Such agreement is drafted by trained minds. An agreement such as inter-state water sharing agreement would not leave its interpretation to chance. In our view, in the absence of any express limitation, except quantity, on the use of water by Maharashtra within its territory in Clause II(i), the interpretation put by Andhra Pradesh to this Clause cannot be accepted.

50. Moreover, apportionment of the Godavari river was agreed to by the two states in a typical situation in as much as building of Pochampad project by Andhra Pradesh with FRL+1091 feet and MWL+1093 feet involved submergence of certain areas in the State of Maharashtra. But for Maharashtra's consent to submergence of its area, Andhra Pradesh could not have built Pochampad dam with capacity of 112 TMC; rather

its capacity would have been limited to 40 TMC. Seen thus, in the absence of any express clause, it cannot be said that Maharashtra was given right to utilize waters not exceeding 60 TMC for new projects from the flowing waters of the Godavari basin alone. We are not persuaded to accept the submission of Mr. K. Parasaran that the apportionment of waters is founded on dichotomy of two sources of waters. On careful reading of Clause II(ii) we find that this Clause gives right to Andhra Pradesh to utilize all the balance waters up to Pochampad dam site in any manner it chooses for its beneficial use. The use of the expression, "all the balance waters up to Pochampad dam site" signifies that parties agreed that on utilization of waters not exceeding 60 TMC for new projects by Maharashtra from the waters in the geographical area of the Godavari basin, all the balance waters up to Pochampad dam site is left for utilization by Andhra Pradesh for its beneficial use.

51. The contention of Mr. K. Parasaran, learned senior counsel for Andhra Pradesh that up to Pochampad dam site in Clause II(i) and Clause II (ii) means up to the spread area of Pochampad dam and not the concrete structure of the dam does not appeal to us. The common meaning of the word "dam" is the structure across the stream, including the abutment on the sides. The dam is an obstruction to the natural flow of the water of a river or a barrier to prevent the flowing water. A dam is built across a water course to confine and keep back flowing water. In Words and Phrases; Permanent Edition 11, "dam" is explained with reference to decision in *Morton v. Oregon Short Line Ry. Co.*[2] as follows:

> "A "dam" is a structure composed of wood, earth, or other material, erected in and usually extending across the entire channel at right angles to the thread of the stream, and intended to retard the flow of water by the barrier, or to retain it within the obstruction."

2. 87 P. 151, 153, 48 Or. 444.

51.1. The same book with reference to *Colwell v. May's Landing Water Power Co.,*[3] explains the word "dam" as follows:

> "The word "dam" is used in two different senses. It properly means a structure raised to obstruct the flow of water in a river, but by well-settled usage it is often applied to designate the pond of water created by its obstruction. The word is used in this conventional sense in some statutes, and it is evidently used in this sense in a statute giving power to raise the "dam and water-works" to a height mentioned."

51.2. In the Indian Standard Glossary of Terms Relating To River Valley Projects, Part 8, Dams and Dam Sections [First Revision], paragraph 2.27 explains "dam" as follows :

> "A barrier constructed across a river or natural watercourse for the purpose of: (a) impounding water or creating reservoir; (b) diverting water there from into a conduit or channel for power generation and or irrigation purpose; (c) creating a head which can be used for generation of power; (d) improving river navigability; (e) retention of debris; (f) flood control; (g) domestic, municipal and induses; (h) preservation of wild life and pisciculture, (j) recreation, etc."

51.3. Glossary of Irrigation and Hydro-Electric Terms and Standard Notations used in India, Third Edition, published by Central Board of Irrigation and Power, explains "dam" as under:

> "Dam : A structure erected to impound water in a reservoir or to create hydraulic head."

51.4. "Reservoir" is defined in the said publication as follows :

> "Reservoir : A pond, lake, or basin, either natural or artificial, for the storage, regulation and control of water"

3. 19 N.J. Eq. (4 C.E. Green) 245, 248.

51.5. "Introduction to dams", Publication No. 220 by Central Board of Irrigation and Power under the Chapter "Dam Sites – Large Dams" with reference to book by J. Cotillon explains the position with regard to dam sites as under:

> "A dam is a structure meant to retain water. Only hydraulic dams are dealt with in this paper; when it is question of other dams, it will be specified "Tailing dam", "industrial waste dam".
>
> 1. Generally, this retention takes place in a natural depression. But it can also take place in an artificial enclosure created, for instance, by embankments set-up along the banks of a river.
>
> Moreover, the enclosure can be fully artificial: this is the case of a basin filled by pumping, created on a plateau and closed by a ring embankment; in this case, we speak about an "embankment" rather than about a "dam".
>
> Generally, the dam is set-up on a river.
>
> But it can be constructed in a dead valley where only a trickle of water flows; the reservoir is then filled by pumping and/or by gravity diversions.
>
> It can also close a pass on the perimeter of a reservoir, it is then called "secondary dam" as opposed to "main dam" which closes the natural depression (living valley or dead valley).
>
> 3. The dam retains generally the upstream water, its purpose may be also to retain the downstream water for a few hours. That is, an exceptional tidal wave (anti-storm dam)."

51.6. In the same book under the Chapter "Role of Dams-Purpose and Symbols", in paragraph 2.1.2 it is stated as under:

> "2.1.2 Creation of a Reservoir
>
> The objective consists in altering the natural or disturbed condition of the river by acting upon the filling or the draining of the reservoir in order to fulfil the following objectives:
>
> • to cut down the floods
>
> • to raise low waters
>
> • to guarantee a discharge higher than that of the low waters for all the cases described in 11 and 12.
>
> • to reduce the disturbances in the regime of the river upstream: a reservoir is necessary in the immediate downstream of a leading hydroelectric plant in order to restore the continuity and the regularity of the discharge; such a dam or reservoir is then called "dam" or "compensating reservoir".

52. It is sound principle of interpretation that if an expression has been used in an agreement at more than one place, such expression must bear the same meaning at all places unless expressed otherwise. When the agreement dated 06.10.1975 is read carefully, it would be seen that in Clause V, it is provided that Maharashtra and Andhra Pradesh will be free to use additional quantity of 300 TMC of water each below Pochampad dam site for new projects. If the meaning of Pochampad dam site is given meaning as spread area of Pochampad dam, Clause V does not make sense and leads to absurdity. Clause V becomes workable only when Pochampad dam site is understood to mean concrete structure of the dam. We have no doubt that the dam site in the agreement has the same meaning in all clauses and it means the concrete structure of the dam. In our view, therefore, Clause II(i) that provides that Maharashtra can utilize waters not exceeding 60 TMC for new projects from the waters in the area

of the Godavari basin below three dam sites noted therein and up to Pochampad dam site on the Godavari gives right to Maharashtra to utilize waters of the Godavari river up to Pochampad site which may be water flowing through the river from the catchment area or the water spread area. Such utilization is not confined to the water flowing through the river from the catchment area. The thrust of the parties in Clause II(i) and the essence of this clause is to put a cap on the right of Maharashtra to utilize waters of Godavari river below the three dams mentioned therein up to Pochampad dam site to the extent of 60 TMC for new projects and in no case exceeding that limit. There is no demarcation made that the utilization of waters not exceeding 60 TMC for new projects by Maharashtra shall be from the flowing water. While reaching the agreement, the two states must have sought to equalize the burden and benefits. We do not think that we can read such demarcation impliedly in Clause II(i) as contended by Andhra Pradesh.

53. As a matter of fact, Andhra Pradesh understood the location of Pochampad dam site at particular latitude and longitude and not the reservoir. This also indicates that by Pochampad dam site what is meant in the agreement dated 06.10.1975 is the structure and not the spread area.

54. In *Orient Papers & Industries Ltd.*[1], this Court was concerned with provisions of Orissa Irrigation Act, 1959, particularly, Sections 4(d) and 28 thereof. While dealing with the argument that the irrigation work as defined under Section 4(d) would not cover the area in which the reservoir lies, but only a reservoir, tank, anicuts, dams, weirs, canals, barrages, channels, pipes, wells, tubewells and artesian wells constructed, maintained or controlled by the state or a local authority, this Court referred to Section 4(d) and observed as follows :

> "14. Irrigation work is defined under Section 4(d) of the Act as to include all land occupied by the Government for the purpose of reservoir, tanks, etc., and other structures occupied by or on behalf of the State Government on such

> land. A reservoir cannot be understood merely to be a means to hold water in a stream. It is only by controlling the flowing stream in an area that water can be stored in a reservoir. Viewed thus, irrigation work would include land used for such purpose. In this case the finding recorded by the authorities is in accord with this view. "Reservoir" may not necessarily mean only the constructed part of the land but includes the area where the water is held by a dam constructed by the Government; then if from such a point falling within that area water is drawn it must be held that the appellant is liable to pay the water rate. Therefore, there is no substance in the contention urged on behalf of the appellant that the point at which the water is drawn by the appellant does not lie within the reservoir area or water is not drawn from a government source or a water work. Under Section 28 of the Act, the Irrigation Officer is empowered to fix the compulsory basic water rate for supply of water from a government source as distinguished from a private source."

54.1. In *Orient Papers & Industries Ltd.*[1], this Court did hold that reservoir may not necessarily mean only the constructed part of the land but includes the area where the water is held by a dam. This is generally what is understood by reservoir but, as noted above, we are concerned with the interpretation of the words "up to dam site" occurring in the agreement between the two states which was entered into when the dispute was already pending before the Tribunal and Andhra Pradesh was intending to construct Pochampad dam with 112 TMC that would submerge certain areas of Maharashtra. Therefore, these words have to be understood in the context of the agreement and terms thereof. In the overall context it is very difficult to hold that dam site is given meaning in the agreement as spread area of dam. Thus, in fact situation of the present case, *Orient Papers & Industries Ltd.*[1] has no application.

55. Generally, there cannot be a dam within a dam. This is also true that generally there cannot be lake/pondage of a project of one state within the lake/pondage of the project of another state. But we are concerned with specific water sharing agreement between the two states which has been endorsed by the Tribunal. The parties have not brought any oral expert engineering and hydrographic testimony. In the circumstances, we have to see extent of rights and obligations created by virtue of the agreement between the two states and the award given by the Tribunal. Like any other agreement, the terms of inter-state agreement ordinarily must be found out from the actual words employed therein. We have already analysed the agreement dated 06.10.1975 above and we find merit in the submission made on behalf of Maharashtra that in Clause II(i), there is no limitation imposed upon Maharashtra to utilize the waters of the Godavari river from the water flowing through the river from the catchment area only in its territory. What Maharashtra has to ensure is that it does not utilize waters of Godavari river in its territory exceeding 60 TMC for new projects and it does not interfere with natural and continuous flow of water into Pochampad reservoir.

56. Clause VII and Clause III(C) of the final order (award) passed by the Tribunal also support the view which we have taken. Clause VII provides that right or power or authority of any state to regulate within its boundaries the use of water, or to enjoy the benefit of waters within that state in a manner not inconsistent with the order of the Tribunal shall not be impaired. Clause III(C) says that the water stored in any reservoir across any stream of the Godavari river system shall not by itself be reckoned as depletion of the water of the stream except to the extent of the losses of water from evaporation and other natural causes from such reservoir.

57. Alternatively, even if we accept the stand of Andhra Pradesh that utilization of waters to the extent of 60 TMC for new projects by Maharashtra from below the three dam sites

mentioned in Clause II(i) up to Pochampad dam site can be only from water flowing through the river from the catchment area and not from the pondage/water spread area of Pochampad dam, the question that arises for consideration is, whether Andhra Pradesh is entitled to injunction against Maharashtra from setting up Babhali barrage in the suit filed under Article 131 of the Constitution.

58. The US Supreme Court in *State of Washington v. State of Oregon*[4] has exposited two principles, one, a contest between the states is to be settled in the large and ample way that alone becomes the dignity of litigants concerned and two, burden of proof falls heavily on complainant in a suit for injunction when states are involved. The above principles are sound principles in law and, in our view, there is no reason for not applying them to a suit of this nature. We are of the considered view that in a suit for injunction filed by one state against the other state, the burden on the complaining state is much greater than that generally required to be borne by one seeking an injunction in a suit between private parties. The complaining state has to establish that threatened invasion of rights is substantial and of a serious magnitude. In the matter between states, injunction would not follow because there is infraction of some rights of the complaining state but a case of high equity must be made out that moves the conscience of the Court in granting injunction. We shall consider whether burden of that degree has been discharged by Andhra Pradesh on the charge of wrong doing by Maharashtra in construction of Babhali barrage and a case of substantial injury of a serious magnitude and high equity made out.

59. According to Andhra Pradesh, Pochampad project has three sources of contribution of its storage (i) from the Maharashtra territory of Godavari basin below Paithan dam, (ii) contribution from Manjra tributary and (iii) from the catchment within the state of Andhra Pradesh. It is the case of Andhra

4. 297 US 517.

Pradesh that invasion of water spread area by construction of Babhali barrage would significantly deprive inhabitants of the Adilabad, Nizamabad, Karimnagar, Warangal, Nalgonda, Khammam and Medak districts of having water for irrigation and drinking purposes. Moreover, the construction of Babhali barrage prejudicially affects Andhra Pradesh (a) having regard to the FRL of Pochampad dam and the height of Babhali barrage as water would confine its level, there will be reverse flow up to 65 TMC (b) Maharashtra will be drawing water from Babhali barrage with the aid of pump sets installed along 58 km length and it will be enabled to draw more than 2.74 TMC, thereby exceeding its entitlement of 60 TMC; (c) Maharashtra will utilize the non-monsoon flows to the fullest extent even if the 75% dependability, as pleaded by Maharashtra, is only 2.73 TMC, still Maharashtra is in a position to appropriate more than 2.74 TMC in 74% of the year and (d) Maharashtra will utilize the waters from Pochampad storage during the remaining 25% of the deficit years where non-monsoon yield is less than 2.74 TMC. Andhra Pradesh complains that as per the list of major, medium and minor projects sanctioned in Maharashtra after 06.10.1975 the gross utilization by Maharashtra of all the projects will be 63.018 TMC. Andhra Pradesh in this connection relies upon the additional affidavit filed by the Maharashtra.

60. Andhra Pradesh further complains that in a given year in the absence of adequate contribution from the Maharashtra territory of Godavari basin, Pochampad dam may have contribution from the other two sources, namely, contribution from Manjra territory and from the catchment within the state of Andhra Pradesh which would result in the storage of Pochampad into the territory of Maharashtra. Any construction within submergence area in Maharashtra and appropriation of water from it would result in Maharashtra drawing from a source over which it has no right.

61. On the other hand, Maharashtra says that it was using water within its territory which is now part of Pochampad

storage prior to 1975 by lift irrigation schemes. Babhali barrage construction is partly to establish the requirements of these lift irrigation schemes. It is stated that there were 13 lift irrigation schemes which were existing, sanctioned and cleared on the Godavari river up to the present Babhali barrage and they were utilizing about 2.6 TMC. Out of these 13 lift irrigation schemes; 6 were within the submergence of Pochampad. These schemes were operated successfully for seven to ten years from its commencement but they were not fully operated later due to non-availability of sufficient water in the river. After the agreement dated 06.10.1975, Maharashtra had planned for the Babhali barrage on the Godavari river within its territory in 1995. Babhali barrage was planned for a life saving irrigation of 7995 hectares and drinking water for 58 villages and three towns. Maharashtra denies that water spread area of the Pochampad dam is 55 km within the territory of Maharashtra. Maharashtra asserts that the water spread area is not beyond 32 km within Maharashtra territory. Babhali barrage project requires 2.74 TMC of water out of the allocation of 60 TMC for new projects under the agreement. The maximum quantity of water which Maharashtra can lift during the period from 28th October till the end of June next year is only 2.74 TMC of which only 0.6 TMC is from the common submergence of Pochampad reservoir and Babhali barrage. Maharashtra has denied the allegation of Andhra Pradesh that it will be drawing water from the Babhali barrage with the aid of pump sets installed along 58 km length and it will be enabled to draw more than 2.74 TMC and thereby exceeding its entitlement of 60 TMC.

62. Maharashtra has suggested without prejudice to its rights and contentions that it is willing to reimburse 0.6 TMC of water to Andhra Pradesh by releasing the same on 1st March every year. Maharashtra has submitted that the operation of Babhali barrage can be supervised by a committee consisting of representatives of Central Water Commission and of states of Andhra Pradesh and Maharashtra. This committee will supervise that the gates are lowered on the 28th October each

year and will remain in operation till the end of June next year and that on the 1st of March the gates will be lifted to allow the flow of water of 0.6 TMC to Andhra Pradesh. Thus, even 0.6 TMC will not be made use of by Maharashtra.

63. As regards lift irrigation schemes, Maharashtra has averred in paragraph 12(ii) of the amended written statement filed on 30.01.2008 as under:

> "Below Vishnupuri Barrage on the main Godavari river and the State border with Andhra Pradesh there is a vast area and population of Nanded District in Maharashtra on the both the banks of Godavari over a stretch of 97 KMs. which is in dire need of irrigation and drinking water supply to 58 villages. In view of this acute water need and no other alternate resources available, lift irrigation schemes had been constructed by Maharashtra during 1972 to 1975 for lifting water from the main Godavari river for drinking water and some Rabi irrigation. No objection was raised to such scheme by Andhra Pradesh even though the water was extracted from the submergence of the Pochampad project in Maharashtra."

63.1. Then in para 13, the following averment is made:

> "These Lift Irrigation schemes after construction were operating in initial years with reasonable satisfaction. The lifting of water at these sites were planned for the fair weather season Rabi and hot-weather irrigation and drinking water supply for the entire year. Subsequently, difficulties were experienced in getting the needed river supplies in an assured manner from these fluctuating daily river flows. There was acute agitation and pressure from the local people of 58 villages to provide them with a regulating scheme to get assured supply of water for irrigation and drinking water according to their needs. To enable this requirement, it was decided in 1995 to create a small pondage at Babhali to assure and regulate the needed supplies."

63.2. In paragraph 14, it is averred as under:

> "……..The gates of Babhali Barrage are therefore proposed to be kept open during monsoon period upto latter half of October, as if there is no barrage and lowered thereafter to create necessary small pondage in fair-weather to meet the dire needs in Maharashtra out of the permitted share of 60 TMC. The Barrage crest level at Babhali is at river bed level and therefore, there will be no obstructions to Godavari river flows upto Andhra Pradesh's Pochampad dam during monsoon period. The small pondage at Babhali (2.74 TMC) proposed to be created during fair-weather is only a negligible fraction of Pochampad storage of 112 TMC out of which only 0.6 TMC is a common storage. By the middle of December, Pochampad storage recedes totally away from Maharashtra's territory and therefore the pondage at Babhali during operation does not interfere or encroach with the Pochampad storage of Andhra Pradesh….."

63.3. In paragraph 17 (xiiiA)(iii), (iv),(v)(a),(b),(c) and (d), Maharashtra has stated as follows:

> "17(xiiiA)(iii) After middle of October, the gates at Babhali Barrage would be lowered to create a small pondage of 2.74 TMC by storing the post monsoon or dry weather Godavari river flows to enable individual farmer's pumps to lift the water for the basic water supply needs of people including drinking water on the river banks and to stabilize and to ensure some Rabi and Hot weather irrigation part of which is already in existence by various lift along this stretch of the Godavari river.
>
> (iv) The overlapping storage of Pochampad and Babhali when constructed is only to the extent of 0.6 TMC out of 112 TMC live storage of Pochampad at FRL+1091

feet(330.56 m.). This 0.6 TMC overlapping small storage at the upstream end of Pochampad Reservoir is in any case going to be silted up very soon making overlapping storage negligible.

(v) The contention that between Babhali Barrage crest level and the river bed level at State border, there is 65 TMC of Pochampad storage which can be pumped up by Maharashtra by reserve flow is baseless and without any substance, because

(a) Maharashtra Government is not installing any pumps or constructing any canals at Babhali to lift water, but only creating a pondage for individual farmers to lift for their own small irrigation needs.

(b) The Pochampad storage level will not remain at Babhali Barrage crest level throughout October to May but recede to a level lower than Babhali Barrage still level by end of December when there can be no lifting of water at all. Therefore, even theoretically, there is no possibility of a reserve flow into Babhali Barrage after December.

(c) In the absence of the Babhali Barrage Maharashtra could have utilized its permitted share of 60 TMC for new projects from this stretch of Godavari river occupied by Pochampad storage by putting up necessary capacity pumps in this stretch of Godavari river occupied by Pochampad storage to which Andhra Pradesh could not have objected.

(d) At Babhali Barrage Maharashtra has planned for life saving irrigation of 7995 ha. and drinking water for 58 villages and 3 towns which requires only 2.74 TMC of water of its 60 TMC share. The entire allegation of using 65 TMC of Pochampad water is baseless because such quantity cannot be lifted during the period of November to December when the level reaches the sill level. In the

present Babhali Barrage scheme the intention is to only create a small pondage of about 2.74 TMC, which will be lifted by the individual farmers over a period of about 9 months. 65 TMC would be required to irrigate about 3.5 lakhs ha. which is not available at Babhali site. Moreover, for lifting 65 TMC water, a pumping capacity of about 162350 h.p. would be required and to utilize this pumping capacity about 121.11 MW of electricity will be necessary. The State of Maharashtra has not planned to install any such pumps at Babhali."

64. Before this Court was moved by filing the present suit, Andhra Pradesh objected to the Babhali barrage in 2005. As the dispute could not be resolved by the two states amicably, the Central Water Commission ('CWC') intervened. In the meanwhile, a public interest litigation was also filed before this Court. One of the prayers therein is for issuance of directions against Maharashtra to stop the construction of Babhali barrage and direction to the central government to take appropriate action to enforce the agreement dated 06.10.1975 reached between the two states. On 10.04.2006 this Court requested the Minister for Water Resources to call for the meetings of the officers and others from the two states with a view to resolve the issue and if it becomes necessary, the Minister may request the Prime Minister to intervene in the matter.

65. On 26.04.2006, the Chairman, CWC convened the technical committee meeting. Maharashtra on that day made a presentation highlighting the following facts:

"Storage of Babhali barrage is well within the banks. The sill level and FRL of Babhali barrage are 327 m and 338 m respectively and 13 gates of 15 m x 11 m size are proposed to be installed. The Gross storage of Srirama Sagar Project and that of Babhali barrage are 112 TMC and 2.74 TMC respectively and there is a common storage of 0.60 TMC which is just 0.54% of the storage of SRSP.

Command area of Babhali barrage is 7995 ha."

66. On behalf of Andhra Pradesh, it was stated that more than 50 per cent of the time Pochampad dam has not filled up to designed capacity and the water proposed to be stored by Babhali barrage would further reduce its storage which rightfully belongs to Andhra Pradesh and Andhra Pradesh cannot agree to construction of Babhali barrage in the submergence area of Pochampad dam. In the meeting of 26.04.2006, three alternative situations emerged which are as under:

1. Maharashtra to give their plan for the utilization of 60 TMC of water agreed with A.P. in addition to 42 TMC and the need for construction of Babhali Barrage.

2. To ensure that gates are lowered only after Sriram Sagar dam is filled up to its designed capacity or alternately on a date to be mutually agreed by both the states, which- ever occurs earlier.

3. Possibility of reducing the height of Babhali Barrage to limit the storage to their minimum requirement during December to February to be explored by Govt. of Maharashtra.

67. Maharashtra agreed to examine the above suggestions and submit the proposal for consideration in the next meeting.

68. On 19.05.2006, the second meeting of the technical committee under the Chairmanship of the Chairman, CWC was held. The minutes of the meeting dated 19.05.2006 recorded as under:

"1. The 75% dependable flows at Yelli gauging site was reported as 1530 MCM (54.03 TMC) considering a hydrologic year and 78.34 MCM (2.77 TMC) considering post monsoon months from 28th October to May end. These figures need to be rechecked and confirmed.

2. Babhali barrage to be constructed with 2.74 TMC capacity and the gates to be lowered on 28th October. This proposal was not acceptable to Govt. of Andhra Pradesh because they maintained that Babhali barrage is an encroachment into the submergence area of Sri Ram Sagar Project (SRSP). They also apprehended that Govt. of Maharashtra can use waters several times the capacity of barrage, which will affect the storage of SRSP adversely.

3. The 2nd proposal given by the Govt. of Maharashtra was regarding reduction in the height of the gates of the Babhali barrage. They have worked out the minimum requirement from Babhali barrage considering the requirement for Rabi crop up to February and drinking water requirement up to June as 30.84 MCM (1.09 TMC). In addition to this, intercepted water of SRSP required to be released from Babhali Barrage is of the order of 17.00 MCM (0.6 TMC) and the evaporation losses may be considered of the order of 0.27 TMC. To meet the above total requirement, the gross capacity for Babhali barrage has been worked out as 1.96 TMC. For this storage, the FRL of Babhali Barrage as per the Area-Capacity curve submitted by Govt. of Maharashtra in the meeting is 336.5m, resulting in a reduction of the height of the gates by 1.5 m. This proposal was also not acceptable to Govt. of Andhra Pradesh."

68.1. The minutes further recorded:

"Govt. of Maharashtra submitted that there is no other possibility for drinking water supply in this region since, from the month of November-December, the storage in SRSP recedes considerably and water spread falls below the border. The farmers in this region need water for irrigating their Rabi crops and at present there is no other arrangement for this purpose. Considering the requirement

of Govt. of Maharashtra and keeping in view the objectives of Govt. of Andhra Pradesh, an alternative solution was suggested as under:

> The capacity of the barrage should be reduced to the bare minimum requirement of Govt. of Maharashtra, which has been assessed by them as 1.09 TMC. From the Area Capacity relationship submitted by the Govt. of Maharashtra, it was observed that at an FRL of 334.20m, the capacity of the Babhali barrage reservoir is 1.03812 TMC and at FRL 334.60 m, the capacity is 1.16893 TMC. Therefore, if the FRL is kept at 334.50 m, the requirement of Govt. of Maharashtra can be met and this will reduce the height of the gates by 3.5 m. The gates will be closed only after 28th October depending on the inflow and storage condition of SRSP, to be mutually agreed by both the concerned states.
>
> Under the existing circumstances, this was discussed by the Committee as a viable option for consideration for amicable settlement of the issue. The officials of the Govt. of Andhra Pradesh and the Govt. of Maharashtra expressed that they would need approval of their respective governments in this regard. The Chairman suggested that there may not be any need for another meeting if the response is positive and the recommendation could be submitted to the Hon'ble Union Minister for Water Resources after the response from the two states are received."

68.2. The two states could not agree to any solution mutually thereafter.

69. Andhra Pradesh has a grievance about meetings held on 26.04.2006 and 19.05.2006 as according to it the technical committee did not examine the issues in terms of the grievance of Andhra Pradesh. According to Andhra Pradesh, CWC in the Inter-state meetings held on 11.07.2005 and 05.10.2005 have

categorically opined that without the consent of Andhra Pradesh, Maharashtra is not entitled to construct the Babhali barrage within the submergence area of the Pochampad project.

70. The issue of entitlement of Maharashtra under the agreement dated 06.10.1975 has been examined in the earlier part of the judgment. The question now is, even if we accept the interpretation placed upon the agreement dated 06.10.1975 by Andhra Pradesh, should an injunction follow against Maharashtra.

71. There is a sharp conflict over the subject matter of the dispute between the two states. Andhra Pradesh does not trust Maharashtra and seriously doubts that Maharashtra would honour what it says. In this regard, Mr. K. Parasaran, learned senior counsel for Andhra Pradesh brought to our notice the diverse acts of Maharashtra. During the pendency of the suit, Mr. K. Parasaran submitted that Maharashtra resumed the construction contrary to the directions given by CWC on 03.03.2006. In the meeting of the Chief Ministers of Andhra Pradesh and Maharashtra held on 04.04.2006, it was decided that a technical committee shall go into the details of various issues involved in Babhali Barrage project and till the technical committee submits its report, further construction work will not be done by Maharashtra. This was not adhered to by Maharashtra. On 26.04.2007, this Court by an interim order permitted Maharashtra to go ahead with construction of the Babhali barrage but directed that it shall not install the proposed 13 gates until further orders. It was clarified by this Court that as the Maharashtra is permitted to proceed with construction at its own risk, it will not claim any equity by reason of the construction being carried on by it. Contrary to and in violation of the interim order of this Court, Andhra Pradesh says that Maharashtra proceeded to install the gates. It also installed 14 gates instead of proposed 13 gates. As the Maharashtra went ahead with installation of gates (5 Nos.), Andhra Pradesh was compelled to file contempt petition.

72. There may be some merit in the grievances of Andhra Pradesh in this regard. Andhra Pradesh has suggested that to take care of its concerns, it would be appropriate to permit it to provide 1.09 TMC to Maharashtra from the water spread area of the Pochampad in the territory of Maharashtra and direct Maharashtra to remove the installed gates. In our view, if Andhra Pradesh's apprehensions are addressed and its fears are allayed by putting in place a supervisory mechanism in the form of a committee, no substantial injury of serious magnitude would occasion to Andhra Pradesh.

73. There are views and counter views on the post monsoon yield data (October 29 to May 31). Andhra Pradesh, with reference to the post monsoon yield data furnished by Maharashtra, submits that the available yield to Maharashtra at Babhali barrage is in the range of 1537.20 MM^3 (i.e. 54.29 TMC) to 77.39 MM^3 (i.e. 2.73 TMC) in 75 per cent years of the 37 years series project. This enables Maharashtra to appropriate more than 2.74 TMC in 74 per cent of years as water will be drawn from pondage and replenished. During non-monsoon 7/8 months the water flows in trickles and, therefore, water will be drawn for irrigation and replenish on a regular basis even in remaining failure years of 25 per cent where non-monsoon yield is less than 2.74 TMC or years where non-monsoon flows are absolutely bare minimum, Maharashtra will be enabled to draw the water from the intercepted storage of Pochampad or by reverse flow. Andhra Pradesh emphasizes that Maharashtra has ignored 75 per cent dependability of Pochampad project. After lowering the gates of Babhali barrage on October 28, the non-monsoon flows into Pochampad are obstructed during the 75 per cent of the years. Babhali barrage has the effect of depleting Andhra Pradesh's entitlement to the flow of water into its project constructed at 75 per cent dependability.

74. Maharashtra, on the other hand, says that Andhra Pradesh has ignored the fact that Babhali barrage comes into

operation only after October 28 and the 75 per cent dependability yield at Babhali barrage after that date is only 2.73 TMC. Maharashtra asserts that it has calculated the actual 75 per cent available flows from October 29 to May 31 from 1968 to 2004 which comes to only 2.73 TMC at 75 per cent dependable yield. Hence, the utilization cannot be more than 2.73 TMC. Maharashtra also asserts that there is no occasion for it to utilize periodically 2.74 TMC from time to time as the total flow after October 28 is only 2.73 TMC. Maharashtra also says that there is no question of Maharashtra drawing water of Pochampad reservoir in the reverse direction to the extent of 65 TMC. With regard to Balegaon barrage, Maharashtra asserts that the capacity of Balegaon barrage is about 1.5 TMC out of which 0.6 TMC is the intercepted storage of Babhali barrage and the remaining 0.9 TMC is adjusted from the sanctioned utilization of Vishnupuri barrage project upstream.

75. We have carefully considered the submissions of the two states on post monsoon yield data (October 29 to May 31). The discharge data actually has been observed by the CWC at Yelli gauging site for the period 1968 to 2004, October 29 to May 31 which does indicate that on 75 per cent dependable flow, the total yield for this period is 2.733 TMC (77.39 MM3). We find no justifiable reason to discard the discharge data observed by CWC for 36 years.

76. We have also examined the list of major, medium, minor (state sector), minor (local sector) of the projects sanctioned after 06.10.1975 below Paithan dam up to Maharashtra – Andhra Pradesh state border. A careful look at the said list shows that for the diverse projects sanctioned after 06.10.1975 in Godavari river below Paithan dam up to Andhra Pradesh state border, the total utilization is of 63018 MC feet (63.018 TMC) and the net utilization is 59112.70 MC feet (59.11270 TMC). Andhra Pradesh is right that total utilization of waters for new projects sanctioned after 06.10.1975 is 63.018 TMC. However, as noted above, the net utilization by

Maharashtra of the projects sanctioned after 06.10.1975 is 59.11270 TMC. In any case, Maharashtra has to ensure that it does not exceed the restriction placed upon its utilization in Clause II(i) of the agreement dated 06.10.1975.

77. In the minutes of 19.05.2006 of the technical committee meeting convened by Chairman, CWC, it is stated that the project report of the Babhali barrage has been prepared according to the standard guidelines of the Commission. The project report of Babhali barrage which has been got approved from CWC clearly indicates that the monthly yield from November during post monsoon season is 2.64 TMC. The project report also shows that there is no scope for Maharashtra for withdrawing more than 2.73 TMC.

78. Maharashtra's assertion that Babhali barrage will trap maximum 0.6 TMC of the Pochampad storage is not a new plea raised for the first time before this Court in the amended written statement. As a matter of fact, before filing the suit by Andhra Pradesh, the said aspect was highlighted by Maharashtra in the technical committee's meeting convened by Chairman, CWC on 26.04.2006. The minutes of that meeting record, "storage of Babhali barrage is well within the banks. The sill level and FRL of Babhali barrage are 327 m and 338 m respectively and 13 gates of 15 m x 11 m size are proposed to be installed. The Gross storage of Sri Ram Sagar Project and that of Babhali barrage are 112 TMC and 2.74 TMC respectively and there is a common storage of 0.60 TMC which is just 0.54% of the storage of SRSP. Command area of Babhali barrage is 7995 ha."

79. Moreover, admittedly rainfall during monsoon months is the major contribution to the Godavari river flows. Monsoon contributes about 90 per cent of the river flow. During monsoon months, the gates of Babhali barrage shall remain lifted. Thus, river flow towards Pochampad dam during monsoon shall not be affected in any manner whatsoever. There is no diminution of flow during monsoon irrespective of construction of Babhali

barrage by Maharashtra. The only difficulty is in respect of non-monsoon season which contributes about 10 per cent of the flows that too is not well defined and well spread. If this difficulty is taken care of, virtually there is no injury to Andhra Pradesh much less substantial injury in as much as the inhabitants of seven districts (Adilabad, Nizamabad, Karimnagar, Warrangal, Nalgonda, Khammam and Medak) shall not be deprived of water for drinking purpose and irrigation which is the main concern of Andhra Pradesh. On the other hand, if Babhali barrage is made operational subject to certain conditions and some supervisory mechanism is put in place to ensure that those conditions are strictly adhered to, Maharashtra may be able to meet drinking water requirement of 58 villages and three towns and also provide water for irrigation to 7995 hectares. The matter needs to be viewed in this perspective as well.

80. We assume that apprehensions of Andhra Pradesh are bona fide and genuine. However, in our view, these apprehensions can be largely overcome and addressed. It is pertinent to notice that though with regard to present subject matter, Andhra Pradesh has taken a very rigid and hard stance but with regard to Pranhita project (Dr. B.R. Ambedkar Pranhita Chevella Sujala Sravanti Project) Andhra Pradesh and Maharashtra have adopted a very collaborative position to ensure efficient, speedy and economical investigation and execution of this project. The two Chief Ministers as recently as May 2012 have entered into an agreement for constitution of Inter-State Board to take charge of and deal with all the matters relating to all relevant items as stipulated in the 1979 award and 1980 further award with regard to Pranhita river. There is no reason why supervisory committee cannot oversee the compliance of commitments which Maharashtra had made to this Court by way of pleadings and also in the course of hearing.

81. In view of the foregoing discussion, we may conclude

our findings as follows :

(i) Under the agreement dated 06.10.1975 and the 1979 award of the Tribunal the utilization of 60 TMC water by Maharashtra for the new projects below Paithan dam site on the Godavari and below Siddheswar dam site on the Purna and below Nizamsagar dam site on the Manjra and up to Pochampad dam site on the Godavari is not confined to flowing waters alone in the territory of Maharashtra.

(ii) The thrust of the parties in Clause II(i) of the agreement dated 06.10.1975 and the essence of this Clause is to put a cap on the right of Maharashtra to utilize water of Godavari river below the three dams mentioned therein up to Pochampad dam site to the extent of 60 TMC for new projects and in no case exceeding that limit. There is no demarcation made in the agreement that the utilization of waters not exceeding 60 TMC for new projects by Maharashtra shall be from the flowing water through the river from the catchment area only.

(iii) The commitment of Maharashtra that the Babhali barrage project requires 2.74 TMC of water out of the allocation of 60 TMC for new projects under the agreement of which only 0.6 TMC is from the common submergence of Pochampad reservoir and Babhali barrage if accepted and its compliance is ensured, it may be conveniently held that Babhali barrage would not enable Maharashtra to draw and utilize 65 TMC of water from the storage of Pochampad project as alleged by Andhra Pradesh.

(iv) Alternatively, even if the interpretation placed upon the agreement dated 06.10.1975 by Andhra Pradesh is accepted that utilization of waters to the extent of 60 TMC for new projects by Maharashtra from below the three dam sites mentioned in Clause II(i) up to Pochampad dam site can be only from water flowing through the river from the

catchment area and not from the pondage/water spread area of Pochampad dam, on the basis of facts which have come on record, a case of substantial injury of a serious magnitude and high equity that moves the conscience of the Court has not been made out by Andhra Pradesh justifying grant of injunction.

82. In light of the above, we hold that Andhra Pradesh is not entitled to the reliefs, as prayed for, in the suit.

83. However, a three member supervisory committee is constituted. The committee shall have one representative from the Central Water Commission and one representative each from the two states, Andhra Pradesh and Maharashtra. The representative of Central Water Commission shall be Chairman of the committee. The Committee shall select the place for its office which shall be provided by Maharashtra. Maharashtra shall bear the entire expenditure of the Committee. The powers and functions of the supervisory committee shall be as follows:

(i) The committee shall surprise the operation of the Babhali barrage.

(ii) The committee shall ensure that;

(a) Maharashtra maintains Babhali barrage storage capacity of 2.74 TMC of water out of the allocation of 60 TMC given to Maharashtra for new projects under the agreement dated 06.10.1975.

(b) The gates of Babhali barrage remain lifted during the monsoon season, i.e, July 1 to October 28 and there is no obstruction to the natural flow of Godavari river during monsoon season below the three dams mentioned in Clause II(i) of the agreement dated 06.10.1975 towards Pochampad dam.

(c) During the non-monsoon season i.e., from October 29 till the end of June next year, the quantity of water which Maharashtra utilizes for Babhali barrage does not exceed 2.74 TMC of which only 0.6 TMC forms the common submergence of Pochampad reservoir and Babhali barrage.

(d) Maharashtra does not periodically utilize 2.74 TMC from time to time.

(e) Maharashtra releases 0.6 TMC of water to Andhra Pradesh on 1st March every year.

(f) Maharashtra maintains the capacity of Balegaon barrage to 1.5 TMC. Out of this 0.9 TMC is adjusted from sanctioned utilization of Vishnupuri project upstream and 0.6 TMC remains the intercepted storage of Babhali barrage.

84. Suit and IA Nos. 13 and 15 are disposed of as above with no orders as to costs.

W.P.(C) No. 134/2006, W.P.(C) No. 210/2007 AND W.P.(C) No. 207/2007

85. We have heard Mr. A.K. Ganguli, learned senior counsel for the petitioners in W.P.(C) No. 207 of 2007. We have also considered the written submissions filed in W.P.(C) Nos. 207 and 210 of 2007. However, we do not find it necessary to consider these writ petitions on merits in view of consideration and decision in the original suit filed by Andhra Pradesh against Maharashtra.

86. These Writ Petitions and IA Nos. 1 and 3 in Writ Petition © No. 134 of 2006, IA Nos. 1 and 2 in Writ Petition © No. 210 of 2007 and IA No. 1 in Writ Petition © No. 207 of 2007

are disposed of accordingly.

Contempt Petition (C) No. 142 of 2009 in Original Suit No. 1 of 2006

87. In view of our judgment given in Original Suit, we are not inclined to consider the Contempt Petition on merits. It is disposed of accordingly.

R.P. Original Suit disposed of.

SACHIN GUPTA AND ANOTHER
v.
K.S. FORGE METAL PRIVATE LIMITED
(Civil Appeal No.2058 of 2013)

MARCH 01, 2013

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

ARBITRATION AND CONCILIATION ACT, 1996:

s.34(2)(a)(iii) - Held: High Court could have set aside the Award u/s 34(2)(a)(iii) only on the ground that Award has been rendered against the respondent without issuance of any notice and without hearing the respondent - It was certainly not necessary to examine the dispute between the parties minutely or to make strong remarks against any of the parties - Judges at all levels are required to be restrained and circumspect in use of the language, even when criticizing the conduct of a party - Having set aside the Award, it would have been appropriate if the matter had been referred back to the Arbitrator - Instead of leaving parties to seek their remedy in accordance with law, the matter ought to have been referred to a specific arbitrator - Accordingly, arbitrator appointed - Judicial restraint.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2058 of 2013.

From the Judgments & Orders dated 07.11.2012 of the High Court of Delhi at New Delhi in FAO (OS) No. 539 of 2012.

R.S. Suri, A.K. Singh, Ajay Baury, Shantanu Singh, Nikilesh Ramachandran for the Appellants.

Sandeep Aggarwal, Manjeet Kirpal for the Respondent.

The following order of the Court was delivered

O R D E R

1. Leave granted.

2. We have heard learned senior counsel for the appellants as well as learned counsel for the respondent.

3. We are satisfied that the High Court could have set aside the Award only on the ground that the Award has been rendered against the respondent without issuance of any notice and without hearing the respondent. On this ground alone, the Award was liable to be set aside under Section 34(2)(a)(iii) of the Arbitration and Conciliation Act, 1996. There was no necessity for the learned Single Judge to convert itself into a Court of First Appeal. It was certainly not necessary to examine the dispute between the parties so minutely or to make such strong remarks against any of the parties. Judges at all levels are required to be restrained and circumspect in use of the language, even when criticizing the conduct of a party. However, we agree with the conclusion of the High Court that the Award had to be set aside as no notice had been served on the respondent. But, having set aside the Award, it would have been appropriate if the matter had been referred back to the Arbitrator. In the event, any of the parties were not satisfied, an independent arbitrator agreeable to both the parties could have been appointed.

4. In view of the above, we deem it appropriate to set aside the order passed by the High Court. As noticed above, instead of leaving the parties to seek their remedy in accordance with law, the matter ought to have been referred to a specific arbitrator. Learned counsel for the parties are agreed that we appoint Mr. Justice A.P. Shah, former Chief Justice of the Delhi High Court, residing at F-6A, Hauz Khas Enclave, New Delhi-110 016, as the Arbitrator. We order accordingly. The learned Arbitrator shall be at liberty to determine his remuneration/fees in consultation with the parties.

5. It is made clear that the arbitrator shall proceed with the arbitration proceedings without, in any manner, being influenced by any observations made either by the learned Single Judge or by the Division Bench of the High Court.

6. The appeal is, accordingly, disposed of.

R.P. Appeal disposed of.

LAXMAN LAL (DEAD) THROUGH LRS. AND ANR.
v.
STATE OF RAJASTHAN AND ORS.
(Civil Appeal No. 6392 of 2003)

MARCH 1, 2013.

[R.M. LODHA AND J. CHELAMESWAR, JJ.]

Rajasthan Land Acquisition (Amendment and Validation) Act, 1981:

s.5(2) – Validation of certain acquisitions – Notice u/s 4(5) of principal Act given prior to commencement of Amendment Act – Notification u/s 6 of principal Act issued after more than 5 years of the commencement of the Amendment Act – Held: The provision of sub-s. (2) of s.5 of Amendment Act leaves no manner of doubt that two years' time prescribed for making declaration u/s 6 in respect of the notice issued u/s 4(5) prior to the commencement of the 1981 Amendment Act is mandatory and permits no departure – Therefore, the preliminary notification, which was followed by notice u/s 4(5) before the commencement of the 1981 Amendment Act, has lapsed and does not survive since declaration u/s 6 has been made much beyond the time limit prescribed in law – The impugned orders are set aside – It is declared that preliminary notification dated 01.05.1980 has lapsed and the declaration made on 19.03.1987 is legally unsustainable – Rajasthan Land Acquisition Act, 1953 – ss. 4(5) and 6.

Rajasthan Land Acquisition Act, 1953:

ss. 5-A, 17(1) and 17(4) – Special powers in case of urgency – Acquisition of land for construction of bus stand – After a lapse of 7 years from the date of notification u/s 4, Notification u/s 6 issued and powers u/ 17(1) read with s/17(4)

invoked dispensing with provision of s. 5-A – Held: Any construction of building (institutional, industrial, residential, commercial etc.) takes some time and, therefore, acquisition of land for such purpose can always brook delay of few months – Ordinarily, invocation of power of urgency by State Government for such acquisition may not be legally sustainable – In the instant case, a very valuable right conferred on the land owner/person interested u/s 5-A has been taken away without any justification – It is so because construction of bus stand would have taken some time – The exercise of power by State government u/s 17(1) read with s. 17(4) and dispensation of inquiry u/s 5-A cannot be legally sustained – Land Acquisition Act, 1894 – ss. 17(1), 17(4) and 5-A.

s. 17(1) read with s. 17(4) – Exercise of power under – Affidavit with regard to – Held: Counter affidavit filed by Rajasthan State Road Transport Corporation is not relevant as s. 17 confers power of urgency only on the State government alone and it is the State government that has to justify that the urgency was so imminent that dispensation of inquiry u/s 5-A was necessary – Constitution of India, 1950 – Art. 300-A – Eminent domain – Affidavit.

In the instant appeal arising out of acquisition of appellants' land for construction of a bus stand, the questions for consideration before the Court were: (i) "Whether invocation of power of urgency and dispensation of inquiry u/s 5-A after 7 years of issuance of preliminary notification u/s 4 of the 1953 Act are legally sustainable?" and (ii) "Whether preliminary notification u/s 4 of the Rajasthan Land Acquisition Act, 1953 issued on 01.05.1980 has lapsed since declaration u/s 6 of that Act was made on 19.03.1987 after the expiry of two years from the commencement of the Rajasthan Land Acquisition (Amendment and Validation) Act, 1981?"

Allowing the appeal, the Court

HELD: 1.1 The statutory provisions of compulsory acquisition contained in the Rajasthan Land Acquisition Act, 1953 (the 1953 Act) are not materially different from the Land Acquisition Act, 1894 (the 1894 Act). The power of urgency which takes away the right to file objections can only be exercised by the State government for such public purpose of real urgency which cannot brook delay of few weeks or few months. This Court has held that the right to file objections u/s 5-A is a substantial right. The State government, therefore, has to apply its mind before it invokes its power of urgency and dispensation of inquiry u/s 5-A that the compliance of the mandate of s. 5-A may lead to precious loss of time which may defeat the purpose for which land is sought to be acquired. Any construction of building (institutional, industrial, residential, commercial etc.) takes some time and, therefore, acquisition of land for such purpose can always brook delay of few months. Ordinarily, invocation of power of urgency by the State government for such acquisition may not be legally sustainable. [para 16, 17 and 27] [230-H; 231-E-F; 240-F-G]

Nandeshwar Prasad & Ors. v. U.P. Govt. & Ors. **1964 SCR 425 = AIR 1964 SC 1217;** *Munshi Singh & Ors. v. Union of India* **1973 (1) SCR 973 = (1973) 2 SCC 337;** *Hindustan Petroleum Corporation Ltd. v. Darius Shapur Chenai & Ors.* **2005 (3) Suppl. SCR 388 = 2005 (7) SCC 627;** *Anand Singh and Another v. State of Uttar Pradesh and Others* **2010 (9) SCR 133 = 2010 (11) SCC 242 - relied on.**

Narayan Govind Gavate & Ors. v. State of Maharashtra & Ors. **1977(1) SCR 763 = 1977 (1) SCC 133,** *Deepak Pahwa & Ors. v. Lt. Governor of Delhi & Ors.* **1985 (1) SCR 588 = 1984 (4) SCC 308;** *State of U.P. v. Smt. Pista Dev & Ors.* **1986 (3) SCR 743 = 1986 (4) SCC 251,** *State of U.P. & Anr. v. Keshav Prasad Singh* **1995 (2) Suppl. SCR 329 = 1995 (5) SCC 587;** *Chameli Singh & Ors. v. State of U.P. & Anr.*

1995 (6) Suppl. SCR 827 = 1996 (2) SCC 549; *Meerut Development Authority & Ors. v. Satbir Singh & Ors.* **1996 (6) Suppl. SCR 529 = 1996 (11) SCC 462;** *Om Prakash & Anr. v. State of U.P. & Ors.* **1998 (3) SCR 643 = 1998 (6) SCC 1,** *Union of India & Ors. v. Mukesh Hans* **2004 (8) SCC 14** *Union of India & Ors. v. Krishan Lal Arneja & Ors.* **2004 (1) Suppl. SCR 801= 2004 (8) SCC 453;** *Mahadevappa Lachappa Kinagi & Ors. v. State of Karnataka & Ors.* **2008 (12) SCC 418;** *Babu Ram & Anr. v. State of Haryana & Anr.* **2009 (14) SCR 1111 = 2009 (10) SCC 115; and** *Tika Ram & Ors. v. State of U.P.* **2009 (14) SCR 905 = 2009 (10) SCC 689;** *Radhy Shyam (Dead) Through LRs & Ors. v. State of Uttar Pradesh and Others* **2011 (8) SCR 359 = 2011 (5) SCC 553 – referred to.**

1.2 In the instant case, the preliminary notification u/s 4 was issued on 01.5.1980. After lapse of about 7 years on 19.03.1987, the State government issued declaration u/s 6 without complying with the mandate of s. 5-A and in that declaration it was stated that it has invoked its powers conferred u/s 17(1) read with s. 17 (4) of the 1953 Act and dispensed with the provisions of s. 5-A. Had the State government intended to hold and complete the inquiry u/s 5-A, it could have been done in few months. However, no steps for commencement of the inquiry u/s 5-A were even taken by the State government. Thus, a very valuable right conferred on the land owner/person interested u/s 5-A has been taken away without any justification. The counter affidavit filed by respondent no. 4, i.e., Rajasthan State Road Transport Corporation is not relevant as s. 17 confers power of urgency only on the State government alone and it is the State government that has to justify that the urgency was so imminent that dispensation of inquiry u/s 5-A was necessary. The exercise of the power by the State government u/s 17(1) read with s. 17(4) of the 1953 Act and dispensation of

inquiry u/s 5-A can not be legally sustained and has to be declared as such. [para 26 and 28] [240-A-B, H; 241-A-D]

2.1 At the time of issuance of the preliminary notification, the 1953 Act did not prescribe any time limit for issuance of declaration u/s 6. However, with effect from 27.06.1981 by the 1981 Amendment Act, s. 6 was amended and a proviso was inserted that no declaration in respect of any land covered by notice u/s 4, sub-s. (5), after the commencement of the 1981 Amendment Act shall be made after the expiry of three years from the date of giving of such notice. As regards the acquisition proceedings which had already commenced by issuance of preliminary notification before coming into force of the 1981 Amendment Act, sub-s. (2) of s. 5 of the 1981 Amendment Act, provides that notwithstanding anything contained in clause (b) of sub-s. (1), no declaration u/s 6 of the 1953 Act in respect of any land for the acquisition of which notice under sub-s. (5) of s. 4 has been given before the commencement of the 1981 Amendment Act shall be made after the expiry of two years from the commencement of the 1981 Amendment Act. Sub-s. (2) of s. 5 of the 1981 Amendment Act begins with non obstante clause. The provision leaves no manner of doubt that two years' time prescribed for making declaration u/s 6 in respect of the notice issued u/s 4(5) prior to the commencement of the 1981 Amendment Act is mandatory and permits no departure. [para 29] [241-E-H, B-D, E-F]

Indrapuri Grah Nirman Sahakari Samiti Ltd. v. State of Rajasthan and Others **2002 (3) WLN 122;** *Pesara Pushapmala Reddy v. G. Veera Swamy and Others* **2011 (3) SCR 496 = 2011 (4) SCC 306 – held inapplicable.**

Chain Singh and etc., v. State of Rajasthan and Others **AIR 1991 Rajasthan 17 – distinguished.**

2.2 In the instant case, s. 4(5) notice under the 1953 Act was issued by the state government in 1980 and declaration u/s 6 was made on 19.03.1987. Having regard to clear and unambiguous mandate of s. 5(2) of the 1981 Amendment Act, this Court holds that preliminary notification dated 01.05.1980, which was followed by notice u/s 4(5) before the commencement of the 1981 Amendment Act, has lapsed and does not survive since declaration u/s 6 has been made much beyond the time limit prescribed in law. The impugned orders are set aside. It is declared that preliminary notification dated 01.05.1980 has lapsed and the declaration made on 19.03.1987 is legally unsustainable. If possession of the subject land has been taken from the appellants, the same shall be restored to them without any delay. [para 23, 32 and 33] [238-C-E; 243-G; 244-A-C]

Case Law Reference:

1964 SCR 425	**relied on**	**Para 17**
1973 (1) SCR 973	**relied on**	**Para 18**
2005 (3) Suppl. SCR 388	**relied on**	**para 19**
2010 (9) SCR 133	**relied on**	**para 20**
1977 (1) SCR 763	**referred to**	**para 21**
1985 (1) SCR 588	**referred to**	**para 21**
1986 (3) SCR 743	**referred to**	**para 21**
1995 (2) Suppl. SCR 329	**referred to**	**para 21**
1995 (6) Suppl. SCR 827	**referred to**	**para 21**
1996 (6) Suppl. SCR 529	**referred to**	**para 21**
1998 (3) SCR 643	**referred to**	**para 21**
2004 (8) SCC 14	**referred to**	**para 21**

2004 (1) Suppl. SCR 801	**referred to**	**para 21**
2008 (12) SCC 418	**referred to**	**para 21**
2009 (14) SCR 905	**referred to**	**para 21**
2009 (14) SCR 1111	**referred to**	**para 21**
2011 (8) SCR 359	**referred to**	**para 21**
2002 (3) WLN 122	**held inapplicable**	**para 30**
AIR 1991 Rajasthan 17	**distinguished**	**para 30**
2011 (3) SCR 496	**held inapplicable**	**para 31**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6392 of 2003.

From the Judgment & Order dated 11.01.2002 of the High Court of Judicature for Rajasthan at Jodhpur in D.B. Civil Special Appeal No. 894 of 1999.

Manu Mridul, Priyambada Sharma (for Surya Kant) for the Appellants.

Dr. Manish Singhvi, AAG Amit Lubhaya (for Milind Kumar), Puneet Jain (for Sushil Kumar Jain) for the Respondents.

The Judgment of the Court was delivered by

R.M. LODHA, J. 1. The compulsory acquisition of the land admeasuring 4 bigha and 2 biswa comprised in Khasra no. 1013 at Dungarpur (Rajasthan) is the subject matter of this appeal by special leave. The appellants were unsuccessful in challenging the acquisition of the above land in the High Court. They failed before the Single Judge as well as the Division Bench.

2. The two questions that arise for consideration are :

(i) Whether preliminary notification under Section 4 of the Rajasthan Land Acquisition Act, 1953 (for short, "1953 Act") issued on 01.05.1980 has lapsed since

declaration under Section 6 of that Act was made on 19.03.1987 after the expiry of two years from the commencement of the Rajasthan Land Acquisition (Amendment and Validation) Act, 1981 (for short, "1981 Amendment Act").

(ii) Whether invocation of power of urgency and dispensation of inquiry under Section 5-A after 7 years of issuance of preliminary notification under Section 4 of the 1953 Act are legally sustainable?

3. The above two questions arise from these facts: on 01.05.1980, the state government issued a preliminary notification under Section 4 that the subject land was needed or likely to be needed for a public purpose, namely, construction of bus stand. The state government required and authorised Land Acquisition Officer (SDO), Dungarpur to enter upon, do survey and all other acts necessary to ascertain whether land was suitable for such public purpose and enquire into and ascertain the particulars of the persons interested in such land.

4. On 19.03.1987, a notification was issued under Section 6 of the 1953 Act. By that notification the state government also invoked its powers conferred under Section 17(1) read with Section 17(4) of the 1953 Act and dispensed with the provisions of Section 5-A.

5. An important event occurred between 01.05.1980 and 19.03.1987. The State Legislature following the Ordinance promulgated by the Governor amended the 1953 Act by the 1981 Amendment Act. Effective from 27.06.1981, by the 1981 Amendment Act, Section 6 of 1953 Act was amended and the following proviso in Section 6 was inserted:

"Provided that no declaration in respect of any particular land covered by a notice under section 4, sub-section 5, given after the commencement of the Rajasthan Land

Acquisition (Amendment and Validation) Act, 1981, shall be made after the expiry of three years from the date of giving of such notice:"

6. Section 5 of the 1981 Amendment Act provides for validation of certain acquisitions. Sub-sections 1(b) and (2) thereof, which are relevant for the present controversy, read as follows :

"S. 5. Validation of certain acquisitions.—

(1) (a) xxx xxx xxx

(b) any acquisition in pursuance of any notice given under sub-section (5) of section 4 of the principal Act before the commencement of this Act may be made after such commencement and no such acquisition and no action taken or thing done (including any order made, agreement entered into or notice given), whether before or after such commencement, in connection with such acquisition shall be deemed to be invalid merely on the grounds referred to in clause (a) or any of them.

(2) Notwithstanding anything contained in clause (b) of sub-section (1) no declaration under section 6 of the principal Act in respect of any land for the acquisition of which notice under sub-section (5) of section 4 of the principal Act has been given before the commencement of this Act, shall be made after the expiry of two yeas from the commencement of the said Act."

7. The above acquisition was challenged in three writ petitions before the High Court. One of these writ petitions was filed by Laxman Lal and Manohar Lal. Both these petitioners are dead and now represented by their legal representatives who are appellants herein. The challenge to the acquisition was laid on diverse grounds but none of the grounds persuaded the Single Judge and all the three writ petitions were dismissed by a common order dated 11.05.1999.

8. The order of the Single Judge was challenged in intra-court appeal by the writ petitioners. Before the Division Bench, the following three points were raised in support of the appeal:-

I) Proceedings could not be continued because notification under Section 6 of the Act was issued after a lapse of about 7 years. This was in view of the provisions of sub-section (2) of Section 5 of the Rajasthan Land Acquisition (Amendment and Validation) Act, 1981. The said provisions provided a limitation of two years from the date of commencement of the Validation Act for issuing the declaration under Section 6. Since the declaration was issued much beyond this period of limitation the same was liable to be quashed. It was further contended that Section 17(4) notification could not be used to validate the proceedings.

II) Notice under Section 17(4) was void ab initio because the respondents failed to tender payment of 80 percent of compensation as envisaged under sub-section (3)(a) of Section 17 of the Land Acquisition Act.

III) The action of the respondents is highly arbitrary. By issuing a notification under Section 4 of the Act in the year 1980 the appellants were being pegged down for purposes of payment of compensation although effectively the acquisition was being made in the year 1987.

9. Dealing with the first point, the Division Bench held as under:

It will be seen from the above that a declaration under Section 6 in respect of the land can be made at any time after the publication of the notification under Section 4(1). In view of this specific statutory provision which is admittedly applicable, it cannot be said that a declaration under Section 6 could not have been issued after a lapse of 7 years or more. Learned counsel for the appellants

fairly conceded that Section 17 is a Code in itself. It contains complete procedure for acquisition made under the said provision. Section 17 is a provision to be resorted to in cases of urgency. Notification under Section 4 of the Act already stood issued with respect to the land in question as far back as the year 1980. The Government felt the urgency for the acquisition and, therefore, Section 17(4) notification, read with Section 6, was issued on 19.03.1987. We find no illegality in the procedure following in the facts of the case.

10. It is not necessary to deal with the second ground urged before the Division Bench as it has not been pressed before us. As regards the third ground, the Division Bench held as under:

"Lastly, the learned counsel raised an argument suggesting arbitrariness on the part of the respondents. As already noted, Section 17 permits the Government to invoke its provisions at any time, therefore, there is no statutory bar so far as the action is concerned. If the action of the respondents results in some hardship to the landowners normally, the provision regarding payment of interest takes care of the hardship. The power of compulsory acquisition of land is in the nature of a power of eminent domain which the State is entitled to exercise keeping in view the larger public interest as against individual interest."

11. We shall deal with the second question first. Two basic facts are not in dispute, namely, one, preliminary notification under Section 4 showing intention to acquire the subject land for a public purpose, namely, construction of bus stand was issued by the state government on 01.05.1980 and two, the declaration under Section 6 of the 1953 Act was made on 19.03.1987 and by means of that very notification the state government exercised its power of urgency under Section 17(1) read with Section 17(4) and dispensed with enquiry under Section 5A. Thus, the power of urgency was invoked for the first

time by the state government after seven years of issuance of the preliminary notification under Section 4.

12. Section 4 of the 1953 Act is identical to Section 4 of the Land Acquisition Act, 1894 (for short, "1894 Act"). It provides that whenever the state government considers it necessary or expedient to acquire land in any locality, needed or likely to be needed for a public purpose, it shall, by an order published in accordance with the provisions of sub-section (4) of Section 45, require any officer subordinate to it and generally or specially authorised in this behalf, to enter upon or into any land in such locality accompanied by his servants and workmen for the purpose stated therein. Sub-section (5) of Section 4 empowers the Collector to issue notice to the persons interested of the proposed acquisition and also issue a public notice to that effect at convenient places on or near about the land proposed to be acquired.

13. Section 5A enables the person interested in any land in respect of which notice has been issued under Section 4 (5) to object to acquisition of that land.

14. Section 6 is also similar to Section 6 of the 1894 Act. Inter alia, it provides that when the state government is satisfied after considering the report, if any, made under Section 5-A that any particular land is needed for a public purpose, a declaration shall be made to that effect. Such declaration is conclusive evidence that the land is needed for a public purpose and after making such declaration the state government may acquire the land in the manner provided in sub-section (4) thereof. As noticed above, Section 6 came to be amended by the 1981 Amendment Act and, inter alia, limitation of three years for issuance of notification under Section 6 was fixed from the date of issuance of notice under Section 4(5). As regards the notice issued under Section 4(5) prior to the 1981 Amendment Act, limitation of two years from coming into force of the 1981 Amendment Act was fixed.

15. Section 17 of the 1953 Act gives special powers to the state government in the cases of urgency and emergency. To the extent it is relevant, Section 17 reads as under:

"S. 17. Special powers in case of urgency.—In cases of urgency, whenever the State Government so directs the Collector though no such award has been made may, on the expiration of fifteen days from the publication of the notice mentioned in section 9, sub-section (1), take possession of any waste or arable land needed for public purposes or for a company. Such land shall thereupon vest absolutely in the State Government free from all encumbrances.

xxx xxx xxx

2. xxx xxx xxx

3. xxx xxx xxx

4. In the case of any land to which in the opinion of the State Government the provisions of sub-sections (1) or sub-section (2) are applicable the State Government may direct that the provisions of section 5-A shall not apply and, if it does so direct a declaration may be made under section 6 in respect of the land at any time after the publication of the order under sub-section (1) of section 4.

5. xxx xxx xxx

6. xxx xxx xxx

7. xxx xxx xxx"

16. The statutory provisions of compulsory acquisition contained in the 1953 Act are not materially different from the 1894 Act. This Court has explained the doctrine of eminent domain in series of cases. Eminent domain is the right or power

of a sovereign state to appropriate the private property within the territorial sovereignty to public uses or purposes. It is an attribute of sovereignty and essential to the sovereign government. The power of eminent domain, being inherent in the government, is exercisable in the public interest, general welfare and for public purpose. The sovereign is entitled to reassert its dominion over any portion of the soil of the state, including private property without its owner's consent provided that such assertion is on account of public exigency and for public good.

17. Article 300-A of the Constitution mandates that no person shall be deprived of his property save by authority of law. Though right to property is no longer a fundamental right but the constitutional protection continues in as much as without the authority of law, a person cannot be deprived of his property. Accordingly, if the state intends to appropriate the private property without the owners' consent by acting under the statutory provisions for compulsory acquisition, the procedure authorised by law has to be mandatorily and compulsorily followed. The power of urgency which takes away the right to file objections can only be exercised by the state government for such public purpose of real urgency which cannot brook delay of few weeks or few months. This Court as early as in 1964 said that the right to file objections under Section 5-A is a substantial right when a person's property is being threatened with acquisition; such right cannot be taken away as if by a side wind (*Nandeshwar Prasad & Ors. v. U.P. Govt. & Ors.*[1]).

18. In *Munshi Singh & Ors. v. Union of India*[2], this Court explained the importance of Section 5-A in the following terms:

> "7. Section 5-A embodies a very just and wholesome principle that a person whose property is being or is intended to be acquired should have a proper and reasonable opportunity of persuading the authorities concerned that acquisition of the property belonging to that person should not be made. We may refer to the observation of this court in *Nandeshwar Prasad v. The State of U.P.* [AIR 1964 SC 1217] that the right to file objections under Section 5-A is a substantial right when a person's property is being threatened with acquisition and that right cannot be taken away as if by a side wind. Sub-section (2) of Section 5-A makes it obligatory on the Collector to give an objector an opportunity of being heard. After hearing all objections and making further inquiry he is to make a report to the appropriate Government containing his recommendation on the objections. The decision of the appropriate Government on the objections is then final. The declaration under Section 6 has to be made after the appropriate Government is satisfied, on a consideration of the report, if any, made by the Collector under Section 5-A(2). The legislature has, therefore, made complete provisions for the persons interested to file objections against the proposed acquisition and for the disposal of their objections. It is only in cases of urgency that special powers have been conferred on the appropriate Government to dispense with the provisions of Section 5-A: [See Section 17(4) of the Acquisition Act.]"

19. In *Hindustan Petroleum Corporation Ltd. v. Darius Shapur Chenai & Ors.*[3], it was reiterated by this Court that Section 5-A confers a valuable right in favour of a person whose lands are sought to be acquired.

20. We do not think it is necessary to multiply the authorities. In a comparatively recent judgment, this Court speaking through one of us (R.M. Lodha, J.) in *Anand Singh and Another v. State of Uttar Pradesh and Others*[4] explained the importance of Section 5-A in the following words:

1. AIR 1964 SC 1217.
2. (1973) 2 SCC 337.
3. (2005) 7 SCC 627.
4. (2010) 11 SCC 242.

"41.……That Section 5-A of the Act confers a valuable right to an individual is beyond any doubt. As a matter of fact, this Court has time and again reiterated that Section 5-A confers an important right in favour of a person whose land is sought to be acquired.

42. When the Government proceeds for compulsory acquisition of a particular property for public purpose, the only right that the owner or the person interested in the property has, is to submit his objections within the prescribed time under Section 5-A of the Act and persuade the State authorities to drop the acquisition of that particular land by setting forth the reasons such as the unsuitability of the land for the stated public purpose; the grave hardship that may be caused to him by such expropriation, availability of alternative land for achieving public purpose, etc. Moreover, the right conferred on the owner or person interested to file objections to the proposed acquisition is not only an important and valuable right but also makes the provision for compulsory acquisition just and in conformity with the fundamental principles of natural justice."

21. This Court has dealt with the scope, extent and ambit of the power of the state government under Section 17(1) and (4) of the 1894 Act from time to time. *Narayan Govind Gavate & Ors. v. State of Maharashtra & Ors.*[5], *Deepak Pahwa & Ors. v. Lt. Governor of Delhi & Ors.*[6], *State of U.P. v. Smt. Pista Dev & Ors.*[7], *State of U.P. & Anr. v. Keshav Prasad Singh*[8], *Chameli Singh & Ors. v. State of U.P. & Anr.*[9], *Meerut Development Authority & Ors. v. Satbir Singh & Ors.*[10], *Om*

5. (1977) 1 SCC 133.
6. (1984) 4 SCC 308.
7. (1986) 4 SCC 251.
8. (1995) 5 SCC 587.
9. (1996) 2 SCC 549.
10. (1996) 11 SCC 462.

Prakash & Anr. v. State of U.P. & Ors.[11], *Union of India & Ors. v. Mukesh Hans*[12], *Union of India & Ors. v. Krishan Lal Arneja & Ors.*[13], *Mahadevappa Lachappa Kinagi & Ors. v. State of Karnataka & Ors.*[14], *Babu Ram & Anr. v. State of Haryana & Anr.*[15] and *Tika Ram & Ors. v. State of U.P.*[16] have been referred to in *Anand Singh*[4] and the legal position in paragraphs 43 to 48 of the Report (pgs. 265-266) is culled out as follows :

"43. The exceptional and extraordinary power of doing away with an enquiry under Section 5-A in a case where possession of the land is required urgently or in an unforeseen emergency is provided in Section 17 of the Act. Such power is not a routine power and save circumstances warranting immediate possession it should not be lightly invoked. The guideline is inbuilt in Section 17 itself for exercise of the exceptional power in dispensing with enquiry under Section 5-A. Exceptional the power, the more circumspect the Government must be in its exercise. The Government obviously, therefore, has to apply its mind before it dispenses with enquiry under Section 5-A on the aspect whether the urgency is of such a nature that justifies elimination of summary enquiry under Section 5-A.

44. A repetition of the statutory phrase in the notification that the State Government is satisfied that the land specified in the notification is urgently needed and the provision contained in Section 5-A shall not apply, though may initially raise a presumption in favour of the Government that prerequisite conditions for exercise of

11. (1998) 6 SCC 1.
12. (2004) 8 SCC 14.
13. (2004) 8 SCC 453.
14. (2008) 12 SCC 418.
15. (2009) 10 SCC 115.
16. (2009) 10 SCC 689.

such power have been satisfied, but such presumption may be displaced by the circumstances themselves having no reasonable nexus with the purpose for which the power has been exercised. Upon challenge being made to the use of power under Section 17, the Government must produce appropriate material before the Court that the opinion for dispensing with the enquiry under Section 5-A has been formed by the Government after due application of mind on the material placed before it.

45. It is true that power conferred upon the Government under Section 17 is administrative and its opinion is entitled to due weight, but in a case where the opinion is formed regarding the urgency based on considerations not germane to the purpose, the judicial review of such administrative decision may become necessary.

46. As to in what circumstances the power of emergency can be invoked are specified in Section 17(2) but circumstances necessitating invocation of urgency under Section 17(1) are not stated in the provision itself. Generally speaking, the development of an area (for residential purposes) or a planned development of city, takes many years if not decades and, therefore, there is no reason why summary enquiry as contemplated under Section 5-A may not be held and objections of landowners/persons interested may not be considered. In many cases, on general assumption likely delay in completion of enquiry under Section 5-A is set up as a reason for invocation of extraordinary power in dispensing with the enquiry little realising that an important and valuable right of the person interested in the land is being taken away and with some effort enquiry could always be completed expeditiously.

47. The special provision has been made in Section 17 to eliminate enquiry under Section 5-A in deserving and

cases of real urgency. The Government has to apply its mind on the aspect that urgency is of such nature that necessitates dispensation of enquiry under Section 5-A. We have already noticed a few decisions of this Court. There is a conflict of view in the two decisions of this Court viz. *Narayan Govind Gavate* [(1977) 1 SCC 133] and *Pista Devi* [(1986) 4 SCC 251]. In *Om Prakash* [(1998) 6 SCC 1] this Court held that the decision in *Pista Devi* [(1986) 4 SCC 251] must be confined to the fact situation in those days when it was rendered and the two-Judge Bench could not have laid down a proposition contrary to the decision in *Narayan Govind Gavate* [(1977) 1 SCC 133]. We agree.

48. As regards the issue whether pre-notification and post-notification delay would render the invocation of urgency power void, again the case law is not consistent. The view of this Court has differed on this aspect due to different fact situation prevailing in those cases. In our opinion such delay will have material bearing on the question of invocation of urgency power, particularly in a situation where no material has been placed by the appropriate Government before the Court justifying that urgency was of such nature that necessitated elimination of enquiry under Section 5-A."

22. *Anand Singh*[4] has been referred to in later cases, one of such decisions is *Radhy Shyam (Dead) Through LRs & Ors.. v. State of Uttar Pradesh and Others*[17] wherein this Court in paragraph 77 (v) to (ix) of the Report stated as follows:

"77(v) Section 17(1) read with Section 17(4) confers extraordinary power upon the State to acquire private property without complying with the mandate of Section 5-A. These provisions can be invoked only when the purpose of acquisition cannot brook the delay of even a few weeks

17. (2011) 5 SCC 553.

or months. Therefore, before excluding the application of Section 5-A, the authority concerned must be fully satisfied that time of few weeks or months likely to be taken in conducting inquiry under Section 5-A will, in all probability, frustrate the public purpose for which land is proposed to be acquired.

(vi) The satisfaction of the Government on the issue of urgency is subjective but is a condition precedent to the exercise of power under Section 17(1) and the same can be challenged on the ground that the purpose for which the private property is sought to be acquired is not a public purpose at all or that the exercise of power is vitiated due to mala fides or that the authorities concerned did not apply their mind to the relevant factors and the records.

(vii) The exercise of power by the Government under Section 17(1) does not necessarily result in exclusion of Section 5-A of the Act in terms of which any person interested in land can file objection and is entitled to be heard in support of his objection. The use of word "may" in sub-section (4) of Section 17 makes it clear that it merely enables the Government to direct that the provisions of Section 5-A would not apply to the cases covered under sub-section (1) or (2) of Section 17. In other words, invoking of Section 17(4) is not a necessary concomitant of the exercise of power under Section 17(1).

(viii) The acquisition of land for residential, commercial, industrial or institutional purposes can be treated as an acquisition for public purposes within the meaning of Section 4 but that, by itself, does not justify the exercise of power by the Government under Sections 17(1) and/or 17(4). The court can take judicial notice of the fact that planning, execution and implementation of the schemes relating to development of residential, commercial, industrial or institutional areas usually take few years. Therefore, the private property cannot be acquired for such

purpose by invoking the urgency provision contained in Section 17(1). In any case, exclusion of the rule of audi alteram partem embodied in Sections 5-A(1) and (2) is not at all warranted in such matters.

(ix) If land is acquired for the benefit of private persons, the court should view the invoking of Sections 17(1) and/or 17(4) with suspicion and carefully scrutinise the relevant record before adjudicating upon the legality of such acquisition."

23. In light of the above legal position which is equally applicable to Section 17(1) and (4) of the 1953 Act, we may turn to the fact situation of the present matter. Section 4(5) notice under the 1953 Act was issued by the state government in 1980. For almost seven years, no steps were taken in taking the acquisition proceedings pursuant to the Section 4(5) notice to the logical conclusion. Even inquiry under Section 5-A was not commenced, much less completed. Abruptly on 19.03.1987, without following the procedure contemplated in Section 5-A, the declaration under Section 6 was made and in that notification the state government stated that it has invoked its power of urgency under Section 17(1) and dispensed with inquiry under Section 5-A in exercise of its power under Section 17(4). Can it be said that an inquiry under Section 5-A could not have been completed in all these years? We think that it could have been done easily and conveniently in few months leave aside few years. There were not large number of owners or persons interested in respect of the subject land. Section 5-A, which gives a very limited right to an owner/person interested, is not an empty formality. The substantial right under Section 5-A is the only right given to an owner/person interested to object to the acquisition proceedings. Such right ought not to be taken away by the State Government sans real urgency. The strong arm of the government is not meant to be used nor it should be used against a citizen in appropriating the property against his

consent without giving him right to file objections as incorporated under Section 5-A on any ostensible ground. The dispensation of enquiry under Section 17(4) has to be founded on considerations germane to the purpose and not in a routine manner. Unless the circumstances warrant immediate possession, there cannot be any justification in dispensing with an enquiry under Section 5-A. As has been stated by this Court in Anand Singh4, elimination of enquiry under Section 5-A must only be in deserving and in the cases of real urgency. Being an exceptional power, the government must be circumspect in exercising power of urgency.

24. In *Anand Singh*[4], dealing with the issue whether the pre-notification and post-notification delay would render the invocation of urgency power void, this Court said that such delay would have material bearing on the question of invocation of urgency power, more so, in a situation where no material has been placed by the appropriate government before the Court justifying that urgency was of such nature that necessitated elimination of inquiry under Section 5-A.

25. In the counter affidavit filed on behalf of the respondent nos. 1 to 3 before this Court, in respect of invocation of power of urgency under Section 17(1) and dispensation of inquiry under Section 17(4), it is stated as follows:

> "…….. Section 17 of the Rajasthan Land Acquisition Act which is a code containing complete procedure for acquisition made under the said provision in case of urgency. In the present petition, urgency of the acquisition has been shown by the respondent. For the purpose of public interest, as a bus stand was to be put up, hence the nature of urgency is quite apparent.
>
> The government issued notification under Section 6 read with 17(4) of the Act on 19.03.1987 under the compulsory need of the land ……..".

26. The counter affidavit filed by the respondent no. 4, i.e., Rajasthan State Road Transport Corporation is not relevant as Section 17 confers power of urgency only on the state government alone and it is the state government that has to justify that the urgency was so imminent that dispensation of inquiry under Section 5-A was necessary.

27. The explanation by the state government unsupported by any material indicates that the state government feels that power conferred on it under Section 17(1) and (4) is unbridled and uncontrolled. The state government seems to have some misconception that in the absence of any time limit prescribed in Section 17(1) and (4) for exercise of such power after issuance of notice under Section 4 of the 1953 Act, it can invoke the power of urgency whenever it wants. We are afraid the whole understanding of Section 17 by the state government is fallacious. This Court has time and again said with regard to Section 17(1) read with Section 17 (4) of the 1894 Act that the provisions contained therein confer extraordinary power upon the state to appropriate the private property without complying with the mandate of Section 5-A and, therefore, these provisions can be invoked only when the purpose of acquisition cannot brook the delay of even few weeks or months. This principle equally applies to the exercise of power under Section 17(1) and (4) of the 1953 Act. The state government, therefore, has to apply its mind before it invokes its power of urgency and dispensation of inquiry under Section 5-A that the compliance of the mandate of Section 5-A may lead to precious loss of time which may defeat the purpose for which land is sought to be acquired. Any construction of building (institutional, industrial, residential, commercial etc.) takes some time and, therefore, acquisition of land for such purpose can always brook delay of few months. Ordinarily, invocation of power of urgency by the state government for such acquisition may not be legally sustainable.

28. In this case, as noted above, the preliminary notification

under Section 4 was issued on 01.5.1980. After lapse of about 7 years on 19.03.1987, one fine morning the state government issued declaration under Section 6 without complying with the mandate of Section 5-A and in that declaration it was stated that it has invoked its powers conferred under Section 17(1) read with Section 17 (4) of the 1953 Act and dispensed with the provisions of Section 5-A. Had the state government intended to hold and complete the inquiry under Section 5-A, it could have been done in few months. However, no steps for commencement of the inquiry under Section 5-A were even taken by the state government. We find that a very valuable right conferred on the land owner/person interested under Section 5-A has been taken away without any justification. It is so because the bus stand construction would have taken some time. The exercise of the power by the state government under section 17(1) read with Section 17(4) of the 1953 Act and dispensation of inquiry under Section 5-A can not be legally sustained and has to be declared as such.

29. Now, coming to the first question, it will be seen that preliminary notification under Section 4 was issued on 01.05.1980. At the time of issuance of the preliminary notification, the 1953 Act did not prescribe any time limit for issuance of declaration under Section 6. However, with effect from 27.06.1981 by the 1981 Amendment Act, Section 6 was amended and a proviso was inserted that no declaration in respect of any land covered by notice under Section 4, sub-section (5), given after the commencement of the 1981 Amendment Act shall be made after the expiry of three years from the date of giving of such notice. This proviso is obviously applicable to the acquisition proceedings initiated after coming into force of the 1981 Amendment Act and has no application to the present fact situation. As regards the acquisition proceedings which had already commenced by issuance of preliminary notification before coming into force of the 1981 Amendment Act, Section 5(1)(b) of the 1981 Amendment Act, inter alia, provides that acquisition pursuant to such preliminary

notification may be completed after commencement of the 1981 Amendment Act and no such acquisition and no action taken or thing done including any order made, agreement entered into or notice given, whether before or after such commencement, in connection with such acquisition shall be deemed to be invalid merely on the grounds referred to in clause (a) or any one of them. Sub-section (2) of Section 5 of the 1981 Amendment Act, however, provides that notwithstanding anything contained in clause (b) of sub-section (1), no declaration under Section 6 of the 1953 Act in respect of any land for the acquisition of which notice under sub-section (5) of Section 4 has been given before the commencement of the 1981 Amendment Act shall be made after the expiry of two years from the commencement of the 1981 Amendment Act. Sub-section (2) of Section 5 of the 1981 Amendment Act begins with non obstante clause. Section 5(2) of the 1981 Amendment Act thus mandates that no declaration under Section 6 in respect of the notice issued under Section 4(5) before the commencement of the 1981 Amendment Act shall be made after expiry of two years from the commencement of the said Act. The provision leaves no manner of doubt that two years' time prescribed for making declaration under Section 6 in respect of the notice issued under Section 4(5) prior to the commencement of the 1981 Amendment Act is mandatory and permits no departure. This is clear from the words "no declaration" and "shall be made" used in Section 5(2). The intention of the legislature admits of no ambiguity and it is clear that in respect of the notice issued under Section 4(5) before the commencement of the 1981 Amendment Act, it is obligatory on the state government to make declaration on or before the expiry of two years from the commencement of the 1981 Amendment Act. The provision is imperative in nature and has to be followed as it lays down the maximum time limit within which the declaration under Section 6 of the 1953 Act can be made in respect of the notice under Section 4(5) issued before the commencement of the 1981 Amendment Act.

30. On behalf of the respondents, two decisions of the Rajasthan High Court, one, *Indrapuri Grah Nirman Sahakari Samiti Ltd. v. State of Rajasthan and Others*[18] and the other, *Chain Singh and etc., v. State of Rajasthan and Others*[19] were cited. We are afraid insofar as *Indrapuri Grah Nirman Sahakari Samiti Ltd.*[18] is concerned, it has no application whatsoever. As regards *Chain Singh*[19], the Division Bench of the Rajasthan High Court was concerned with the provisions of the Land Acquisition (Rajasthan Amendment) Act, 1987 amending the 1894 Act. The provisions under consideration before the Rajasthan High Court in *Chain Singh*[19] were materially different and, therefore, that decision is of no help to the respondents.

31. Learned counsel for the respondents also cited a decision of this Court in *Pesara Pushapmala Reddy v. G. Veera Swamy and Others*[20]. In Pesara Pushpamala Reddy20, this Court was concerned with the questions whether it was mandatory for the special tribunal or the special court to call for a report of the Mandal Revenue Officer before taking cognizance of a case under the Andhra Pradesh Land Grabbing (Prohibition) Act, 1982 (for short, "Land Grabbing Act") and whether it was mandatory for the special tribunal or the special court to publish a notification in the gazette notifying the fact of cognizance of a case under the Act. This Court considered the provisions of the Land Grabbing Act. In our view, *Pesara Pushpamala Reddy*[20] is not even remotely relevant for the present case and has no application at all.

32. Having regard to clear and unambiguous mandate of Section 5(2) of the 1981 Amendment Act that no declaration under Section 6 of the 1953 Act in respect of any land for the acquisition of which notice under Section 4(5) has been given before the commencement of the 1981 Amendment Act shall be made after the expiry of two years from the commencement

18. 2002 (3) WLN 122.

19. AIR 1991 Rajasthan 17.

20. (2011) 4 SCC 306.

of the 1981 Amendment Act, it has to be held and we hold that preliminary notification dated 01.05.1980, which was followed by notice under Section 4(5) before the commencement of the 1981 Amendment Act, has lapsed and does not survive since declaration under Section 6 has been made much beyond the time limit prescribed in law.

33. Civil appeal is, accordingly, allowed. The impugned orders are set aside. It is declared that preliminary notification dated 01.05.1980 has lapsed and the declaration made on 19.03.1987 is legally unsustainable. If possession of the subject land has been taken from the appellants, the same shall be restored to them without any delay. No orders as to costs.

R.P. Appeal allowed.

STATE OF ORISSA & ORS.
v.
M/S MESCO STEELS LTD. & ANR.
(Civil Appeal No. 2206 of 2013)

MARCH 6, 2013

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

Constitution of India, 1950:

Art. 226 – Writ petition – Challenging intra-departmental communication proposing to consider re-allocation of lease area for mining iron ore – Held: High Court was in error in proceeding on an assumption that a final decision had been taken and in quashing what was no more than an inter-departmental communication constituting at best a step in the process of taking a final decision by the Government – The writ petition in that view was pre-mature and ought to have been disposed of as such – Mines and minerals – Iron ore.

Art. 226 – Writ petition – Order by High Court to maintain status quo – Issuance of show cause notice by government – Held: Issue of show cause notice did not interfere with status quo – Once the show cause notice was issued, High Court could have directed the respondent-company to respond to the same and disposed of the writ petition reserving liberty to it to take recourse to appropriate remedy – Since the show cause notice is not without jurisdiction, Government to consider the reply that may be submitted by respondent and pass a reasoned order on the subject.

In response to the advertisement inviting applications for grant of prospecting licenses and mining leases for iron ore in the notified area, the respondent-company and others submitted applications. It was required that the lessee would set up two steel plants and

would utilize the entire iron ore extracted from the lease area for meeting the captive requirement of such steel plants and no commercial tracking of the mining material would be carried out by it. Ultimately, by letter dated 17.3.2000, the State Government sanctioned the grant of lease in favour of the respondent-company. However, when it was pointed out that some area in the proposed lease in favour of the respondent-company was overlapping with the area recommended for allotment to the Orissa Mining Corporation Ltd. and some area came under forest land attracting the Provisions of Forest Conservation Act, 1980, the Director of Mining, by letter dated 19.9.2006 recommended re-allocation of resources based on the requirement of iron ore for the existing steel plant set up by the respondent-company. It was further recommended that the respondent-company should not be permitted to carry on any trading activity in iron ore removed from the area to be allocated in its favour. This intra departmental communication was challenged by the respondent-company in a writ petition before the High Court, which, by order dated 1.2.2007, directed maintenance of status quo. However, the State Government issued a notice dated 6.2.2007 to the respondent-company to show cause as to why the overlapping area of 469.25 hectares of State PSU and 921.258 hectares granted in excess of the captive requirement of the respondent-company be not deducted from total mining lease area of 1519.980 hectares. The High Court ignored the show cause notice, quashed the letter dated 19.9.2006, and directed the State Government to execute a formal mining lease in favour of the respondent-company.

In the instant appeal filed by the State Government, the questions for consideration before the High Court were: (1) Whether the writ petition filed by the respondent-company was premature, the same having

been filed against an inter-departmental communication that did not finally determine any right or obligation of the parties?; (2) Whether the show cause notice could be ignored by the High Court simply because it had been issued in violation of the interim order passed by it requiring the parties to maintain status quo?; and (3)Whether the show cause notice was without jurisdiction and could, therefore, be quashed?

Allowing the appeal, the Court

HELD:

Question No.1

1. It is obvious from a conjoint reading of letter dated 12.1.2006 and communication dated 19.9.2006 sent by the Director of Mines in response thereto that a final decision on the subject had yet to be taken by the Government. It is only after the Government provisionally decided to resume the area in part or full that a show cause notice could have been issued. To put the matter beyond any pale of controversy, an unequivocal statement has been made at the bar on behalf of the State Government that no final decision regarding resumption of any part of the lease area has been taken by the State Government so far and all that had transpired till date must necessarily be taken as provisional. Such being the case, the High Court was in error in proceeding on an assumption that a final decision had been taken and in quashing what was no more than an inter-departmental communication constituting at best a step in the process of taking a final decision by the Government. The writ petition in that view was pre-mature and ought to have been disposed of as such. [para 15] [258-B, E-H, 259-A]

Question No.2

2. It is true that the High Court had by an interlocutory

order directed the parties to maintain status quo, but the issue of show cause notice did not interfere with the status quo. It simply enabled the respondent-company to respond to the proposed action. However, once the show cause notice was issued, the High Court could have directed the respondent-company to respond to the same and disposed of the writ petition reserving liberty to it to take recourse to such remedy as may have been considered suitable by it depending upon the final order that the Government passed on the said notice. The respondent-company had not assailed the validity of the show cause notice on the ground of jurisdiction or otherwise. The High Court could not simply ignore the notice even if it was issued in breach of the order passed by it. The High Court could have taken the show cause notice as a reason to relegate the parties to a procedure which was just and fair and in which the respondent could urge all its contentions whether on facts or in law. [para 16] [259-B-E, F-H]

Question No.3

3. So long as the show cause notice is not without jurisdiction as indeed it does not appear to be so, the question whether the grounds taken in the same provide a good basis for proposed action can be left open for the Government to decide. The Government would carefully consider the reply which the respondent may submit to the said show cause notice and pass a reasoned order on the subject. [para 18] [260-D-E, G]

T.N. Godavarman Thirumulkpad v. Union of India & Ors. **1996 (9) Suppl. SCR 982 = (1997) 2 SCC 267 – cited.**

Case Law Reference:

1996 (9) Suppl. SCR 982	**cited**	**para 12**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2206 of 2013.

From the Judgment & Order dated 16.05.2008 of the High Court of Orissa at Cuttack in W.P. (C) No. 14044 of 2006.

U.U. Lalit, Kirti Renu Misra, Shibashish Misra for the Appellants.

Rakesh Dwivedi, Sanjit Mohanty, Naveen Kumar, Nikhil Sharma, Preetika Dwivedi, R.K. Rathore, Shailender Saini, A. Dev Kumar, D.S. Mahra 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 16th May, 2008 passed by the High Court of Orissa at Cuttack whereby Writ Petition No.14044 of 2006 filed by the respondent-company has been allowed, an inter-departmental communication in the form of a letter dated 19th September, 2006 addressed by the Director of Mines to Joint Secretary to Government of Orissa quashed and by writ of mandamus the State Government directed to execute a mining lease for an area measuring 1519.980 hectares in favour of the respondent-company.

3. By Notification No.647/91 dated 23rd August, 1991, the Government of Orissa de-reserved and threw open Iron/ Manganese Ore areas spreading over 282.46 square miles in five blocks located in Keonjhar and Sundergarh districts in the State. Applications were then invited from interested private parties in terms of Rule 59 of the Mineral Concession Rules, 1960 for grant of prospecting licenses and mining leases in respect of the said blocks. The exercise was, it appears, intended to boost the economy of the State by ensuring optimum utilisation of its mineral reserves and in the process generating employment opportunities for the predominantly

tribal population inhabiting the two districts of the State. The invitation to apply for leases and to set up steel plants was open to all leading steel manufacturers.

4. In response to the advertisement notice applications were received from different parties including one filed by respondent-Mesco Steels Ltd. These applications appear to have been evaluated, culminating in a conditional recommendation made by the State Government in favour of the respondent-company. One of the conditions which the State Government imposed in exercise of its power under Rule 27 (3) of the Mineral Concession Rules, 1960 required that the lessee shall set up two full-fledged Steel Plants within a reasonable time to be intimated by the lessee at the time of issue of the terms and conditions for the grant of the proposed mining lease. The other condition required that the lessee would utilise the entire iron ore extracted from the lease area for meeting the captive requirement of the Steel Plants to be set up at Duburi and Jakhapura and that no commercial trading of the mining material shall be carried out by it.

5. By an order dated 7th January, 1999 the Government of India, Ministry of Steel and Mines, Department of Mines, conveyed the approval of the Central Government for grant of the mining lease for extraction of iron ore from an area measuring 1011.480 hectares in villages Kadakala and Luhakala besides an area measuring 508.500 hectares in villages Sundara and Pidapokhari in district Keonjhar for a period of 30 years. The approval was subject to the State Government ensuring compliance of the amended provisions of the Mines and Minerals (Regulation and Development) Act, 1957 and the Rules made thereunder besides the provisions of the Forest (Conservation) Act, 1980 and Notification dated 27th January, 1994 issued in terms thereof.

6. On receipt of the approval from the Central Government the State Government conveyed to the respondent-company the terms and conditions subject to which it proposed to grant a

mining lease for mining of iron ore from the area mentioned above which included 377.690 hectares of forest land in villages Sundara and Pidapokhari of Keonjhar district. A letter dated 8th February, 1999 issued by the State Government to the respondent-company stipulated the terms and conditions that would govern the proposed mining lease and required the respondent-company to convey its acceptance to the same. In response, the respondent-company by its letter dated 15th February, 1999 conveyed its unconditional acceptance of the terms and conditions stipulated in the letter mentioned earlier. The acceptance letter was followed by another letter dated 13th March, 1999 by which the respondent-company informed the State Government that it had already taken steps for preparation of a mining plan and initiated action for preparation and approval of de-reservation proposal for the mining lease in village Sundara and Pidapokhari over an area measuring 508.500 hectares said to be forest land. What is significant is that the respondent-company also pointed out that it was on the verge of completion of its Steel Plant at Kalinga Nagar, Industrial Complex, Sukinda, P.O. Danagadi, District Jajpur, Orissa which was expected to be commissioned by April/May, 1999. The State Government eventually sanctioned the grant of a lease in favour of the respondent-company to the extent indicated earlier in terms of its order dated 17th March, 1999.

7. By a letter dated 19th June, 2000 addressed to the respondent-company the State Government pointed out that the company had failed to submit the required mining plan and obtain the approval of Ministry of Environment and Forest, Government of India, in regard to forest land involved in the proposed mining lease despite extension of time allowed to the respondent-company by the Government in terms of its letter dated 11th October, 1999. The State Government further pointed out that on account of the company's inaction in the matter of setting up the proposed two steel plants, IDCO had initiated action for cancellation of allotment of 3100 acres of land allotted in favour of MESCO Kalinga Steel Plant, the sister

concern of the respondent-company, for the proposed steel plant, captive power plant and township. The letter in that backdrop invited the respondent-company for a personal hearing in terms of Rule 26(1) of the Mineral Concessions Rules, 1960 to discuss whether the iron ore required by the respondent-company for the steel plant which was already in existence could be assessed to enable the company to retain the iron ore deposits required for the said plant and restore back the remainder to the Government.

8. The respondent-company acknowledged receipt of the letter above mentioned and, inter alia, pointed out that the mining plan for the entire area had been prepared and submitted separately on 31st January, 2000. It was also pointed out that out of the total extent covered by the proposed lease only 508.500 hectares was forest land for which extent alone was a diversion proposal required to be submitted. It also referred to certain other steps taken by the company like survey and demarcation of the area which was underway. More importantly, the company stated that it had already invested Rs.57.12 crores in the project but had to put the same on hold on account of the steel market passing through a lean phase because of which all steel majors were facing problems due to a glut in the market. The respondent-company claimed to have undertaken substantial work for developing the mine including financial participation by a Canadian company and assured the Government that the proposed project would create enormous job opportunities for the people of Orissa.

9. For nearly four years thereafter the matter appears to have remained pending for a final decision at different administrative levels in the Government. What is significant is that by letter dated 26th May, 2004 the Director of Mines, Orissa, wrote to the Joint Secretary, Department of Steel and Mines, Government of Orissa, inter alia, pointing out that an area measuring 469.25 hectares included in the proposed lease in favour of the respondent-company was overlapping

with the area recommended for allotment to the Orissa Mining Corporation Ltd. and that even though the Government had moved for elimination of the said overlapping area in terms of Director's letter dated 1st June, 2000, no formal Government order in the matter had been received. The Director further pointed out that D.F.O., Keonjhar had reported in terms of its letters dated 15th January, 2004 and 7th February, 2004 that major portion of the surveyed and demarcated area came under Khandadhar D.P.F. and was reported to be forest land as per column 7 of the D.L.C. report to which effect an affidavit had also been filed before this Court by the State Government. It was also mentioned that the Mining Officer had reported that an area measuring 692.6953 hectares out of the surveyed and demarcated area of 802.6678 hectares came under forest land which attracted the provisions of Forest Conservation Act, 1980. Clearance from the Ministry of Environment and Forests, Government of India, was, therefore, absolutely necessary for execution of any mining lease in respect of the said area and till such time this essential pre-condition was not fulfilled, the execution of the lease deed was not legally permissible. By another letter dated 19th September, 2006, the Director of Mines recommended re-allocation of resources based on the requirement of iron ore for the existing steel plant set up by the respondent-company. It was further recommended that the respondent-company should not be permitted to carry on any trading activity in iron ore removed from the area to be allocated in its favour based on its actual requirement for the existing unit.

10. Aggrieved by the said inter-departmental communication the respondent-company filed Writ Petition No.14044 of 2006 before the High Court of Orissa at Cuttack in which the company prayed for quashing of the recommendations made by the Director of Mines proposing to reduce the lease area granted to the respondent-company and prayed for a mandamus directing the State Government to execute the mining lease in respect of the entire 1519.980 hectares of land in the villages mentioned earlier. By an order

dated 1st February, 2007 the High Court directed maintenance of status quo. Despite the said order, however, the Government of Orissa issued a notice dated 6th February, 2007 by which it called upon the respondent-company to show cause as to why the overlapping area of 469.25 hectares of the State PSU and 921.258 hectares granted in excess of the captive requirement of the unit set up by the respondent-company may not be deducted from the total mining lease area of 1519.980 granted to the company. The High Court ignored the show cause notice primarily on the ground that the same had been issued in the teeth of the interim order by which the parties had been directed to maintain status quo, and eventually came to the conclusion that the proposed reduction of the mining lease area whether on account of the alleged overlapping of the areas with the area approved for Orissa Mining Corporation or on account of the failure of the respondent-company and its sister concern to set up the second steel plant was not justified. The High Court held that although the State Government had not issued any final order so far regarding the deduction of the area yet since a final decision appeared to have been taken by it, thereby implying that the issue of a show cause notice after taking of such a decision was a mere formality. In coming to that conclusion, the High Court placed reliance upon paragraph 8 of the counter affidavit filed by the State Government before the High Court. The High Court also held that in the absence of a mining lease in favour of the respondent-company, it could not take the risk of setting up of a steel plant. The High Court accordingly quashed letter dated 19th September, 2006 and by mandamus directed the State Government to execute a formal mining lease in favour of the respondent-company. The present appeal assails the correctness of the said judgment of the High Court as already noticed earlier.

11. Appearing for the appellant, Mr. U.U. Lalit, learned senior counsel, made a three-fold submission before us. *Firstly,* he contended that the writ petition filed by the respondent-company was manifestly premature as the

Government had not taken any final decision that could have been challenged by the respondent-company nor was the writ petition, according to the learned counsel, maintainable against a mere inter-departmental letter dated 19th September, 2006, which did not by itself finally decide any right or obligation of the parties so as to furnish a cause of action to the respondent to challenge the same in the extra ordinary writ jurisdiction of the High Court. *Secondly,* it was contended that even if the letter could be described as a final decision taken by the State Government in regard to the reduction of the lease area, the respondent-company ought to have taken recourse to proceedings under Section 30 of the Act before the Central Government instead of rushing to the High Court in a writ petition. *Thirdly,* it was contended that the very issue of a show cause notice to the respondent-company suggesting reduction of the lease area after assessment of the actual requirement by reference to the plant already set up, meant that the Government had not taken any final decision in the matter and that the respondent-company could say whatever it intended to say in opposition to the action proposed in the show cause notice where upon the Government could notify a final order on the same, which order could then be challenged by the respondent-company either before the Central Government or before the High Court in a writ petition if otherwise permissible. Inasmuch as the High Court ignored the show cause notice and proceeded on the assumption that the same was an exercise in futility, it fell in a serious error, argued Mr. Lalit. The proper course, according to the learned counsel, was to allow the State Government to take a final view on the show cause notice after considering the response which the respondent-company may have to make.

12. On behalf of the respondent-company it was contended by Mr. Rakesh Dwivedi, learned senior counsel, that although the show cause notice issued by the appellant-State had not been specifically challenged in the writ proceedings before the High Court, this Court could look into the notice and examine

whether the same had been validly issued on grounds and material that are legally tenable. He urged that although the State Government may be competent to recall its recommendations in exceptional situations, any such exercise of powers of recall can never be exercised arbitrarily or whimsically. At any rate, the exercise of power of recall was, according to the learned counsel, wholly unjustified in the facts and circumstances of this case as the whole attempt of the Government appeared to be to somehow deprive the respondent-company of the benefit of the mining lease already sanctioned in its favour. It was also contended that the question of overlapping of the area had since been examined and rejected by the State Government as was apparent from the Minutes of the Meeting held in the office of the Chief Minister on 29th October, 2001, a copy whereof has been placed on record as Annexure R-1. It was also contended that the State Government was making much ado about nothing regarding the setting up of the second steel plant and that the same was no more than a pretext to deny to the respondent-company its rightful due under the sanction order issued by the Central Government and the grant made by the State. It was contended by Mr. Dwivedi that the requirement of an approved mining plan which was one of the conditions for the grant of lease had already been complied with while the execution of a lease deed could be made subject to the clearance of the project and the grant of a no objection by the Ministry of Environment and Forest under Section 2 of the Forest (Conservation) Act, 1980. The order passed by the High Court could to that extent be modified, argued Mr. Dwivedi. Inasmuch as the High Court had not taken note of the requirement of such clearance being essential not only under the Act aforementioned but also because of the directions issued by this Court in *T.N. Godavarman Thirumulkpad v. Union of India & Ors.* (1997) 2 SCC 267, it had no doubt committed a mistake but that did not warrant, setting aside of the entire order passed by the High Court.

13. We have given our anxious consideration to the submissions made at the bar. The following questions, in our opinion, arise for determination:

(1) Whether the writ petition filed by the respondent-company was premature, the same having been filed against an inter-departmental communication that did not finally determine any right or obligation of the parties?

(2) Whether the show cause notice could be ignored by the High Court simply because it had been issued in violation of the interim order passed by it requiring the parties to maintain status quo?

(3) Whether the show cause notice was without jurisdiction and could, therefore, be quashed?

14. We propose to deal with the questions ad seriatim.

Regarding Question No.1

15. The writ petition, as already noticed above, was directed against a communication that had emanated from the office of Director of Mines and brought forward certain factual aspects relevant to the question whether a lease deed could be immediately executed in favour of the respondent-company. A careful reading of the said communication would show that it was issued in pursuance of a letter dated 12th January, 2006 from the Joint Secretary, Government of Orissa to the Director of Mines and another letter dated 29th August, 2006. By the former letter the Joint Secretary to the Government had instructed the Director of Mines to take action pursuant to certain directions issued by the Chief Minister of Orissa. This included making a real assessment of the requirement of respondent-company and permitting execution of a lease deed subject to clearance of the Ministry of Environment and Forest, Government of India. The instructions issued to the Director of Mines also required him to resume the excess area for reallocation of the same to other deserving parties. The

Director of Mines had responded to the said communication and assessed the mineral deposits in the area by reference to maps and surveys and made a recommendation back to the State Government. It is obvious from a conjoint reading of letter dated 12th January, 2006 and communication dated 19th September, 2006 sent by the Director of Mines in response thereto that a final decision on the subject had yet to be taken by the Government, no matter the Government may have provisionally decided to follow the line of action indicated in its communication dated 12th January, 2006 issued under the signature of the Joint Secretary, Department of Steel and Mines. It is noteworthy that there was no challenge to the communication dated 12th January, 2006 before the High Court nor was any material placed before us to suggest that any final decision was ever taken by the Government on the question of deduction of the area granted in favour of the respondent so as to render the process of issue of show cause notice for hearing the respondent-company an exercise in futility. On the contrary, the issue of the show cause notice setting out the reasons that impelled the Government to claim resumption of a part of the proposed lease area from the respondent-company clearly suggested that the entire process leading up to the issue of the show cause notice was tentative and no final decision on the subject had been taken at any level. It is only after the Government provisionally decided to resume the area in part or full that a show cause notice could have been issued. To put the matter beyond any pale of controversy, Mr. Lalit made an unequivocal statement at the bar on behalf of the State Government that no final decision regarding resumption of any part of the lease area has been taken by the State Government so far and all that had transpired till date must necessarily be taken as provisional. Such being the case the High Court was in error in proceeding on an assumption that a final decision had been taken and in quashing what was no more than an inter-departmental communication constituting at best a step in the process of taking a final decision by the Government. The writ petition in that view was pre-mature and ought to have been

disposed of as such. Our answer to question No.1 is accordingly in the affirmative.

Regarding Question No.2

16. In the light of what we have said while deciding question No.1 above, this question should not hold us for long. It is true that the High Court had by an interlocutory order directed the parties to maintain status quo, but whether the said order had the effect of preventing the State Government from issuing a show cause notice was arguable. The issue of show cause notice did not interfere with the status quo. It simply enabled the respondent-company to respond to the proposed action. Be that as it may, once the show cause notice was issued, the High Court could have directed the respondent-company to respond to the same and disposed of the writ petition reserving liberty to it to take recourse to such remedy as may have been considered suitable by it depending upon the final order that the Government passed on the said notice. What was significant was that the respondent-company had not assailed the validity of the show cause notice on the ground of jurisdiction or otherwise. If the validity of the show cause notice was itself in question on the ground that the Government had no jurisdiction to issue the same, nothing prevented the company from maintaining a writ petition and challenging the notice on that ground. The High Court would in that event have had an opportunity to examine the validity of the notice. In the absence of any such challenge the High Court could not simply ignore the notice even if it was issued in breach of the order passed by the Court. It was one thing to prevent further steps being taken pursuant to the notice issued by the Government but an entirely different thing to consider the notice to be non est in the eye of law. The High Court could have taken the show cause notice as a reason to relegate the parties to a procedure which was just and fair and in which the respondent could urge all its contentions whether on facts or in law. Our answer to question No.2 is, therefore, in the negative.

Regarding Question No.3

17. Although it is not necessary for us now to examine the question of validity of the show cause notice as the same was not questioned before the High Court in the writ petition filed by the respondent-company, we may to the credit of Mr. Dwivedi, learned senior counsel appearing for the respondent-company, mention that he did not seriously challenge the validity of the notice on the ground of jurisdiction. Mr. Dwivedi fairly conceded that the State Government could, in appropriate situations, exercise the option of recalling or modifying its recommendations but contended that the present case did not present a situation that could justify such a recall.

18. We do not propose to make any comment or express any opinion to the merits of the show cause notice. So long as the notice is not without jurisdiction as indeed it does not appear to be so, the question whether the grounds taken in the same provide a good basis for proposed action can be left open for the Government to decide. All that we need say is that learned counsel for the parties made detailed submissions in regard to the grounds given in the notice and the validity thereof from their respective points of view and in support of their respective versions. Some of these grounds and submissions were quite attractive also. But so long as the matter is yet to be examined by the State Government, we consider it unnecessary to prejudice the issues or express any opinion about the merits of the said contentions on either side. The proper course, in our opinion, would be to leave the contentions available to the parties open for being determined by competent authority in the Government who would, in our opinion, do well to carefully consider the reply which the respondent may submit to the said show cause notice and pass a reasoned order on the subject. Question No.3 is answered accordingly.

19. In the result we allow this appeal, set aside the judgment and order passed by the High Court and direct that the respondent-company shall submit its reply to the show

cause notice dated 6th February, 2007 issued by the State Government within three months from today. The Government may then upon consideration of the reply so submitted pass a reasoned order on the subject within two months thereafter under intimation to the respondent. If the order so made is, for any reason found to be unacceptable by the respondent-company, it shall have the liberty to take recourse to appropriate proceedings before an appropriate forum in accordance with law.

20. Parties are left to bear their own costs.

R.P. Appeal allowed.

POURNIMA SURYAKANT PAWAR

v.

STATE OF MAHARASHTRA AND OTHERS

(Special Leave Petition (Civil) No. 3910 of 2008)

MARCH 7, 2013

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

Scheduled Caste / Scheduled Tribe - Caste scrutiny - Claim of petitioners that they belonged to Scheduled Tribe - Rejected by Scheduled Tribe Certificate Scrutiny Committee - Order upheld by High Court - On appeal, held: Documentary evidence showed that family members of the petitioners did not belong to the 'Thakar Scheduled Tribe' as claimed by them - Petitioners deliberately withheld their caste at the time of making application before the Caste Scrutiny Committee - The Scrutiny Committee also noticed that the petitioners failed in the affinity test as the information supplied by them was at variance with the information given by them in Court - Documents discovered by the Vigilance Cell relating to local school register clearly proved that the caste of the family members and predecessors of the petitioners was recorded as 'Bhat', 'Thakar', 'Marathe' and 'Hindu Marathe' - Conclusions recorded by the Scrutiny Committee were reasonable and fully supported by the material on record - Therefore, conclusions reached by the Scrutiny Committee, and affirmed by the High Court cannot be said to be either perverse or based on no evidence.

Kumari Madhuri Patil and Another versus Addl. Commissioner, Tribal Development and Others **(1994) 6 SCC 241: 1994 (3) Suppl. SCR 50 - relied on.**

Case Law Reference:

1994 (3) Suppl. SCR 50	**relied on**	**Para 12**

CIVIL APPELLATE JURISDICTION : Special Leave Petition (Civil) No. 3910 of 2008.

From the Judgment & Order dated 08.01.2008 of the High Court of Judicature at Bombay in Writ Petition No. 6674 of 2007.

WITH

SLP (C) No. 11376 of 2010.

Naresh Kumar, Sudhanshu S. Choudhari, Asha Gopalan Nair for the Appearing Parties.

The following order of the Court was delivered by

O R D E R

1. Delay condoned in SLP(C) No.11376/2010.

2. Both the petitions are filed by two cousin (sisters) against the decision of the Scheduled Tribe Certificate Scrutiny Committee, Pune Region, Pune, (for short "Scrutiny Committee") in Case No.ICSC/MPSC/Pune-01/2006 decided on 30th July, 2007 and in Case No. TCSC/SER/PUNE/19/2006 decided on 26th March, 2009, whereby the claim of the petitioners belonging to 'Thakar, Scheduled Tribe' was rejected. Both the petitioners moved the High Court of Judicature at Bombay by way of separate writ petitions being Writ Petition No.6674 of 2007 and Writ Petition No.5231 of 2009, which were dismissed by orders, dated 8th January, 2008 and 4th November, 2009 respectively. Both the petitioners are relying on common facts in support of their claim. They are also relying on the Certificate issued to Dilip Pandurang Pawar, recognizing his caste to be "Thakar Scheduled Tribe". For the purposes of this order, we shall make a reference to the facts as pleaded by the petitioner in Writ Petition No. 6674 of 2007.

3. A perusal of the order passed by the Scrutiny Committee in the case of the petitioner in Writ Petition No.6674

of 2007 would show that she had relied upon the following documents in support of her claim:

"I. Original and attested copy of caste certificate in respect of applicant showing caste as Hindu Thakar, Scheduled Tribe bearing No.030405248, dated 11.7.2003 issued by the Deputy Collector, (C.F.C. Pune)

II. Attested copy of school leaving certificate in respect of applicant wherein caste is shown as Hindu Thakar and date of admission 02.06.88.

III. Attested copy of high school leaving certificate in respect of applicant wherein caste is shown as Hindu Thakar and date of admission 12.06.95.

IV. Attested copy of school admission abstract in respect of Laxman Tukaram Thakar (applicant's grandfather) wherein caste is shown as Thakar and date of admission is not recorded.

V. Attested copy of school leaving certificate in respect of Sakharam Tukaram Thakar (applicant's cousin grandfather) wherein caste is shown as Thakar and date of admission 23.08.23.

VI. Attested copy of caste certificate showing caste as Hindu Thakar, Scheduled Tribe and attested copy of validity certificate issued by the Scrutiny Committee, Pune vide No.TRI/TCSC/Pune-1/2001/2998, dated 19.07.2002 in respect of Dilip Pandurang Pawar (applicant's uncle). Also the original affidavit sworn by Dilip Pandurang Pawar showing the relationship with the applicant.

VII. Attested copy of death certificate in respect of Rama Pipalu Thakar (applicant's great grandfather) wherein caste is shown as Thakar and date of

death is 10.12.22.

VIII. Attested copy of death certificate in respect of Bakula Kom Tukaram Thakar (applicant's great grandmother) wherein caste is shown as Thakar and date of death is 21.10.18.

IX. Attested copy of death certificate in respect of Banu Kom Tukaram Thakar (applicant's great grandmother) wherein caste is shown as Thakar and date of death is 15.04.39.

X. Attested copy of death certificate in respect of Chandri Bap Tukaram Thakar (applicant's father's aunt) wherein caste is shown as Thakar and date of death is 10.11.17.

XI. Attested copy of death certificate in respect of Parvati Bap Tukaram Thakar (applicant's father's aunt) wherein caste is shown as Thakar and date of death is 22.11.22.

XII. Attested copy of birth certificate showing that one female child is born to Tukaram Rama Thakar (applicant's grandfather) wherein caste is shown as Thakar and date of birth is 19.11.23.

XIII. Unattested copy of death certificate in respect of Babaji Bin Ramu Thakar (applicant's relative wherein caste is shown as Thakar and date of death is 04.10.12.

XIV. Unattested copy of birth certificate in respect of Shevanti Tukaram Thakar (applicant's father's aunt) wherein caste is shown as Thakar and date of birth is 11.04.33."

4. The Vigilance Cell conducted separate enquiries into

the claim made by both the petitioners. During the course of enquiry, statement of Suryakant Pandurang Pawar (petitioner's father) in Writ Petition No.6674 of 2007, was recorded on 31st January, 2007, in which he stated that:

> "Kuidaivat is Palicha Khandoba, Jejuricha Khandoba and Rekaidevi. From our family one person use to go to sing Banya once in every year at Khandoba of Pali. My mother knows to sing 'Banya' in various occasions. The surnames in our community are Toraskar, Gavali, Gaikwad, Pawar, Shinde, Savant, Bhosale, Londhe, Salunke, Kadam, Chavan etc. The main festivals of our community are Divali, Dasara, Gauri Ganpati, Holi, Akshaytrutiya, Gudhipadava, etc. There is no dowry system in our community. The marriages in our community are performed by the Bramhins. I am unaware about Umbarya-Umbari, Pitarya-Pitari, Avanji, Padekhot, Phadki etc. customs of our community. In our community, the cow's milk is extracted and we drink it."

5. The Vigilance Cell also examined the school admission general register issued by the Head Master, Z.P. Primary School, Kudal, Taluka Javali, District Satara, the abstract of which reveals the following information:

"Sr. No.	Regl. No./ Book No.	Name of the Student	Caste	Date of Admission	Relation with the Applicant
1.	15/1	Tukaram Bin Rama Thakar	Bhat	1.8.1890	Great-grand--father
2.	184/1	Hariba Bharu Thakar	Bhat	5.3.1891	Relative
3.	108/1	Hariba Narayan Thakar	Bhat	10.10.1892	Relative

4.	38/1	Tukaram Rama Thakar	Bhat	1.8.1890	Great grand--father
5.	169/1	Tukaram Bin Rama Thakar	Bhat	1.8.1890	Great grand--father
6.	8/2	Ramchandra Tukaram Pawar	Marathe	04.07.08	Cousin Grand--father
7.	151/2	Laxman Tukaram Thakar	Thakar	4.1.1918	Relative
8.	60/3	Sakharam Tukaram Thakar	Thakar	23.08.1923	Cousin grand--father
9.	354/3	Raghunath Tukaram Pawar	Hindu Marathe	25.06.1929	Cousin grand--father
10.	30/4	Anusaya Ni. Tukaram Pawar	Hindu Marathe	10.03.1919	Grandfather's sister
11.	32/4	Tara Tukaram Pawar	Hindu Marathe	27.06.1941	Grandfather's sister"

6. In order to comply with the rules of natural justice, a copy of the aforesaid vigilance enquiry report was served on the applicant – petitioner and she was asked to submit her response to the same. The petitioner was also called for personal hearing on 6th March, 2007. The petitioner appeared before the Scrutiny Committee on 20th March, 2007. In her response, she stated that :

"b) The name of the great grandfather has been reflected

three times and his caste has been mentioned as Bhat. In old records people were identified by the name of their caste and it was surname which is used to be written as caste. Therefore caste of the great grandfather came to be entered as Thakar. However, inadvertently the caste is recorded as 'Bhat'. Save and except this is plated (sic) entry specific of my grandfather namely Laxman Tukaram Thakar mentions his caste as Thakar."

7. Although first part of the last sentence does not make sense, we presume that she has asserted that 'Bhat' has been wrongly stated to be caste of her grandfather. In its order dated 30th July, 2007, the Scrutiny Committee also noticed in Paragraph 5 as follows:-

"5. At the time of personal hearing, the applicant has filled in 'Sunavani Patrika' and given following information about traits, characteristics, customs and traditions of her community:-

a) Traditional deity of their community is 'Waghdev'

b) Kuldaivat of their family is 'Pimpreshwar, Wakadeshwar'

c) Main festivals of their community are 'Dasara' Holi, Divali.

d) Jat Panchayat of their community is "Padakhot, Jamatganga/Panchayat"

e) Traditional dance of their community is "Kambad Nach, Dhol Nach, Dhamadi Nach, Gauri Nach, Bhondala Nach.'"

8. Upon examination of the entire material on record, the Scrutiny Committee, in both the matters, rejected the claim of the petitioners.

9. Mr. Sudhanshu S. Choudhari, learned counsel for the petitioners submitted that the Scrutiny Committee was not

justified in ignoring the voluminous record produced by the petitioners, which pertained to the pre-constitution period showing that the petitioners belonged to 'Thakar Scheduled Tribe'. He submitted that as the Committee was not headed by a Judicial Officer, the High Court ought to have scrutinized the orders of the Scrutiny Committee with care and caution. The High Court was not justified in ignoring the crucial issue that the same Scrutiny Committee had verified the cast claim of Dilip Pandurang Pawar, the paternal uncle of the petitioners, in both the matters. The Scrutiny Committee without any justification discarded all the documentary evidence produced by the petitioners on the ground that the oldest record i.e. school record of Shri Tukaram Thakar, great grandfather of the petitioners dated 1st August, 1890 recorded his caste as 'Bhat'. The decision rendered by the Committee in both the cases, being arbitrary, was liable to be set aside.

10. Ms. Asha Gopalan Nair, learned counsel appearing for the respondents, had pointed out that the Scrutiny Committee, after considering all the documents, decided the claim of the petitioners. She has made reference to the report of the Vigilance Officer, which indicated that from 1st August, 1890 to 27th June, 1941, the caste of the petitioners' relatives from paternal side, is clearly recorded as 'Bhat', 'Marathe', 'Thakar', 'Hindu Maratha' and 'Hindu Marathe'. She further pointed out that the Committee has observed the discrepancy in the information submitted by the applicant and the applicant's father in W.P. No.6674 of 2007 on different days and different places. The statement made by the father was recorded without any forewarning, is spontaneous. It has been correctly accepted by the Scrutiny Committee to be reliable. The Scrutiny Committee also noticed that, on the other hand, the information given by the applicant, at the time of hearing was made upon notice and after careful thought. The Scrutiny Committee has, therefore, observed that it has been made, by making a reference to some literature, only with an intention to grab the benefits and concessions available to Scheduled Tribes.

11. We have given careful thought to the submissions of the learned counsel.

12. Before we proceed further, it would be appropriate to notice the observations made by this Court in *Kumari Madhuri Patil and Another versus Addl. Commissioner, Tribal Development and Others* [(1994) 6 SCC 241],which are as follows :

> "15. The question then is whether the approach adopted by the High Court in not elaborately considering the case is vitiated by an error of law. High Court is not a court of appeal to appreciate the evidence. The Committee which is empowered to evaluate the evidence placed before it when records a finding of fact, it ought to prevail unless found vitiated by judicial review of any High Court subject to limitations of interference with findings of fact. The Committee when considers all the material facts and records a finding, though another view, as a court of appeal may be possible, it is not a ground to reverse the findings. The court has to see whether the Committee considered all the relevant material placed before it or has not applied its mind to relevant facts which have led the Committee ultimately record the finding. Each case must be considered in the backdrop of its own facts."

13. Keeping in view the ratio above, let us now examine the fact situation in the present matters. As noticed earlier, the Scrutiny Committee, in both the cases, has noticed that number of documents from 1890 to 1941 showing that the family members of the petitioners did not belong to the 'Thakar Scheduled Tribe', their caste being variously indicated as 'Bhat', 'Marathe', 'Thakar' and 'Hindu Marathe', were deliberately withheld by the petitioners at the time of making the application before the caste Scrutiny Committee. The Scrutiny Committee also noticed that the petitioners failed in the affinity test as the information supplied by them was at

variance with the information given by Suryakant Pandurang Pawar, father of the applicant, in Writ Petition No.6674 of 2007. On a careful analysis of the entire material, the Scrutiny Committee has concluded that the certificate issued in favour of Dilip Pandurang Pawar would be of no assistance to the petitioners as the documents discovered by the Vigilance Cell relating to local school register from 1st August, 1890 to 27th June, 1941 clearly proved that the caste of the family members and predecessors of the petitioners was recorded as 'Bhat', 'Thakar', 'Marathe' and 'Hindu Marathe'.

14. Upon examination of the reasons given by the Scrutiny Committee in both the matters, we are unable to accept the submissions made by Mr. Sudhanshu Choudhari that the High Court has committed any error in affirming the decision rendered by the Scrutiny Committee in both the matters. In fact, the decision rendered by the High Court would fall squarely within the ratio laid down by this Court in the case of *Kumari Madhuri Patel* (supra). The conclusions recorded by the Scrutiny Committee are reasonable and fully supported by the material placed on record. Therefore, the conclusions reached by the Scrutiny Committee, and affirmed by the High Court cannot be said to be either perverse or based on no evidence.

15. In view of the above, we find no merit in both the Special Leave Petitions. Accordingly, both the special leave petitions are dismissed.

B.B.B. SLPs dismised.

BUDH SINGH

v.

STATE OF HARYANA AND ANR.

(Writ Petition (Criminal) No. 15 of 2012)

MARCH 11, 2013

[P. SATHASIVAM AND RANJAN GOGOI, JJ.]

Narcotic Drugs and Psychotropic Substances Act, 1985:

s. 32-A (as introduced w.e.f. 29.5.1989) – Sentences awarded under the Act not to be suspended, remitted or commuted – Effect of – Accused convicted u/s 15 on 27.7.1990 for offence committed on 13.12.1988 – Held: There is no vice of unconstitutionality in the section insofar as it takes away the powers of the executive conferred upon it u/ss 432 and 433 CrPC to suspend, remit or commute the sentence of a convict under the Act – Exclusion of benefit of remission cannot be understood to have the effect of enlarging the period of incarceration of an accused convicted under the Act – Nor can s. 32-A have the effect of making a convict undergo a longer period of sentence than what the Act had contemplated at the time of commission of the offence.

The petitioner, who was convicted u/s 15 of the Narcotic Drugs and Psychotropic Substances Act, 1985 on 27.7.1990, filed the instant writ petition challenging the constitutional validity of 32-A of the Act on the ground that the exclusion of benefit of remission by introduction of s.32-A would have the effect of making the petitioner undergo a longer period of incarceration than what was visualized by the Act as prevailing on the date of alleged commission of the crime by him i.e. 13.12.1988. The question for consideration before the Court was: "whether the remission(s) earned by a convict operates as a reduction of the sentence."

Dismissing the writ petition, the Court

HELD: 1.1 Insofar as the challenge to s. 32-A of the NDPS Act founded on violation of Arts. 14 and 21 of the Constitution of India, 1950 is concerned, in Dadu alias Tulsidas* this Court has held that there is no vice of unconstitutionality in the section insofar as it takes away the powers of the executive conferred upon it u/ss 432 and 433 CrPC to suspend, remit or commute the sentence of a convict under the Act. [para 2] [275-B-C, G; 276-A]

***Dadu alias Tulsidas vs. State of Maharashtra (2000) 8 SCC 437 - relied on.**

1.2 With regard to challenge founded on alleged violation of Art. 20(1) of the Constitution, s.32-A of NDPS Act ex facie has nothing to do with the punishment or penalty imposed under the Act. In fact, no change or alteration in the severity of the penalty under the NDPS Act has been brought about by the introduction of s. 32A with effect from 29.05.1989. What s. 32A has done is to obliterate the benefit of remission(s) that a convict under the NDPS Act would have normally earned. The correct legal position, as has been held by this Court in Sarat Chandra Rabha's case is that the remission(s) do not in any way touch or affect the penalty/sentence imposed by a court. In view of this settled position of law, the exclusion of benefit of remission cannot be understood to have the effect of enlarging the period of incarceration of an accused convicted under the NDPS Act. Nor can s. 32A have the effect of making a convict undergo a longer period of sentence than what the Act had contemplated at the time of commission of the offence. [para 9] [279-B-E]

Sarat Chandra Rabha and Others vs. Khagendranath Nath and Others **1961 SCR 133 = AIR 1961 Supreme Court 334;** *Maru Ram vs. Union of India and Others* **(1981) 1 SCC 107- relied on**

Case Law Reference:

(2000) 8 SCC 437	**relied on**	**para 2**
1961 SCR 133	**relied on**	**para 5**
(1981) 1 SCC 107	**relied on**	**para 9**

CRIMINAL ORIGINAL JURISDICTION : Writ Petition (Crl.) No. 15 of 2012.

Under Article 32 of the Constitution of India.

K.G. Bhagat, Divya Shukla, Dattatray Vyas, Vineet Bhagat for the Petitioner.

Nupur Choudhary, Kamal Mohan Gupta for the Respondents.

The Judgment of the Court was delivered by

RANJAN GOGOI, J. 1. The petitioner has been convicted under Section 15 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter for short "the NDPS Act") by an order of the learned Sessions Judge, Sirsa, Haryana dated 27.7.1990. He has been sentenced to undergo RI for a period of 10 years and also to pay a fine of Rs. 1,00,000/- (One lakh only), in default, to suffer further RI for a period of 3 years. The said order has been confirmed in appeal. The petitioner, on the date of the filing of the present writ petition, had undergone custody for a period of more than 7 years. He contends that taking into account the remissions which would have been due to him under different Government Notifications/ Orders issued from time to time he would have been entitled to be released from prison. However, by virtue of the provisions of Section 32A of the NDPS Act, the benefit of such remissions have been denied to him resulting in his continued

custody. Consequently, by means of this writ petition under Article 32 of the Constitution, he has challenged the constitutional validity of Section 32A of the NDPS Act, inter-alia, on the ground that the said provision violates the fundamental rights of the petitioner under Articles 14, 20(1) and 21 of the Constitution.

2. Insofar as the challenge founded on violation of Articles 14 and 21 is concerned, the issue stands squarely covered by the decision of this Court in *Dadu alias Tulsidas vs. State of Maharashtra*[1]. The following extract from para 15 from the decision in *Dadu* (supra) which deals with the contentions advanced on the basis of Articles 14 and 21 and the views of this Court on the said contentions amply sums up the situation.

> "The distinction of the convicts under the Act and under other statutes, insofar as it relates to the exercise of executive powers under Sections 432 and 433 of the Code is concerned, cannot be termed to be either arbitrary or discriminatory being violative of Article 14 of the Constitution. Such deprivation of the executive can also not be stretched to hold that the right to life of a person has been taken away except, according to the procedure established by law. It is not contended on behalf of the petitioners that the procedure prescribed under the Act for holding the trial is not reasonable, fair and just. The offending section, insofar as it relates to the executive in the matter of suspension, remission and commutation of sentence, after conviction, does not, in any way, encroach upon the personal liberty of the convict tried fairly and sentenced under the Act. The procedure prescribed for holding the trial under the Act cannot be termed to be arbitrary, whimsical or fanciful. There is, therefore, no vice of unconstitutionality in the section insofar as it takes away the powers of the executive conferred upon it under

1. (2000) 8 SCC 437.

> Sections 432 and 433 of the Code, to suspend, remit or commute the sentence of a convict under the Act."

3. It is to the challenge founded on alleged violation of Article 20(1) that the attention of the Court will have to be primarily focused in the present case. Article 20(1) is in the following terms :

> **"20. Protection in respect of conviction for offences.-** (1) No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence."

4. It has been argued on behalf of the petitioner that though the petitioner has been sentenced to undergo RI for a period of 10 years on being found guilty under Section 15 of the NDPS Act, the said period of imprisonment must be understood to be subject to such remissions to which the petitioner would have been entitled to in the normal course. However, Section 32A of the NDPS Act by denying the benefit of remissions has, in fact, enlarged the period of incarceration. According to the petitioner, he is alleged to have committed the offence under the NDPS Act on 13.12.1988 and was convicted of the said offence by the learned Trial Court and sentenced accordingly on 27.7.1990. Section 32A of the NDPS Act was brought into the statute book by an amendment to the Act with effect from 29.5.1989. Therefore, according to the petitioner, the benefit of remissions of sentences under the Act being permissible on the date when he is alleged to have committed the offence, i.e., 13.12.1988, the exclusion of the said benefit by the introduction of Section 32A with effect from 29.5.1989 has the effect of making the petitioner undergo a longer period of incarceration than what was visualized by the Act as prevailing on the date of the alleged commission of the crime by the petitioner.

5. The answer to the above issue raised by the petitioner would depend on the true and correct meaning of the effect of the period/periods of remissions earned by a convict under Section 432 of the Code of Criminal Procedure on the sentence or penalty that may have been imposed by a court of competent jurisdiction. Specifically, the question that arises is whether the remission(s) earned by a convict operates as a reduction of the sentence. The issue arising, is no longer res integra having been dealt with by a decision of this Court of somewhat old vintage in *Sarat Chandra Rabha and Others vs. Khagendranath Nath and Others*[2].

6. The facts in *Sarat Chandra Rabha* (supra) will be required to be noticed to appreciate the relevance of the view expressed therein to the context of the present case. In *Sarat Chandra Rabha* (supra) the nomination paper of the appellant Aniram Basumatari for election to the Assam Legislative Assembly was rejected by the Returning Officer on the ground that the said person was disqualified under Section 7(b) of the Representation of the People Act, 1951 (hereinafter for short "the RP Act"). Under Section 7(b) of the RP Act a person stood disqualified from being chosen as a Member of the Legislative Assembly if he is convicted by a Court in India of any offence and sentenced to imprisonment for not less than two years unless a period of five years or such lesser period as may be allowed by the Election Commission, has elapsed since his release. The appellant in *Sarat Chandra Rabha* (supra) was convicted of the offence under Section 4(b) of the Explosive Substances Act, 1908 and sentenced to three years RI on 10.7.1953. On the date of filing of the nomination paper by the appellant, i.e. on 19th January, 1957, admittedly, the period of five years since his release had not elapsed. However, the sentence of three years imposed on the appellant on 10.7.1953 was remitted by the Government of Assam on 8.11.1954 under Section 401 of the Code of Criminal Procedure, 1898 (Section 432 of the present Code of Criminal Procedure) and the

2. AIR 1961 Supreme Court 334.

appellant was released on 14.11.1954. In the above facts, it was contended before the Election Tribunal that in view of the remission granted, the sentence imposed on the appellant was reduced to a period of less than 2 years and therefore the appellant had not incurred the disqualification under Section 7(b) of the RP Act. The issue raised was answered in favour of the appellant by the Election Tribunal, which view was, however, reversed in the appeal filed before the High Court by the returned candidate. In doing so the High Court was of the opinion, "that a remission of sentence did not have the same effect as a free pardon and did not have the effect of reducing the sentence passed on the appellant from three years to less than two years, even though the appellant might have remained in jail for less than two years because of the order of remission."

7. The matter having reached this Court on the basis of a certificate granted by the High Court, the question that had arisen was formulated in the following terms:-

> "The main question therefore that falls for consideration is whether the order of remission has the effect of reducing the sentence in the same way in which an order of an appellate or revisional criminal court has the effect of reducing the sentence passed by the trial court to the extent indicated in the order of the appellate or revisional court."

8. On a detailed examination and scrutiny of the various dimensions of the question that had arisen, this Court upheld the view taken by the High Court and answered the question formulated by it by holding that "….the effect of an order of remission is to wipe out that part of the sentence of imprisonment which has not been served out and thus in practice to reduce the sentence to the period already undergone, in law the order of remission merely means that the rest of the sentence need not be undergone, leaving the order

of conviction by the court and the sentence passed by it untouched."

9. In *Maru Ram vs. Union of India and Others*[3] (para 27), this Court had observed that Article 20(1) of the constitution engrafts the rule that there can be no ex post facto infliction of a penalty heavier than what had prevailed at the time of commission of the offence. Section 32A ex facie has nothing to do with the punishment or penalty imposed under the Act. In fact, no change or alteration in the severity of the penalty under the NDPS Act has been brought about by the introduction of Section 32A with effect from 29.05.1989. What Section 32A has done is to obliterate the benefit of remission(s) that a convict under the NDPS Act would have normally earned. But, if the correct legal position is that the remission(s) do not in any way touch or affect the penalty/sentence imposed by a Court, we do not see how the exclusion of benefit of remission can be understood to have the effect of enlarging the period of incarceration of an accused convicted under the NDPS Act or as to how the said provision, i.e., Section 32A, can have the effect of making a convict undergo a longer period of sentence than what the Act had contemplated at the time of commission of the offence.

10. For the aforesaid reasons, we find no substance in the challenge to the provisions of Section 32A of the NDPS Act. This writ petition, therefore, has to fail and is accordingly dismissed.

R.P. Writ Petition dismissed.

3. (1981) 1 SCC 107.

ARESH @ ASHOK J. MEHTA (D) BY PROP. LRS.
v.
SPL. TAHSILDAR, BALGAUM KARNATAKA & ANR.
(Civil Appeal No. 5517 of 2005)

MARCH 11, 2013.

[G.S. SINGHVI AND SUDHANSU JYOTI MUKHOPADHAYA, JJ.]

Karnataka Land Reforms Act, 1961:

ss. 44 and 51 – Vesting of land in State Government – Interest on the amount payable – Held: In view of the specific clarification made by Circular dated 24.11.1986 and decision of the Court, appellant is entitled to interest w.e.f. 1.3.1974 @ 5 ½% till the total amount was paid to him – Substantive provision of 'mode of calculation' as prescribed u/s 51 has been clarified by Circular dated 24.11.1986 – The example cited in the circular is merely an illustration – If the illustration is in conflic with the clarification of the substantive law/ provision or if the illustration is vague, the clarification will prevail over the illustration – Government of Karnataka Rev. Dep. (Land Reforms) Circular No. ND 171 LWM 86 dated 24.11.1986.

In terms of s.44 of the Karnataka Land Reforms Act, 1961 as amended by Act No. 1 of 1974, the land belonging to the appellant and held or in possession of the tenant stood transferred and vested in the State Government w.e.f. 1.3.1974. As regards the interest on the principal amount of compensation to be paid to the appellant, the Division Bench of the High Court, ultimately held that the appellant was entitled to interest @ 5½% w.e.f. 1.3.1984.

In the instant appeal filed by the claimants, the

questions for consideration before the Court were: (i) whether with respect to the delayed payment of the principal amount, the appellant is entitled for any interest towards the amount paid in cash and thereby the Circular dated 24.11.1986, contrary to such extent is liable to be set aside"; and (ii) "whether the appellant is entitled for payment of interest as per Circular No. ND 171 LWM 86 dated 24.11.1986 or as a matter of general rule."

Allowing the appeal, the Court

HELD: 1.1. The amount payable to the land-owner/ landlord for the extinguishment of their rights is to be paid in the manner prescribed u/s 51 of the Karnataka Land Reforms Act, 1961. Substantive provision of 'mode of calculation' as prescribed u/s 51 has been clarified by Circular dated 24.11.1986. There is no ambiguity in the clarification made by circular dated 24.11.1986, but the example cited therein is not only confusing but also contradictory to the main clarification. The example cited in the circular is merely an illustration. If the illustration is in conflict with the clarification of the substantive law/ provision or if the illustration is vague, the clarification will prevail over the illustration. In such case, a person who is entitled to the interest as per the clarification cannot be deprived of or denied his right relying on the illustration. [para 15, 20 and 21] [293-D; 296-F-H; 297-A]

1.2. As per Circular dated 24.11.1986, the entire amount of compensation payable to the ex-landlords along with interest is to be calculated taking 1.3.1974 as the cut off date upto 1.3.1984. But if the amount is paid earlier then upto the date of payment. Out of the total amount two thousand rupees is to be paid in cash and the rest through National Savings Certificates. If the amount is not paid on or before 1.3.1984, provisions have been made to pay further interest @ 5 ½% on the entire

principal amount from 1.3.1984 till the date of purchase of the National Savings Certificates; that means the authorities are required to either invest the amount in National Savings Certificates or pay interest till the amount is invested. [para 19] [296-C-E]

1.3. In view of the specific clarification made by Circular dated 24.11.1986 and decision of this Court in Satinder Singh, the appellant is entitled to interest w.e.f. 1.3.1974 @ 5 ½% till the total amount was paid to him. The respondent cannot deny the interest on the amount of compensation to which the appellant is entitled as a matter of general rule, and in the light of the clarification made by Circular dated 24.11.1986. The orders passed by the Single Judge and the Division Bench of the High Court are set aside. The respondents are directed to pay the appellant interest @ 5 ½% per annum w.e.f. 1.3.1974. [para 23-24] [299-G-H; 300-A-B]

Satinder Singh vs. Umrao Singh **1961 SCR 676 = AIR 1961 SC 908 – relied on**

Case Law Reference:

1961 SCR 676	**relied on**	**para 22**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5517 of 2005.

From the Judgment & Order dated 06.08.1999 of the High Court of Karnataka at Bangalore in W.A. No. 8110 of 1996.

Kiran Suri, S.J. Amith, Nakibur Rahman Barbhuiya for the Appellants.

V.N. Raghupathy, Anant Narayana M.G. for the Respondents.

The Judgment of the Court was delivered by

SUDHANSU JYOTI MUKHOPADHAYA, J. 1. This appeal has been preferred by the appellant-landlord against the judgment & order dated 6th August, 1999 passed by the Division Bench of the High Court of Karnataka in Writ Appeal No. 8110/1996 whereby the Division Bench rejected the prayer for interest on amount of compensation w.e.f. 1st March, 1974 and thereby affirmed the order passed by the learned Single Judge but held that the appellant-landlord is entitled for interest w.e.f. 1st March, 1984.

2. The appellant was the owner of the land bearing R.S. No. 16/1, measuring 7 acres 21 guntas in village-Examba, Taluka Chikodi, Karnataka. The land in question was vested with the State for grant in favour of the tenant w.e.f. 1st March, 1974 under Section 44 of the Karnataka Land Reforms Act, 1961 as amended by Act No.1 of 1974 (hereinafter referred to as the 'Act').

3. The Tehsildar, Chikodi under Section 48A(7) and Section 53 heard the appellant-landlord and the tenant and determined the quantum of amount payable at Rs. 17,244/- vide order dated 28.2.1983. It was held that a sum of Rs. 2,000/- is to be paid as first instalment within 30 days from the date of the receipt of the order and the balance in 19 equated annual instalments with interest @ 5½% as indicated therein. The compensation amount was paid to the appellant in between the years 1983-1985 but without any interest. In this background, the appellant moved in the Court of Special Tehsildar, Chikodi with an application that his 1/3rd share in the house and well situated in RS No. 16/1 of Examba village vested with the State therefore he claimed interest on the compensation amount @ 5½% per annum w.e.f. 1st March, 1974 till the payment of the entire amount. The details of amount of compensation, the amount of interest acquired on the compensation amount, the amount paid to the appellant and the amount as was due to him on 25th May, 1988 were shown in the representation. The appellant claimed a sum of Rs.

19,116.37. The Special Tehsildar, Chikodi vide letter dated 7th June, 1988 rejected his prayer and informed that as per Circular No. RD 171:LRM-86 dated 24.11.1986 interest has to be paid on the amount paid through the National Savings Certificate and, therefore, no interest is payable on the amount received in cash.

4. The order of rejection was challenged by the appellant by filing a writ petition no. 18591/88 before the Karnataka High Court; a prayer was made to direct the respondents to pay interest for delayed payment w.e.f. 1.3.1974. The Circular dated 24.11.1986, was also challenged by the appellant, as the same was referred to reject his claim. The learned Single Judge by his judgment held that no interest is payable towards the amount paid in cash. It was further held that interest @5 ½% is payable, if the compensation amount is paid through National savings certificates. On challenge, the Division Bench of the High Court upheld the order passed by learned Single Judge but held that in the facts and circumstances of the case the appellant is entitled for interest w.e.f. 1st March, 1984.

5. Learned counsel for the appellant contended that the examples cited in Circular dated 24.11.1986 is illegal and contrary to the provisions of the Act and the clarification given therein. She secondly contended that the tenanted lands having vested with the State w.e.f. 1st March, 1974, the owners of the land cannot be deprived of the interest on compensation amount for which they are entitled from the date the principal amount become due. She thirdly contended that once the amount of compensation payable is determined in respect of the delayed payment then the land owner is also entitled to the interest amount even if the principal amount is paid in cash. It was also contended that when Circular dated 24.11.1986 itself makes it clear for investment of the amount which shall carry interest @ 5½%, there is no bar as such either under the Act or the Rules to deprive the land-owner from the interest in case the amount is paid in cash. Therefore, according to the

learned counsel the appellant is entitled for payment of interest towards the amount paid in cash in respect of delayed payment of the principal amount by allowing the appeal.

6. On the other hand, it was contended by learned counsel for the respondent that in the absence of any provision for payment of interest for the compensation paid in cash, the learned High Court has rightly rejected such prayer.

7. The question that arises for our consideration in this case is:-

> "Whether with respect to the delayed payment of the principal amount, the appellant is entitled for any interest towards the amount paid in cash and thereby the Circular dated 24.11.1986, contrary to such extend is liable to be set aside?

8. Heard learned counsel for the parties and carefully examined the impugned order passed by the learned Single Judge and the Division Bench of the High Court. For determination of the issue, it is necessary to notice the relevant provisions of the Act in so far as determining the mode of payment of Principal amount, interest, etc.

9. The Karnataka Land Reforms Act, 1961 was enacted for conferment of ownership on tenants, ceiling on land holdings and for certain other matters. Chapter III of the Act deals with the conferment of ownership on tenants. Under Section 44, all lands held by or in the possession of tenants immediately prior to the date of commencement of the (Amendment) Act stand transferred and vests in the State Government with effect from 1st March, 1974, i.e. the date of commencement of the (Amendment) Act No.1 of 1974. All rights, title and interest vesting in the owners of such lands and other persons interested in such land ceases with effect from 1st March, 1974 and vests absolutely with the State Government free from all encumbrances. Under clause (b) of sub section (2) of Section

44 amounts in respect of such lands which become due on or after the date of vesting is payable to the State Government and not to the land owner, landlord or any other person. The State Government takes possession of such lands forthwith. Under clause (g) of sub section (2) of Section 44 permanent tenants, protected tenants and other tenants holding such lands are entitled for rights and privileges which is accrued to them in such lands before the date of vesting against the landlord as apparent from Section 44 and quoted hereunder:-

> ***"44. Vesting of lands in the State Government.***—*(1) All lands held by or in the possession of tenants (including tenants against whom a decree or order for eviction or a certificate for resumption is made or issued) immediately prior to the date of commencement of the Amendment Act, other than lands held by them under leases permitted under Section 5, shall, with effect on and from the said date, stand transferred to and vest in the State Government.*
>
> *(2) Notwithstanding anything in any decree or order of or certificate issued by any Court or authority directing or specifying the lands which may be resumed or in any contract, grant or other instrument or in any other law for the time being in force, with effect on and from the date of vesting and save as otherwise expressly provided in this Act, the following consequences shall ensue, namely:—*
>
> *(a) all rights, title and interest vesting in the owners of such lands and other persons interested in such lands shall cease and be vested absolutely in the State Government free from all encumbrances;*
>
> *(b) [x x x x x] amounts in respect of such lands which become due on or after the date of vesting shall be payable to the State Government and not to the land owner, landlord or any other person and any payment*

made in contravention of this clause not be valid;

(c) all arrears of land revenue, cesses, water rate or other dues remaining lawfully due on the date of vesting in respect of such lands shall after such date continue to be recoverable from the land-owner, landlord or other person by whom they were payable and may, without prejudice to any other mode of recovery, be realised by the deduction of the amount of such arrears from the amount payable to any person under this Chapter;

(d) no such lands shall be liable to attachment in execution of any decree or other process of any court and any attachment existing on the date of vesting and any order for attachment passed before such date in respect of such lands shall cease to be in force;

(e) the State Government may, after removing any obstruction which may be offered, forthwith take possession of such lands:

Provided that the State Government shall not dispossess any person of any land in respect of which it considers, after such enquiry as may be prescribed, that he is prima face entitled to be registered as an occupant under this Chapter;

(f) the land-owners, landlord and every person interested in the land whose rights have vested in the State Government under clause (a), shall be entitled only to receive the amount from the State Government as provided in this Chapter;

(g) permanent tenants, protected tenants and other tenants holding such lands shall, as against the State Government, be entitled only to such rights or privileges and shall be subject to such conditions as are provided by or under this Act; and any other rights and privileges

which may have accrued to them in such lands before the date of vesting against the landlord or other person shall cease and determine and shall not be enforceable against the State Government."

10. The tenants are registered as occupants of land on certain conditions under Section 45 and Section 46 states that if the tenant held land from one or more than one landlord he (tenant) is entitled to choose particular land.

11. Every land-owner, landlord and all other persons interested in the land are entitled for amount payable, for the extinguishment of their rights in the lands vested in the State Government determined with reference to the net annual income derivable from the land in accordance with Section 47, as quoted hereunder:

***"47. Amount payable.**—(1) every land-owner, landlord and all other persons interested in the land shall, for the extinguishment of their rights in the lands vesting in the State Government under sub-section (6) of section 15 or section 20 or section 44, be entitled to an amount determined with reference to the net annual income derivable from the land or all the lands, as the case may be, in accordance with the following scale, namely:—*

(i) for the first sum of rupees five thousand or any portion thereof of the net annual income from the land, fifteen times such sum or portion;

(ii) for the next sum of rupees five thousand or any portion thereof of the net annual income from the land, twelve times such sum or portion;

(iii) for the balance of the net annual income from the land, ten times such balance:

Provided that,—

(i) if the tenant in respect of the land is a permanent tenant, the amount payable shall be six-times the difference between the rent and the land revenue payable for such land;

(ii) if the tenant holds land from intermediaries the amount shall be paid to the land-owner and the intermediaries in the same proportion in which the rent paid for the land by the tenant was being appropriated by them immediately before the date of vesting;

(iii) if the land vesting in the State Government is D class land referred to in Part A of Schedule I or if the landlord is,—

(1) a small holder;

(2) a minor;

(3) a widow;

(4) a woman who has never been married;

(5) a person who is subject to [such physical or mental disability as may be prescribed] ; or

(6) such soldier or seamen whose lands vest in the State Government under section 44, an amount equal to twenty times the net annual income from such land shall be payable.

(2) For the purpose of sub-section (1), the net annual income from the land shall be deemed to be the amount payable as annual rent in respect of the land as specified in section 8. But where in a land assessed as wet land or dry land the landlord has raised fruit bearing trees, the annual income for purpose of sub-section (1) [shall, subject to such rules as may be prescribed, be determined] on the basis of assessment for garden land

which could have been levied having regard to the nature of the fruit bearing trees.

(3) Where there are wells or other structures of a permanent nature on the land constructed by the landlord the value thereof calculated in the prescribed manner shall also be payable.

(4) Notwithstanding anything in sub-sections (1) and (3), the aggregate amount payable according to the said sub-sections shall not exceed rupees two lakhs.]"

12. Section 48 relates to constitution of Tribunals. Under Section 48A, on receipt of an application from a tenant for being registered as an occupant, the Tribunal is required to make an enquiry after publication of a public notice in the village in which the land is situated calling upon the landlord and all other persons having an interest in the land. Under Section 48B, the Tahsildar is required to determine the amount payable on receipt of the orders passed under sub section (4) or sub section (5) of Section 48A by the Tribunal,

13. The Tahsildar while determining the amount under Section 48B is required to determine the encumbrances and the amount payable in terms of Section 50 of the Act; the mode of payment of the amount, which is relevant for the present case, is stipulated under Section 51 which reads as follows:

***"51. Mode of payment [of the amount].**—[(1)] [Save as provided in Section 106] the [amount] payable to any person under Section 47 shall subject to the provisions of Section 50,—*

[(a) be paid in cash in a lumpsum if the amount payable does not exceed [two thousand rupees] and

(b) if the amount payable exceeds [two thousand rupees], the amount up to [two thousand rupees] shall be paid in cash and the balance shall be paid in [non-transferable

and non-negotiable] bonds carrying interest at the rate of [five and a half per cent] per annum and of guaranteed face value maturing within a specified period not exceeding twenty years:

Provided that the amount payable under the bonds issued under this clause may be paid in such number of instalments not exceeding twenty as may be prescribed:]

[Provided further that the amount payable shall, subject to such rules as may be prescribed, be paid,-

(i) in the case of a minor, [a person who has attained the age of sixty five years] a woman who has never been married, a small holder, a person subject to the prescribed physical or mental disability and subject to clause (ii), a widow,—

(a) in a lumpsum where the amount payable does not exceed fifty thousand rupees,; and

(b) where the amount payable exceeds fifty thousand rupees, the first fifty thousand rupees in a lumpsum and the balance in non-transferable and non-negotiable bonds carrying interest at the rate of five and half per cent per annum and of guaranteed face value maturing within a specified period not exceeding twenty years;

(ii) in the case of a widow, if she so elects in writing, in the form of annuity during her life time, a sum determined in such manner as may be prescribed, which shall not be less than the net annual income referred to in sub-section (2) of section 72.

Explanation:—For the purpose of this clause widow, minor and a person subject to physical or mental disability include, a woman who is a widow, a person who is a minor, a person subject to physical or mental disability respectively at the time when the amount payable is determined:

Provided also that in relation to a small holder the second proviso shall have effect as if it was in force on and from the First day of March, 1974.]

[(2) Notwithstanding anything in sub-section (1), on or after 1st March, 1984, the balance and interest thereon payable in accordance with clause (b) of sub-section (1) of the second proviso to the said sub-section shall, in lieu of the bonds specified therein, be paid in the following manner, namely:—

(a) the interest accrued at the rate of five and a half per cent per annum till 1st March, 1984 remaining unpaid shall be paid in five consecutive annual, as far as may be, equal instalments commencing from 1st March, 1984 in National Savings Certificates;

(b) the whole or, as the case may be, part of the balance specified in sub-section (1), payable before 1st March, 1984 remaining unpaid shall be paid in five consecutive annual, as far as may be, equal instalments commencing from the said date in National Savings Certificates; and

(c) the whole or, as the case may be, part of the said balance payable on or after 1st March, 1984 shall be paid in ten consecutive annual, as far as may be equal instalments commencing from the said date in National Savings Certificates:

Provided that along with each of the instalments referred to in items (b) and (c), the interest thereon from 1st March, 1984 at the rate of five and a half per cent per annum upto the date of payment thereof shall also be paid in National Savings Certificates.]"

14. Under Section 52, payment of the amount to the land-owner/landlord shall be a full discharge of the liability for payment of the amount and no further claims or payment of amount shall lie against the State Government or any other person.

15. From the aforesaid provisions, it is clear that the all lands held by or in the possession of tenants prior to 1.3.1974 has been transferred and vested in the State Government with effect from 1.3.1974. All rights, title and interest vesting in the owners of such lands stand cease and is vested absolutely with the State Government. The amount in respect of such lands which becomes due on or after 1.3.1974 is only payable to the State Government and not to the land-owners/landlords. The land-owners/landlords are entitled to receive the amount only from the State Government and not from any other person.

The amount payable to the land-owner/landlord for the extinguishment of their rights is to be paid in the manner prescribed under Section 51. The amount upto Rs. 2,000/- is to be paid in cash and balance of the amount is payable in non-transferable and non-negotiable bonds carrying interest @5 ½% per annum.

Therefore, it is clear that no provision has been made in the Act for payment of interest if any amount is paid in cash. On the other hand, the State Government is entitled to earn interest by establishment of separate fund under Section 53A which is created out of the amount of premium collected from the tenants or sub-tenants of land belonging to the institutions referred to in Section 106.

16. The question that arises further is that whether the appellant is entitled for payment of interest as per Circular No. ND 171 LWM 86 dated 24.11.1986 or as a matter of general rule.

17. Doubts were raised time and again by some of the Deputy Commissioners of the Districts about the mode of calculation and disbursement of amount. The same was made clear by the State Government by its Circular dated 24.11.1986 which reads as follows:-

"Circular No. ND 171 LWM 86 dt. 24th Nov. 1986.

CIRCULAR

Doubts have been raised time and again by some of the Deputy Commissioners of the Districts, about the mode of calculation and disbursement of amount in national savings certificates for the lands lost under the provisions of Karnataka Land Reforms Act, 1961. The field officers are hereby clarified once again the method to be followed in commuting the amount and interest payable to the ex-land-lords.

1. The entire amount due to the ex-land-lords shall be calculated taking 1.3.1974 as the cut of date for the purpose of calculating interest.

2. On the total principal amount interest at the rate of 5-1/2% shall be calculated till 1.3.1984. The principal amount means the entire amount due to the Ex-Landlords (1.3.1974 to 1.3.1984) and the subsequent ten instalments also. The Principal amount so calculated will bear on interest at 5-1/2% per annum from 1.3.1974 to 1.3.1984. The amount so arrived both principal and interest shall be paid in National Savings Certificates.

3. Further the interest @ 5-1/2% shall be calculated on the entire principal amount from 1.3.1984 till the date of purchase of National savings certificates, and paid in cash at the time of handing over the national savings certificates.

4. The fraction amount of less than Rs.50.00 shall also be paid in cash. The action on all these should be simultaneously taken-

For Example:

Total amount	**1. Rs.3,000/-**
Determined:	**2. Rs.2,000/- paid in cash.**
	3. Amount due is Rs.1,000/- (in 20 instalments from 1.3.74 to 1.3.84)
	Interest at 5-1/2% from 1.3.1974 date Of vesting) till 1.3.84 550/-
	To be invested in N.S. Cash 550/-
	4.Interest at 5-1/2% from 1.3.84 till the date
	Of purchase of N.S. Co-cash
	5. Fraction, if any, below Rs. 50/- each.

The above guidelines shall be followed scrupulously in all cases. x x x x x x x x

Sd/- S. Ashok
Under Secretary to Govt. Rev. Dept.
(Land Reforms)

No. RS.KLR.HP.86-87 Belgeum Dt. 27.12.1986

Copy forwarded to all the Tehsildars and Spl. Tehsildar, Land Reforms, in Belgaum Distt. for

information and further necessary action.

Sd/-
for Spl. Dy. Commissioner
Belgaum."

18. The aforesaid clarification made by the State Government makes it clear that the entire amount due to the ex-landlords shall be calculated taking 1.3.1974 as the cut off date for the purpose of calculating interest. However, we find that the example given therein is confusing which does not make it clear whether amount Rs.3000/- shown therein includes the interest w.e.f. 1.3.1974 apart from the principal amount to which the ex-landlords are entitled.

19. As per Circular dated 24.11.1986, as noticed above, the entire amount of compensation payable to the ex-landlords along with interest is to be calculated taking 1.3.1974 as the cut off date upto 1.3.1984. But if the amount is paid earlier then upto the date of payment. Out of the aforesaid total amount two thousand rupees is to be paid in cash and the rest through National Savings Certificates. If the amount is not paid on or before 1.3.1984, provisions have been made to pay further interest @ 5 ½% on the entire principal amount from 1.3.1984 till the date of purchase of the National Savings Certificates; that means the authorities are required to either invest the amount in National Savings Certificates or pay interest till the amount is invested.

20. There is no ambiguity in the clarification made by circular dated 24.11.1986, but the example cited therein is not only confusing but also contradictory to the main clarification.

21. Substantive provision of 'mode of calculation' as prescribed under Section 51 has been clarified by Circular dated 24.11.1986. The example cited in the circular is merely an illustration. If the illustration is conflicting with the clarification of the substantive law/provision or if the illustration is vague, the clarification will prevail over the illustration. In such case, a person who is entitled for the interest as per the clarification

aforesaid cannot be deprived of or denied his right relying on the illustration.

22. The question of payment of interest on compensation amount on acquisition of land fell for consideration before a larger bench of four judges of this Court in the case of *Satinder Singh vs. Umrao Singh* reported in AIR 1961 SC 908. That was a case of property which was acquired under the East Punjab Requisition of Immovable Property (Temporary Powers) Act (48 of 1948). The Act was replaced by Punjab Requisitioning and Acquisition of Immovable Property Act (11 of 1953). Under 1948 Act, compensation was to be paid in accordance with provisions of that Act. In the said case, the party claimed the interest on the amount of compensation. The argument was that the amount of compensation awarded should carry a reasonable interest from the date of acquisition as the claimants lost possession of their property. The said argument earlier was rejected by the High Court principally on the ground that relevant Act of 1948 makes no provision for payment of interest and omission to make such a provision amounts in law to an intention not to award interest in regard to compensation amount determined under it. This Court noticed the contention raised on behalf of the landlords and held as follows:-

> "17. What then is the contention raised by the claimants? They contend that their immovable property has been acquired by the State and the State has taken possession of it. Thus they have been deprived of the right to receive the income from the property and there is a time lag between the taking of the possession by the State and the payment of compensation by it to the claimants. During this period they have been deprived of the income of the property and they have not been able to receive interest from the amount of compensation. Stated broadly the act of taking possession of immovable property generally implies an agreement to pay interest on the value of the

property and it is on this principle that a claim for interest is made against the State. This question has been considered on several occasions and the general principle on which the contention is raised by the claimants has been upheld. In *Swift & Co. And Board of Trade* (1925) AC520 at p.532 it has been held by the House of Lords that "on a contract for the sale and purchase of land it is the practice of the Court of Chancery to require the purchaser to pay interest on his purchase money from the date when he took, or might safely have taken, possession of the land". This principle has been recognised ever since the decision in *Birch v. Joy* (1852) 3 H L C 565. In his speech Viscount Cave, L.C., added that "this practice rests upon the view that the act of taking possession is an implied agreement to pay interest", and he points out that the said rule has been extended to cases of compulsory purchase under the Lands Clauses Consolidation Act, 1845. In this connection distinction is drawn between acquisition or sales of land and requisition of goods by the State. In regard to cases falling under the latter category this rule would not apply.

18. In *Inglewood Pulp and Paper Co. Ltd. And New Brunswick Electric Power Commission,* 1928 AC 492(AIR 1928 P C 287) it was held by the Privy Council that "upon the expropriation of land under statutory power, whether for the purpose of private gain or of good to the public at large, the owner is entitled to interest upon the principal sum awarded from the date when possession was taken, unless the statute clearly shows a contrary intention". Dealing with the argument that the expropriation with which the Privy Council was concerned was not effected for private gain, but for the good of the public at large, it observed "but for all that, the owner is deprived of his property in this case as much as in the other, and the rule has long been accepted in the interpretation of statutes that they are not to be held to deprive individuals of property

without compensation unless the intention to do so is made quite clear. The right to receive the interest takes the place of the right to retain possession and is within the rule". It would thus be noticed that the claim for interest proceeds on the assumption that when the owner of immovable property loses possession of it he is entitled to claim interest in place of right to retain possession. The question which we have to consider is whether the application of this rule is intended to be excluded by the Act of 1948, and as we have already observed, the mere fact that Section 5(3) of the Act makes Section 23(1) of the Land Acquisition Act of 1894 applicable we cannot reasonably infer that the Act intends to exclude the application of this general rule in the matter of the payment of interest. That is the view which the Punjab High Court has taken in *Surjan Singh v. East Punjab Government* (AIR 1961 SC 908) and we think rightly.

19. ……. When a claim for payment of interest is made by a person whose immovable property has been acquired compulsorily he is not making claim for damages properly or technically so called; he is basing his claim on the general rule that if he is deprived of his land he should be put in possession of compensation immediately; if not, in lieu of possession taken by compulsory acquisition interest should be paid to him on the said amount of compensation. In our opinion, therefore, the fact that Section 5(1) deals with compensation both for requisition and acquisition cannot serve to exclude the application of the general rule to which we have just referred."

23. In view of the specific clarification made vide Circular dated 24th November, 1986 and decision of this Court in *Satinder Singh* (Supra), we hold that the appellant is entitled for interest w.e.f. 1.3.1974 @ 5 ½% till the total amount was paid to him. The respondent cannot deny the interest on the amount of compensation to which the appellant is entitled as a

matter of general rule, and in the light of the clarification made by Circular dated 24.11.1986.

24. The orders passed by the Single Judge and the Division Bench of the Karnataka High Court are, accordingly, set aside. The respondents are directed to pay the appellant interest @ 5 ½% per annum w.e.f. 1.3.1974 as ordered above within three months. The appeal is allowed with aforesaid observation and direction, but there shall be no order as to costs.

R.P. Appeal allowed.