STATE OF MAHARASHTRA AND OTHERS
v.
NOWROSJEE WADIA COLLEGE AND OTHERS
(Civil Appeal Nos. 531-532 of 2013)

JANUARY 29, 2013.

[G.S. SINGHVI AND H.L. GOKHALE, JJ.]

Service Law:

Leave encashment benefit – To the teachers of Pune University employed with Government affiliated colleges – Provided by the statutes 424(3) and 424(C) of University of Pune framed under Poona University Act, 1974 – Enactment of Maharashtra Universities Act, 1994 resulted in repeal of 1974 Act – Instruction by Government to Universities to discontinue benefit of leave encashment – State also directed the University to amend the University statutes with retrospective effect and till then to bear expenses incurred in payment of leave encashment – Statutes 424(3) and 424(C) not modified or superseded – Directions of the State challenged by institutes before High Court seeking mandamus to reimburse the amount paid by them to the teachers by way of leave encashment – High Court directed the State to reimburse the amount – On appeal, held: Though the 1974 Act entitle the teachers of affiliated colleges the benefit of leave encashment, but neither the 1974 Act nor the 1994 Act oblige the State to extend this benefit – Merely because the University statute provides for the benefit, it does not entitle the University/College to claim reimbursement from the State as of right – The State was also justified in issuing directives to the Universities to amend their statutes – Maharashtra Universities Act, 1994 – s.115 – Poona University Act, 1974 – Statutes of Pune University – Statutes 424(3) and 424(C).

The question for consideration in the present appeals was whether the respondent-institution (College) in question was entitled to reimbursement, from the State Government, of the amount paid to the teachers by way of leave encashment under the statutes framed by the Pune University.

The State Government contended that the State is not obliged to reimburse the amount because neither the Poona University Act, 1974 nor any other enactment mandates the reimbursement; and that in terms of rr.52 and 54 of Maharashtra Civil Services (Leave) Rules, 1981, the teachers employed in the Government colleges are not entitled to the benefit of leave encashment; and if teachers employed in private colleges are held entitled to the benefit of leave encashment, it would amount to discrimination.

Respondent Nos.1 and 2 contended that in view of s.115(2) of Maharashtra Universities Act, 1994, the existing statutes and Ordinances made under the Act specified in sub-section (1) of s.115, would be deemed to have been saved because the University had not framed fresh statutes or repealed the existing statutes.

Allowing the appeals, the Court

HELD: 1. An analysis of the provisions of the Universities Act, 1994 shows that universities constituted under Section 3(1) are autonomous and they are, by and large, independent in their functioning. However, the State Government can exercise control in some matters including those which have financial implications and issue directives which are binding on the universities. No university can grant special pay or allowance or extra remuneration to the employees except with the prior approval of the State Government. Likewise, any decision regarding affiliated colleges resulting in additional

financial liability can be taken only after obtaining approval from the State Government. By virtue of Section 115(2)(xii) of 1994 Act, the statutes framed by various universities prior to the enforcement of the 1994 Act, were continued till their supersession or modification by the statutes made under the new Act. [Para 16] [327-G-H; 328-B-C, D-E]

2. The provisions contained in the Maharashtra Civil Services (Leave) Rules, 1981 are not applicable to the university teachers and the teachers of the affiliated colleges because they are not Government servants, but this cannot lead to an inference that the affiliated colleges are entitled to reimbursement of the amount paid to the teachers in lieu of earned leave. Though the statutes framed by the Pune University under the Poona University Act, 1974 entitle the teachers of the affiliated colleges to get the benefit of leave encashment, there is no provision either in that Act or in the 1994 Act which obligates the State Government to extend the benefit of leave encashment to the university teachers or to the teachers of the affiliated colleges and the mere fact that the statutes of the particular university provide for grant of leave encashment to the teachers, does not entitle the concerned university or college to claim reimbursement from the State Government as of right. [Para 19] [329-F-H; 330-A-B

3. The State Government was perfectly justified in issuing directives to the universities to amend their statutes. No doubt, in some of the communications reference has been made to Rules 50, 52 and 54 of the 1981 Rules but this does not detract from the fact that the State Government is empowered to issue such directives. It is a different thing that for almost two years the Pune University failed to take action in accordance with the binding directives issued by the State Government. [Para 20] [330-C-E]

4. In the *Khandesh College* case, this Court took cognizance of the directives issued by the State Government from time to time to the universities to amend the statutes and observed that till the statutes, which are not inconsistent with the provisions of the 1994 Act, are modified or superseded, the same shall continue to remain in force. However, these observations cannot be interpreted in a manner which would entitle the university or the affiliated colleges to claim reimbursement. [Para 21] [330-E-G]

Khandesh College Education Society, Jalgaon v. Arjun Hari Narkhede **(2011) 7 SCC 172: 2011 (7) SCR 175 – relied on.**

Case Law Reference:

2011(7) SCR 175	**relied on**	**Paras19, 20**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 531-532 of 2013.

From the Judgment & Order dated 24.08.2009 in Writ Petition No. 6609 of 2009 and Order dated 09.10.2009 in Civil Application No. 2320 of 2009 in Writ Petition No. 6609 of 2009 of the High Court of Judciature at Bombay.

Colin Gonsalves, Anant Bhushan Kandae, Chinmoy Khaladkar, Tariq Adeeb, Vijay Kumar for the appearing parties.

The Judgment of the Court was delivered by

G.S. SINGHVI, J. 1. The question which arises for consideration in these appeals is whether respondent Nos.1 and 2 are entitled to reimbursement of the amount paid to the teachers by way of leave encashment under the statutes framed by the Pune University.

2. Dr. Anagha Anant Nadkarni and Dr. Moreshwar J. Bedekar, who were employed as Professors in respondent

No.1 college retired from service in November, 2003. They filed applications before Pune University Grievance Committee (for short, 'the Committee') for encashment of earned leave. The Committee passed order dated 3.5.2007 and recommended payment of the amount in lieu of earned leave. However, respondent No.1 did not act upon the recommendations of the Committee. Therefore, Dr. Anagha Anant Nadkarni and Dr. Moreshwar J. Bedekar filed Writ Petition Nos.8763 and 8775 of 2007 for issue of a mandamus to respondent No.1 to pay the amount of leave encashment. The same were disposed of by the Division Bench of the Bombay High Court vide order dated 7.4.2008 along with 11 other writ petitions. The Division Bench relied upon order dated 22.1.2007 passed in Writ Petition No.4936/2006 – V. S. Agarkar v. The Chairman, Grievance Cell Committee, Pune University and others and held:

> ". Therefore, there could not be any controversy over the issue of entitlement of the petitioners for encashment of unutilised earned leave on superannuation which in the case of *V.S. Agarkar* (supra) has been discussed at length and, therefore, we dispose of these petitions with a direction to the respondent-institution and the Principal that the Principal of the Institution where the petitioners were employed to pay to the petitioners leave encashment for maximum 180 days or lesser to the extent that the petitioners are entitled to and that they shall complete the exercise within a period of eight weeks from today. We further make it clear that the Institution after discharging their liability of payment of leave encashment as per the entitlement of the petitioners, are entitled to claim reimbursement by way of grant from the Respondent-State."

3. By another order dated 9.6.2008 passed in Writ Petition No.2881/2007 – Khandesh College Education Society v. Arjun Hari Narkhede and others, the Division Bench of the High Court directed payment of leave encashment to the teachers in terms

of the order passed in V. S. Agarkar's case. Simultaneously, liberty was given to the institutions to seek reimbursement from the State. That order was modified on 20.6.2008 in the following terms:

> "We have disposed of these petitions by common order dated 9.6.2008. It has been pointed out by the petitioner in W.P. No.6540/2007 that this court has observed that Grievance Committee has rejected the claim of the petitioner on the ground that it is barred by delay and latches as the petitioner had approached the Grievance Committee after lapse of three years. It is submitted that this statement was made without proper instructions. In fact, the Grievance Committee had given a report in favour of the petitioner which was dealt by the Grievance Committee after petition came to be filed. We, therefore, record this to be read at the end of Paragraph No. 4 that later on Counsel has submitted as aforesaid. This does not in any manner affect the substantive relief granted by the court in favour of the petitioner.
>
> 2. Learned A.G.P. submitted that this court has observed in concluding Paragraph that respondent - institution will be entitled to claim reimbursement by way of grant from the respondent - State. Only correction requires to be done is that the liability of the State would be subject to claim of the respondent being admissible under law. Therefore, we add a sentence at the conclusion of Paragraph No. 9 if admissible under law. Our order be read accordingly."

4. Khandesh College Education Society challenged the orders of the High Court in SLP (C) Nos.17039-17040/2008, which were disposed of by this Court vide order dated 5.7.2011 along with a batch of similar special leave petitions. The two Judge Bench first considered the question whether the provisions of Maharashtra Civil Services (Leave) Rules, 1981 (for short, 'the 1981 Rules') are applicable to the teachers employed by respondent No.1, and held:

"From the very language of different provisions of Rule 54 of the Maharashtra Civil Services (Leave) Rules, 1981 it is clear that it applies only to "a government servant". Respondents 1 to 14 are not government servants and, therefore, cannot be denied earned leave on the basis of provisions made in Rule 54 of the Maharashtra Civil Services (Leave) Rules, 1981."

The Bench then referred to the relevant provisions of the Maharashtra Universities Act, 1994 (for short, 'the 1994 Act'), Statutes 424(3) and 424(C) of the University of Pune and observed:

"On the other hand, Section 115 of the Act while repealing the different Acts applicable to different universities in the State of Maharashtra provides in sub-section (2)(xii) that all Statutes made under the repealed Acts in respect of any existing university shall, insofar as they are not inconsistent with the provisions of the Act, continue in force and be deemed to have been made under the Act in respect of the corresponding university until they are superseded or modified by the Statutes made under the Act. Hence, Statutes 424(3) and 424(C) of University of Pune, which were applicable to the University, continue to be in force and are deemed to be made under the Act if they are not inconsistent with any provision of the Act or are not superseded, modified by Statutes made under the Act.

Sections 5(60), 8 and 14(5) of the Act confer power on the State Government to exercise control over the University in some matters and also empower the State Government to issue directives to the University and cast a duty on the Vice-Chancellor to ensure compliance with such directives, but these provisions in the Act do not prohibit grant of earned leave to a teacher or Lecturer of any affiliated college who can avail a vacation from being entitled to earned leave or from being entitled to encashment of

accumulative earned leave at the time of retirement. In other words, Statutes 424(3) and 424(C) of University of Pune are not in any way inconsistent with the provisions of the Act. The learned counsel for the petitioners and the State Government have also not brought to our notice any statute of the University modifying or superseding Statute 424(3) or Statute 424(C) of University of Pune which were applicable to the University.

Statutes 424(3) and 424(C) of University of Pune are extracted hereinbelow:

"424. (3). Leave.—

(a)-(b) * * *

(c) Earned leave.—

(a) The confirmed non-vacation teacher shall be entitled to earned leave at the rate of one-eleventh of the period spent on duty subject to his accumulating maximum of 180 days of leave.

(b) The teacher other than the one included in (a) above shall be entitled to one twenty-seventh of the period spent on duty and the period of earned leave as provided in the proviso to Section 423 subject to his accumulation of maximum of 180 days. For this purpose the period of working days only shall be considered."

* * *

"424(C). Encashment of unutilised earned leave on superannuation.—The teacher shall be entitled to encash earned leave in balance to his credit on the date of his superannuation subject to a maximum of 180 days.

In case the teacher is required to serve till the end of academic session beyond the date of his superannuation,

he shall be entitled to encash the balance of earned leave to his credit on the date of his actual retirement from service."

A reading of Statute 424(3) extracted above would show that clause (*a*) applies to confirmed non-vacation teachers and clause (*b*) applies to teachers other than non-vacation teachers and clause (*b*) clearly states that teachers other than non-vacation teachers shall be entitled to earned leave subject to their accumulation of maximum 180 days. Statute 424(C), quoted above, further provides that teachers shall be entitled to encash earned leave in balance to their credit on the date of his superannuation subject to a maximum of 180 days.

It, however, appears that the State Government has issued directives from time to time to the universities to amend the Statutes so as to ensure that Lecturers or teachers working in Vacation Departments are not entitled to earned leave and encashment of earned leave, but the fact remains that Statutes 424(3) and 424(C) of University of Pune have not been modified or superseded. There are also no provisions in the Act to the effect that the Statutes of a university which are inconsistent with the directives of the State Government will be invalid. Section 115(2)(xii) rather states that statutes which are not inconsistent with the provisions of the Act and which have not been modified or superseded shall continue to be in force. Hence, Respondents 1 to 14 were entitled to earned leave and encashment of earned leave as per the provisions of Statutes 424(3) and 424(C) of University of Pune."

5. After recording the aforesaid observations, the Bench declined to grant leave but gave three months time to the SLP petitioners to comply with the directions given by the High Court.

6. After 3 years of enactment of the 1994 Act, which

resulted in repeal of various existing statutes including the Poona University Act, 1974, under which Statutes 424(3) and 424(C) had been framed, the State Government issued instructions to the Universities to discontinue payment of leave encashment to the teachers by pointing out that they fall in the categories of employees working in the 'Vacation Department'. The State Government also took cognizance of the orders passed by the High Court in Writ Petition No. 2671/2006 and Contempt Petition No. 191/2006 and directed that the University Statutes should be amended with retrospective effect and till then, the concerned University should bear expenses incurred in payment of leave encashment. This was reiterated vide letter dated 20.10.2008 sent by the Director of Education (Higher Education), Maharashtra to all the universities.

7. In furtherance of the directives given by the State Government, the Vice-Chancellor of Pune University passed order dated 1.2.2009, which reads as under:

"WHEREAS the Maharashtra State Legislature has enacted the Maharashtra Universities Act, 1994 (Maharashtra Act No. XXXV of 1994), which has come into force with effect from 22nd July, 1994.

AND WHEREAS as per Section 51(8) of the Maharashtra Universities Act 1994, the University has power to prescribe the terms and conditions of the services of the teachers by framing Statutes.

AND WHEREAS the University, in exercise of the power vested in it, as per Section 51(8) of the Maharashtra Universities Act, has framed the Statutes regarding the entitlement, surrender and encashment of the earned leave to the teachers.

State Government, vide its letter dated 9th August, 2007, University to repeal the provisions of earned leave effect, since the teachers of the University of the vacation, they are not entitled for earned leave in the Statutes with retrospective effect, since the Teachers of the University

and affiliated colleges avail of the vacation, they are not entitled for earned leave.

AND WHEREAS the State Government, vide its further letter dated 20th October, 2008 directed all Universities to repeal the provisions of earned leave in the Statues with retrospective effect, within a period of one month from the date of the letter.

AND WHEREAS as per Section 14(5) of the Maharashtra University Act, 1994, it is, inter alia, duty of the Vice-Chancellor to ensure that directives of the State Government are strictly observed.

AND WHEREAS as per Section 5(60) of the Maharashtra Universities Act, 1994, the University has to comply with and carry out any directives issued by the State Govt from time to time.

AND WHEREAS a proposal as regards repealing the Statute 424(C) in respect of encashment of earned leave with retrospective effect, was placed before Management Council in its meeting held on 22nd August, 2008.

AND WHEREAS the Management Council of the University in its above said meeting resolved that an administrative decision as regards repealing the Statute 424 (C), be taken and the directives be issued in this regard in view of the provisions of Section 5(60) and Section 14(5) of the Maharashtra & Universities Act, 1994.

AND WHEREAS the Management Council of the University, in its meeting held on 1st October, 2008 confirmed its earlier decision as regards repealing the Statute 424 (G), be taken and the directives be issued in this regard in view of the provisions of Section 5(60) and Section 14(5) of the Maharashtra Universities Act 1994 arid resolved that the said decision be implemented with effect from 1st February, 2009.

AND WHEREAS it will take some time to repeal the said Statute and place the same before the Statutory Authorities in the University as laid down in Section 52 of the Maharashtra Universities Act, 1994.

Therefore, I Dr. Narendra Damodar Jadhav, Vice-chancellor of the University of Pune, by and under the powers vested in the under sub section 8 of Section 14 of the Maharashtra Universities Act, 1994, hereby issue the following directives;

The Teachers Statute 424 (C) is repealed w.e.f. 1st February, 2009.

Ref: No.LAW/2009/73
Dated 1.2.2009

Dr. Narendra Jadhav
Vice-Chancellor.

Present Statute	Amendment Proposed	Statute after amendment
Statute 424 (C) encashment of Unutilized Earned Leave on Superannuation The teacher shall be entitled to encash earned leave in balance to his credit on the date of his superannuation subject to a maximum of 180 days. In case the teacher is required to serve till the end of academic session beyond the date of his superannuation, he shall be entitled to encash the balance of earned leave to his credit on the date of his actual retirement from service."	Delete statute 424 (C)	

(The order has been extracted from the SLP paper-book)

8. Feeling aggrieved by the directives issued by the State Government, respondent Nos. 1 and 2 filed Writ Petition No.6609/2009 for issue of a mandamus to the State Government to reimburse the total amount of Rs.4,46,815/- paid to Dr. Anagha Anant Nadkarni and Dr. Moreshwar J. Bedekar and for grant of a declaration that State Government is liable to reimburse the amount paid to other teachers by way of leave encashment.

9. The State Government contested the writ petition by relying upon the provisions of the 1981 Rules and the instructions issued for repeal of the Statutes with retrospective effect and pleaded that the writ petitioners are not entitled to reimbursement of the leave encashment paid to the teachers employed in the 'Vacation Department'.

10. The Division Bench of the High Court referred to order dated 7.4.2008 passed in Writ Petition No. 8763/2007 and connected matters and disposed of the writ petition vide order dated 24.8.2009 by taking cognizance of the statement made by the Assistant Government Pleader that the amount paid to the teachers will be reimbursed by way of grant. The Director of Higher Education and others filed Civil Application No.2320/2009 for modification of order dated 24.8.2009. The same was disposed of by the High Court on 9.10.2009 by relieving the Assistant Government Pleader of the concession made by him. However, the direction given for reimbursement of the amount paid by the institutions to the teachers in lieu of earned leave was maintained on the premise that order dated 7.4.2008 passed in Writ Petition No.8763/2007 and batch has become final.

11. On 3.11.2009, this Court ordered notice in SLP (C) Nos.27286-27287/2009 but dismissed a batch of special leave petitions by recording the following observations:

> "These SLPs arise from the common order dated 7.4.2008 in a batch of writ petitions. There is a delay of 480 days.

> It is submitted that the order dated 7.4.2008 has been followed in another batch of cases - Khandesh College Education Society vs. Arjun Hari Narkhede & Ors. and connected cases W.P.No.2881/2007 dated 9.6.2008. Later, having found that there was an obvious omission, the High Court made an amendment to the order dated 9.6.2008, by order dated 20.6.2008 by adding the words "if admissible under law" after the words "are entitled to claim reimbursement by way of grant from the Respondent-State". It is submitted that the High Court, having made the said amendment in the order dated 9.6.2008 in W.P.(C) No.2881/2007, ought to have made the said correction in the impugned order dated 7.4.2008 also as that order also contained a similar omission by oversight. Therefore, it will be appropriate if the petitioner-State approaches the High Court and point out that the correction having been found necessary in the order dated 9.6.2008, it ought to have been made in the order 7.4.2008 also when correcting the order dated 9.6.2008."

12. In furtherance of the observations made by this Court, the appellants filed applications for clarification of order dated 7.4.2008 passed by the High Court. Respondent Nos. 1 and 2 resisted the prayer made in the applications by asserting that the clarifications sought by the State would completely change the nature of relief granted by the High Court. After considering the objections, the High Court passed order dated 3.5.2011, paragraphs 5, 6 and 7 of which read as under:

> "5. In our opinion, the clarification sought by the applicant-State of Maharashtra is a benign clarification. Inasmuch as, the respondents (original writ petitioners) or the management of the school in which the teachers were employed and have been paid leave encashment amount, cannot be heard to contend that the management would be entitled for reimbursement of the amount so paid by them even if the same is inadmissible in law. In other

words, the directions contained in the order dated 7.4.2008 will have to be understood to mean that the management would be entitled to claim reimbursement by way of grant from the respondent-State to the extent of the amount paid by it to the teachers as leave encashment, if permissible in law.

6. In this view of the matter, we allow all these Civil Applications by adding at the end of paragraph 4, the following words:-

"if permissible in law."

7. We, however, record the submission of the management as well as the teachers (original writ petitioners) with approval that the fact that such clarification has been issued does not necessarily mean that the management is not entitled for reimbursement in law. That is a matter which will have to be examined in appropriate proceedings as and when occasion arises."

13. Shri Chinmoy Khaladkar, learned counsel for the appellants referred to the provisions of the 1994 Act, the 1981 Rules and argued that the appellants are not obliged to reimburse the amount paid by respondent No.1 to the teachers by way of leave encashment in terms of the Statutes framed by the Pune University because neither the Poona University Act, 1974 nor any other enactment mandates reimbursement of the amount paid in lieu of the earned leave. Learned counsel pointed out that in terms of Rules 52 and 54 of the 1981 Rules, the teachers employed in the Government colleges are not entitled to the benefit of leave encashment and argued that it would amount to invidious discrimination if the teachers employed in the private colleges affiliated to the University are held entitled to the benefit of leave encashment.

14. Shri Colin Gonsalves, learned senior counsel for respondent Nos. 1 and 2 argued that despite the order passed

by the High Court on 3.5.2011, the appellants are duty bound to reimburse the colleges the amount paid to the teachers by way of leave encashment. Learned senior counsel submitted that in view of Section 115(2), the existing Statutes and Ordinances made under the Acts specified in sub-section (1) of Section 115 will be deemed to have been saved because the University had not framed fresh Statutes or repealed the existing Statutes.

15. We have considered the respective arguments. Sections 3(1), 5(9), 5(49), 5(57), 5(60), 8(1)(a) to 8(c), 8(1)(g), 8(2), 8(3), 8(4), 14(5), 51(5), 51(8), 52(6), 115(1) and 115(2)(xii) of the 1994 Act, Rules 50(1)(a), 50(1)(b), 52, 54(1), 54(2), the relevant extract of Appendix II of the 1981 Rules and Statutes 424(3) and 424(C), which have bearing on these appeals, read as under:

The 1994 Act.

"**3. Incorporation of universities**:- (1) In relation to each of the existing universities specified in column (1) of Part I of the Schedule, with effect from the date of commencement of this Act, the corresponding university with the name, specified against it in column (2) of the said Part, is hereby constituted under this Act, for the same area specified in column (3) of the said Part for which it was constituted immediately before the date of commencement of this Act.

5. Powers and duties of university: - The university shall have the following powers and duties, namely:-

(1) to (8) xxx xxx xxx

(9) to create posts of directors, principals, professors, readers, lecturers and other teaching or non-vacation academic posts required by the university with the prior approval of the State Government and to prescribe their

qualifications and make appointments thereto;

(10) to (48) xxx xxx xxx

(49) to lay down for teachers and university teachers, service conditions including code of conduct, workload, norms of performance appraisal, and such other instructions or directions as, in the opinion of the university, may be necessary in academic matters;

(50) to (56) xxx xxx xxx

(57) to evolve an operational scheme for ensuring accountability of teachers, non-vacation academic and non-teaching staff of the university, institutions and colleges;

(58) to (59) xxx xxx xxx

(60) to comply with and carry out any directives issued by the State Government from time to time, with reference to above powers, duties and responsibilities of the university.

8. Control of State Govt. and universities: - (1) Without prior approval of the State Government, the university shall not, -

(a) create new posts of teachers, officers or other employees;

(b) revise the pay, allowances, post-retirement benefits and other benefits of its teachers, officers and other employees;

(c) grant any special pay, allowance or other extra remuneration of any description whatsoever, including ex gratia, payment or other benefits having financial implications, to any of its teachers, officers or other

employees;

(d) to (f) xxx xxx xxx

(g) take any decision regarding affiliated colleges resulting in increased financial liability, direct or indirect, for the State Government.

(2) The university shall be competent to incur expenditure from the funds received from, -

(a) various funding agencies without any share or contribution from the State Government;

(b) fees for academic programmes started on self-supporting basis;

(c) contributions received from the individuals, industries, institutions, organisations or any person whosoever, to further the objectives of the university;

(d) contributions or fees for academic or other services offered by the university;

(e) development fund, if any, established by the university;

for the purposes of -

(i) creation of post in various categories for specific period;

(ii) granting pay, allowances and other benefits to the posts created through its own funds provided those posts are not held by such persons, who are holding the posts for which government contribution is received;

(iii) starting any academic programme on self-supporting basis;

(iv) incurring expenditure on any development work;

without referring the matter for approval of the State Government, provided there is no financial liability, direct or indirect, immediate or in future on the State Government.

(3) The State Government may in accordance with the provisions contained in this Act, for the purpose of securing and maintaining uniform standards, by notification in the Official Gazette, prescribe a Standard Code providing for the classification, manner and mode of selection and appointment, absorption of teachers and employees rendered surplus, reservation of post in favour of member of the Scheduled Castes, Scheduled Tribes, Denotified Tribes (Vimukta Jatis) and Nomadic Tribes and Other Backward Classes, duties workload, pay, allowances, postretirement benefits, other benefits, conduct and disciplinary matters and other conditions of service of the officers, teachers and other employees of the universities and the teachers and other employees in the affiliated colleges and recognised institutions (other than those managed and maintained by the State Government, Central Government and the local authorities). When such Code is prescribed, the provisions made in the Code shall prevail, and the provisions made in the Statutes, Ordinances, Regulations and Rules made under this Act, for matter included in the Code shall, to the extent to which they are inconsistent with the provisions of the Code, be invalid.

(4) In case of failure of the university to exercise powers or perform duties specified in section 5 or where the university has not exercised such powers or performed such duties adequately, or where there has been a failure to comply with any order issued by the State Government, the State Government may, on making such inquiry as it may

deem fit, issue a directive to the university for proper exercise of such powers or performance of such duties or comply with the order; and it shall be the duty of the university to comply with such direction.

Provided that, in case the university fails to comply with the directives, the State Government shall call upon the university to give reasons in writing why the directives were not complied with. If the State Government is not satisfied with the explanation, it may refer the matter to the Chancellor for taking necessary action under sub-section (3) of section 9.

(5) xxx xxx xxx

14. Powers and duties of Vice-Chancellor:-

(1) to (4) xxx xxx xxx

(5) It shall be the duty of the Vice-Chancellor to ensure that the directives of the State Government if any and the provisions of the Act, Statutes, Ordinances and Regulations are strictly observed and that the decisions of the authorities, bodies and committees which are not inconsistent with the Act, Statutes, Ordinances or Regulations are properly implemented.

(6) to (14) xxx xxx xxx

51. Statutes:- Subject to the provisions of this Act, the Statutes may provide for all or any of the following matters, namely :-

(1) to (4) xxx xxx xxx

(5) the principles governing the seniority and service conditions of the employees of the university;

(6) to (7) xxx xxx xxx

(8) qualifications, recruitment, workload, code of conduct, terms of office, duties and conditions of service, including periodic assessment of teachers, officers and other employees of the university and the affiliated colleges (except those colleges or institutions maintained by the State or Central Government or a local authority), the provision of pension, gratuity and provident fund, the manner of termination of their services, as approved by the State Government;

(9) to (17) xxx xxx xxx

52. Statutes how made:-

(1) to (5) xxx xxx xxx

(6) Notwithstanding anything contained in the foregoing sub-sections, the Chancellor, either suo motu or on the advice of the State Government, may, direct the university to make provisions in the Statutes in respect of any matter specified by him and if the Senate fails to implement such a direction within sixty days of its receipt, the Chancellor may, after considering the reasons, if any, communicated by the Senate for its inability to comply with such direction, make or amend the Statutes suitably.

115. Repeal and savings:- (1) On and from the date of commencement of this Act,-

(a) the Bombay University Act, 1974 (Mah.XXII of 1974);

(b) the Poona University Act, 1974 (Mah.XXIII of 1974);

(c) the Shivaji University Act, 1974 (Mah.XXIV of 1974);

(d) the Dr. Babasaheb Ambedkar Marathwada University Act, 1974 (Mah.XXV of 1974);

(e) the Act, 1974 (Mah.XXVI of 1974);

(f) the Shreemati Nathibai Damodar Thackersey Women's University Act, 1974 (Mah.XXVII of 1974)

(g) the Amravati University Act, 1983 (Mah.XXXVII of 1983); and

(h) the North Maharashtra Universities Act, 1989, shall stand repealed (Mah.XXIX of 1989).

(2) Notwithstanding the repeal of the said Acts, -

(i) to (xi) xxx xxx xxx

(xii) all Statutes and Ordinances made under the said Acts in respect of any existing university shall, in so far as they are not inconsistent with the provisions of this Act, continue in force and be deemed to have been made under this Act in respect of the corresponding university by the Senate or the Management Council, as the case may be of that university, until they are superseded or modified by the Statutes made under this Act;"

The 1981 Rules.

"**50. Earned leave for Government Servant serving in Departments other than Vacation Department**—(1)(a) The leave account of every Government servant who is serving in a Department other than a vacation Department, shall be credited with earned leave, in advance, in two instalments of 15 days each on the first day of January and July of every calendar year.

(b) The leave at the credit of a Government servant at the close of the previous half year shall be carried forward to the next half year, subject to the condition that the leave so carried forward plus the credit for the half year do not exceed the limit of 240 days.

52. Vacation Department—A Vacation Department is,

subject to the exceptions and to the extent stated in Appendix II, a department or part of a department to which regular vacations are allowed, during which a Government servant serving in the department is permitted to be absent from duty.

54. Earned leave for persons serving in Vacation Departments—(1) A Government servant serving in a Vacation Department shall not be entitled to any earned leave in respect of duty performed in any year in which he avails himself of the full vacation.

(2)(a) In respect of any year in which a Government servant avails himself of a portion of the vacation, he shall be entitled to earned leave in such proportion of 30 days, as the number of days of vacation not taken bears to the full vacation:

Provided that no such leave shall be admissible to a Government servant not in permanent employment in respect of the first year of his service.

(b) If, in any year, the Government servant does not avail himself of any vacation earned leave shall be admissible to him in respect of that year under rule 50.

Explanation – For the purposes of this rule, the term "year" shall be construed as meaning not calendar year but twelve months actual duty in a Vacation Department.

Note 1.- A Government Servant entitled to vacation shall be considered to have availed himself of a vacation or a portion of a vacation unless he had been required by general or special order of a higher authority to forego such vacation or portion of a vacation; provided that if he has been prevented by such order from enjoying more than fifteen days of the vacation, he shall be considered to have availed himself of no portion of the vacation.

Note 2.- When a Government servant serving in a Vacation Department proceeds on leave before completing a full year of duty, the earned leave admissible to him shall be calculated not with reference to the vacations which fall during the period of actual duty rendered before proceeding on leave but with reference to the vacations that fall during the year commencing from the date on which he completed the previous year of duty.

APPENDIX II
(See rule 52)

List of Government servants serving in Vacation/Non-vacation Department

The following classes of Government servants serve in Vacation Departments when the conditions of rule 52 are fulfilled:—

1. (a) Under the Directorate of Education, —(i) All Heads of Government Educational Institutions belonging to Class I, II and III.

(ii) Professors, Readers, Associate Professors, Research Assistants, Lecturers, Assistant Lecturers, Demonstrators, Tutors in Class I, II and III, as the case may be, in Government Arts, Science, Commerce and Law Colleges.

(iii) Professors, Lecturers, Co-ordinators, Assistant Lecturers etc. in Class I, II and III as the case may be, in Government Training Colleges.

(iv) Physical Instructors in Government Colleges and Secondary Schools.

(v) Laboratory Assistants, Laboratory Attendants in Government Colleges and Secondary Schools.

(vi) Lecturers or other teachers in Government Primary, Middle and Secondary Schools and in Primary Training Institutions and other special Institutions.

(vii) All other staff in Government Institutions excepting those mentioned as belonging to Non-Vacation Department."

Statutes

"**424. (3). Leave**.—

(a)-(b) * * *

(c) **Earned leave**.—

(a) The confirmed non-vacation teacher shall be entitled to earned leave at the rate of one-eleventh of the period spent on duty subject to his accumulating maximum of 180 days of leave.

(b) The teacher other than the one included in (a) above shall be entitled to one twenty-seventh of the period spent on duty and the period of earned leave as provided in the proviso to Section 423 subject to his accumulation of maximum of 180 days. For this purpose the period of working days only shall be considered.

424(C). Encashment of unutilised earned leave on superannuation.—The teacher shall be entitled to encash earned leave in balance to his credit on the date of his superannuation subject to a maximum of 180 days.

In case the teacher is required to serve till the end of academic session beyond the date of his superannuation, he shall be entitled to encash the balance of earned leave to his credit on the date of his actual retirement from service."

16. An analysis of the provisions of the 1994 Act shows that universities constituted under Section 3(1) are autonomous and they are, by and large, independent in their functioning. However, the State Government can exercise control in some matters including those which have financial implications and issue directives which are binding on the universities. The

creation of posts and conditions of service of the teaching and non-teaching staff which impacts finances of the universities are some such matters. Section 8 makes it obligatory for the universities to seek approval of the State Government for creation of new posts of teachers, officers or other employees and revision of their pay, allowances, post-retirement benefits, etc. No university can grant special pay or allowance or extra remuneration to the employees except with the prior approval of the State Government. Likewise, any decision regarding affiliated colleges resulting in additional financial liability can be taken only after obtaining approval from the State Government. The Statutes framed under Section 51(8) in matters like qualifications, recruitment, workload, code of conduct, terms of office, duties and conditions of service of teachers, officers and other employees of the university and the affiliated colleges, except those maintained by the State or Central Government or a local authority, require approval of the State Government. By virtue of Section 115(2)(xii), the Statutes framed by various universities prior to the enforcement of the 1994 Act were continued till their supersession or modification by the Statutes made under the new Act.

17. We may now advert to the 1981 Rules. Rule 50(1) lays down that leave account of every Government servant other than the one serving in a Vacation Department shall be credited with earned leave, in advance, in two instalments of 15 days each in January and July of every year and the leave at the credit of a Government servant at the close of the previous half year is to be carried forward to the next half year subject to the maximum limit of 240 days. Rule 52 defines the Vacation Department as a department or part thereof to which regular vacations are allowed and during which an employee serving in that department is permitted to be absent from duty. As per Appendix II, which finds reference in Rule 52, all Heads of Government Education Institutions belonging to Class I, Class II and Class III and Professors, Readers, Associate Professors and other teachers in Class I, II and III employed in Government

Arts, Science, Commerce and Law Colleges, Government Training Colleges, Physical Instructors in Government Colleges and Secondary Schools, Laboratory Assistants, Laboratory Attendants in Government Colleges and Secondary Schools, Lecturers and other teachers in Government Primary, Middle and Secondary Schools and in Primary Training Institutions and other special Institutions as also other staff in Government Institutions, except those mentioned as belonging to Non-Vacation Department, are treated as serving in the Vacation Departments.

18. Although, Rule 54 has the caption "Earned leave for persons serving in Vacation Departments", sub-rule (1) thereof declares that a Government servant serving in a Vacation Department shall not be entitled to any earned leave in respect of duty performed in any year in which he avails the full vacation. Sub-rule (2) of Rule 54 deals with a situation in which a Government servant avails himself of a portion of the vacation, in that event he is entitled to earned leave in such proportion of 30 days as the number of days of vacation not taken bears to the full vacation. Clause (b) of Rule 54(2) lays down that if a Government servant does not avail himself of any vacation in any year, earned leave shall be admissible to him in respect of that year in terms of Rule 50.

19. We are in complete agreement with the view expressed by the coordinate Bench in Khandesh College Education Society, Jalgaon v. Arjun Hari Narkhede (2011) 7 SCC 172, that the provisions contained in the 1981 Rules are not applicable to the university teachers and the teachers of the affiliated colleges because they are not Government servants but this cannot lead to an inference that the affiliated colleges are entitled to reimbursement of the amount paid to the teachers in lieu of earned leave. Though the Statutes framed by the Pune University under the 1974 Act entitle the teachers of the affiliated colleges to get the benefit of leave encashment, there is no provision either in that Act or in the 1994 Act which obligates the State Government to extend the benefit of leave

encashment to the university teachers or to the teachers of the affiliated colleges and the mere fact that the Statutes of the particular university provide for grant of leave encashment to the teachers, does not entitle the concerned university or college to claim reimbursement from the State Government as of right.

20. The criticism of the directives issued by the State Government to the universities to amend the Statutes under which the teachers are given the benefit of leave encashment is wholly misplaced. It is neither the pleaded case of respondent Nos. 1 and 2 nor it has been argued by Shri Gonsalves that the teachers employed in the Government colleges are entitled to the benefit of leave encashment. Therefore, the State Government was perfectly justified in issuing directives to the universities to amend their Statutes. No doubt, in some of the communications reference has been made to Rules 50, 52 and 54 of the 1981 Rules but this does not detract from the fact that the State Government is empowered to issue such directives. It is a different thing that for almost two years the Pune University failed to take action in accordance with the binding directives issued by the State Government.

21. In paragraph 18 of the *Khandesh College Education Society, Jalgaon v. Arjun Hari Narkhede* (supra), this Court has taken cognizance of the directives issued by the State Government from time to time to the universities to amend the Statutes and observed that till the Statutes, which are not inconsistent with the provisions of the 1994 Act, are modified or superseded the same shall continue to remain in force. However, these observations cannot be interpreted in a manner which would entitle the university or the affiliated colleges to claim reimbursement.

22. In the result, the appeals are allowed, the impugned orders are set aside and the writ petition filed by respondent Nos. 1 and 2 is dismissed. The parties are left to bear their own costs.

K.K.T. Appeals allowed.

THE RAJASTHAN STATE INDUSTRIAL DEVELOPMENT AND INVESTMENT CORPORATION & ANR.
v.
DIAMOND AND GEM DEVELOPMENT CORPORATION LTD. & ANR.
(Civil Appeal Nos. 7252-7253 of 2003)

FEBRUARY 12, 2013

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

Rajasthan State Industrial & Investment Corporation Limited (Disposal of Land) Rules, 1979 – r.24 – Land notified for public purpose – Possession of land taken over by the State Government and handed over to appellant-RIICO – Appellant allotted the land to respondent-company, to facilitate establishment of an Industrial Estate – Lease deed executed between appellant and respondent-company – Respondent-company asked the appellant to provide it accessibility via an approach road and, as the same was not provided, it filed writ petition seeking such approach/access road – Meanwhile, on ground of non-completion of project within stipulated period, the appellant cancelled the lease deed and took back possession of the land – Same challenged by respondent-company by filing another writ petition – High Court allowed both the writ petitions – On appeal, held: The allotment was made on "as-is- where-is" basis which was accepted by respondent-company without any protest – Terms of the lease deed made it clear that no obligation was placed upon the appellant to provide to the respondent the access road – As per the lease deed, the entire project was to be completed within five years, but construction was made just on a fraction of the entire land – The lease deed also contemplated that, the lessee will not transfer nor sub-let nor relinquish rights without prior permission from the appellant – However, respondent-

company had negotiated with a third party for development of the land – Cancellation of allotment was made by appellant in exercise of its power under Rule 24 of the 1979 Rules read with the terms of the lease agreement – Respondent-company did not resort to any of the statutory remedies, rather preferred a writ petition which could not have been entertained by the High Court – High Court erred in treating the whole case to be governed only under the 1959 Rules, and in holding that the 1979 Rules had no application at all – It further mis-interpreted the amendment to Rule 11-A of the 1959 Rules and decided the case on speculative and hypothetical reasons – Order of cancellation of allotment in favour of respondent-company accordingly restored – Rajasthan Land Revenue (Industrial area allotment) Rules, 1959 – r.11-A – Rajasthan Land Acquisition Act, 1953 – ss. 4 and 6.

Contract – Terms and conditions – Interpretation – Held: The contract is to be interpreted giving the actual meaning to the words contained in the contract –It is not permissible for the court to make a new contract, however reasonable, if the parties have not made it themselves.

Constitution of India, 1950 – Article 226 – Contractual disputes and writ jurisdiction – Held: Generally the court should not exercise its writ jurisdiction to enforce contractual obligation.

Doctrines / Principles – Doctrine of estoppel by election – Basis of – Equity.

Words and Phrases – "as-is-where-is" – Meaning of.

Words and Phrases – "as if" – Meaning of – Rajasthan Land Revenue (Industrial area allotment) Rules, 1959 – r.11A (as amended).

Words and Phrases – "mutatis mutandis" – Meaning of

– Rajasthan Land Revenue (Industrial area allotment) Rules, 1959 – r.11A (as amended).

Land was notified for a public purpose i.e. industrial development under Section 4(1) of the Rajasthan Land Acquisition Act, 1953. Declaration under Section 6 of the Act was also made and possession of the land, was taken over by the State Government and handed over to appellant-RIICO. Appellant made allotment of land to respondent no.1-company, to facilitate the establishment of a Gem Industrial Estate. A lease deed was executed between the appellant and respondent-company with a stipulation that the land was allotted on "as is-where-is" basis, and that the respondent-company must complete the said project within a period of 5 years. The respondent-company asked the appellant to provide it accessibility via an approach road and, as the same was not provided, the respondent-company filed Writ Petition before the High Court, seeking the issuance of a direction to the appellant to provide to it, such a road.

Meanwhile, the appellant issued a show cause notice, to determine the lease in light of the lease agreement, as even after expiry of 5 years, only 10% of the total construction work stood completed. In pursuance thereof, the lease deed was cancelled, and possession of the land in dispute was taken back by the appellant. The respondent-company filed another Writ Petition challenging the cancellation order and the taking over of possession by the appellant.

The High Court allowed both the writ petitions, quashing the order of cancellation, and directing restoration of possession of the land to respondent-company, and further, also directing the appellant to provide to respondent-company, the approach/access road demanded by it.

In the instant appeals, the appellant-RIICO, and the State of Rajasthan raised the following contentions: - 1) that as allotment of the land had been made to the respondent-company on 'as-is-where-is" basis, there was no obligation on the part of RIICO to provide to it, the said access road; 2) that cancellation of the lease deed was in accordance with the terms and conditions incorporated in the lease deed; and 3) that the High Court mis-interpreted the amendment to Rule 11-A of the Rajasthan Land Revenue (Industrial area allotment) Rules 1959, and thus erred in holding that the appellant had no jurisdiction to cancel the said lease.

Allowing the appeals, the Court

HELD: 1. The instant case is required to be decided in the light of the following settled legal propositions:

1.1. *Approbate and Reprobate:* **A party cannot be permitted to "blow hot-blow cold", "fast and loose" or "approbate and reprobate". Where one knowingly accepts the benefits of a contract, or conveyance, or of an order, he is estopped from denying the validity of, or the binding effect of such contract, or conveyance, or order upon himself. This rule is applied to ensure equity, however, it must not be applied in such a manner, so as to violate the principles of, what is right and, of good conscience. The doctrine of election is based on the rule of estoppel- the principle that one cannot approbate and reprobate is inherent in it. The doctrine of estoppel by election is one among the species of estoppels in pais (or equitable estoppel), which is a rule of equity. By this law, a person may be precluded, by way of his actions, or conduct, or silence when it is his duty to speak, from asserting a right which he would have otherwise had. [Para 9, 10] [351-E-F, H; 352-A-B]**

Nagubai Ammal & Ors. v. B. Shama Rao & Ors. **AIR 1956**

SC 593: 1956 SCR 451; *C.I.T. Madras v. Mr. P. Firm Muar* **AIR 1965 SC 1216: 1964 SCR 45;** *Ramesh Chandra Sankla etc. v. Vikram Cement etc.* **AIR 2009 SC 713: 2008 (10) SCR 243;** *Pradeep Oil Corporation v. Municipal Corporation of Delhi & Anr.* **AIR 2011 SC 1869: 2011 (4) SCR 764;** *Cauvery Coffee Traders, Mangalore v. Hornor Resources (International) Company Limited* (**2011) 10 SCC 420: 2011 (12) SCR 473 and** *V. Chandrasekaran & Anr. v. The Administrative Officer & Ors.* **JT 2012 (9) SC 260 – relied on.**

1.2. *Mutatis Mutandis – meaning:* **The phrase** *"mutatis mutandis"* **implies that a provision contained in other part of the statute or other statutes would have application as it is with certain changes in points of detail. [Para 11] [353-C]**

M/s. Ashok Service Centre & Anr. etc. v. State of Orissa **AIR 1983 SC 394: 1983 (2) SCR 363;** *Prahlad Sharma v. State of U.P. & Ors.* **(2004) 4 SCC 113: 2004 (2) SCR 594;** *Mariyappa & Ors. v. State of Karnataka & Ors.* **AIR 1998 SC 1334: 1998 (1) SCR 988 and** *Janba (dead) thr. Lrs. v. Gopikabai (Smt.)* **AIR 2000 SC 1771: 2000 (2) SCR 1035 – relied on.**

1.3. *Contractual disputes and writ jurisdiction:* **Matters/ disputes relating to contract cannot be agitated nor terms of the contract can be enforced through writ jurisdiction under Article 226 of the Constitution. The writ court cannot be a forum to seek any relief based on terms and conditions incorporated in the agreement by the parties. Generally the court should not exercise its writ jurisdiction to enforce the contractual obligation. [Paras 12, 14] [353-D-E; 354-B]**

Bareilly Development Authority & Anr. v. Ajay Pal Singh & Ors. **AIR 1989 SC 1076: 1989 (1) SCR 743;** *State of U.P. & Ors. v. Bridge & Roof Co. (India) Ltd.* **AIR 1996 SC 3515: 1996 (4) Suppl. SCR 762 and** *Kerala State Electricity Board & Anr. v. Kurien E. Kalathil & Ors.* **AIR 2000 SC 2573: 2000**

(1) Suppl. SCR 581 – relied on.

1.4. *Interpretation of terms of contract:* **A party cannot claim anything more than what is covered by the terms of contract, for the reason that contract is a transaction between the two parties and has been entered into with open eyes and understanding the nature of contract. Thus, contract being a creature of an agreement between two or more parties, has to be interpreted giving literal meanings unless, there is some ambiguity therein. The contract is to be interpreted giving the actual meaning to the words contained in the contract and it is not permissible for the court to make a new contract, however is reasonable, if the parties have not made it themselves. It is to be interpreted in such a way that its terms may not be varied. The contract has to be interpreted without giving any outside aid. The terms of the contract have to be construed strictly without altering the nature of the contract, as it may affect the interest of either of the parties adversely. [Para 16] [355-C-F]**

United India Insurance Co. Ltd. v. Harchand Rai Chandan Lal **AIR 2004 SC 4794: 2004 (4) Suppl. SCR 662;** *Polymat India P. Ltd. & Anr. v. National Insurance Co. Ltd. & Ors.* **AIR 2005 SC 286: 2004 (6) Suppl. SCR 535 and** *DLF Universal Ltd. & Anr. v. Director, T. and C. Planning Department Haryana & Ors.* **AIR 2011 SC 1463: 2010 (15) SCR 85 – relied on.**

1.5. *"As-is-where-is"* – means

The phrase, "as is-where-is", has been explained by Supreme Court in the case of Punjab Urban Planning & Development Authority, wherein it was held, that the allottees after having accepted the allotment on "as-is-where-is" basis, are estopped from contending that the basic amenities like parking, lights, roads, water, sewerage, etc. were not provided by PUDA when the

plots were allotted. [Para 18] [356-F-G; 357-B-C]

Punjab Urban Planning & Development Authority & Ors. v. Raghu Nath Gupta & Ors. **(2012) 8 SCC 197 and** *UT Chandigarh Admn. & Anr. v. Amarjeet Singh & Ors.* **(2009) 4 SCC 660: 2009 (4) SCR 541 – relied on.**

1.6. *"As if" – means*

The expression "as if", is used to make one applicable in respect of the other. The words "as if" create a legal fiction. The words "as if", in fact show the distinction between two things and, such words must be used only for a limited purpose**. They further show that a** legal fiction must be limited to the purpose for which it was created. **[Para 19] [357-D-E, F-G]**

Radhakissen Chamria & Ors. v. Durga Prasad Chamria & Anr. **AIR 1940 PC 167;** *Commr. of Income-tax, Delhi v. S. Teja Singh* **AIR 1959 SC 352: 1959 Suppl. SCR 394;** *Ram Kishore Sen & Ors. v. Union of India & Ors.* **AIR 1966 SC 644: 1966 SCR 430;** *Sher Singh v. Union of India & Ors.* **AIR 1984 SC 200: 1984 (1) SCR 464;** *State of Maharashtra v. Laljit Rajshi Shah & Ors*. **AIR 2000 SC 937: 2000 (1) SCR 1239;** *Paramjeet Singh Patheja v. ICDS Ltd.* **AIR 2007 SC 168: 2006 (8) Suppl. SCR 178;** *Commissioner of Income Tax v. Willamson Financial Services & Ors.* **(2008) 2 SCC 202: 2007 (13) SCR 376;** *East End Dwelling Co. Ltd. v. Finsbury Borough Council* **1952 AC 109 and** *Industrial Supplies Pvt. Ltd. & Anr. v. Union of India & Ors.* **AIR 1980 SC 1858: 1981 (1) SCR 375 – relied on.**

2.1. In the instant case, the terms and conditions incorporated in the lease deed reveal that, the allotment was made on "as-is- where-is" basis. The same was accepted by the respondent-company without any protest, whatsoever. The lease deed further enabled the appellant to collect charges, in case it decided to provide

the approach road. Otherwise, it would be the responsibility of the respondent-company to use its own means to develop such road, and there was absolutely no obligation placed upon the appellant to provide to the respondent the access road. As the respondent-company was responsible for the creation of its own infrastructure, it has no legal right to maintain the writ petition. The order of the High Court is in contravention of clause 2(g) of the lease deed. [Para 22] [358-G-H; 359-A-B]

2.2. The High Court erred in holding that the provision of providing the access road was an obligation on the part of the appellant-RIICO, deciding this on equitable grounds. The terms of the lease deed clearly stipulated that in case the appellant-RIICO provides the access road, it will be vested with the right to collect the charges incurred by it from the respondent-company, therein, and in the alternative, it would be the obligation of the respondent-company to develop its own infrastructure, and the same would include development of the access road. Therefore, the appellant-RIICO was not under any obligation to provide the said access road. [Para 26] [360-E-F]

3.1. The State exercised its power in transferring the land to RIICO under the Rajasthan Land Revenue (Industrial area allotment) Rules, 1959. However, further allotment by RIICO to the respondent-company was under the Rajasthan State Industrial & Investment Corporation Limited (Disposal of Land) Rules, 1979. Therefore, the High Court committed an error treating that the whole case was governed only under the Rules, 1959, and that Rules, 1979 had no application at all. [Para 23] [359-C-D]

3.2. The interpretation given to the amended Rule 11-A of the Rules 1959 by the High Court, takes away the

vested right of the appellant-RIICO in the title as well as in the interest that it had acquired in the property, as it had paid the entire amount for the land to the State when possession of land was handed over to it. Rule 11-A of the Rules 1959 was amended only to facilitate the respondent-company to grant further sub-lease and not to divest RIICO from its rights and title.The rule provided a deeming clause/fiction that for the purpose of sub-lease by the respondent-company to further allottees, it would be deemed that the State Government had executed the lease in favour of the respondent-company. The terms "*mutatis mutandis",* and "as if", used in the amended provisions of Rule 11-A of the Rules 1959 simply facilitated the sub-letting of a part of the premises by the respondent-company, and did not take away the title and rights that the appellant-RIICO had over the land. Rule 11-A of the Rules 1959 has further been amended on 12.10.2000 enabling all the allottees of RIICO to sub-lease further. Thus, if the interpretation given by the High Court is accepted, the appellant RIICO looses all its lands and properties and rendered the development authority existing on papers only, without any status/authority. [Para 27] [360-G-H; 361-A-D]

3.3. The appellant-RIICO had autonomous functioning, and the interpretation given by the High Court has devastating effect underlying its status, authority and autonomous functioning. In fact, by interpretation the High Court had conferred an authoritarian role to the State, taking away the right of appellant-RIICO on its property without realizing that the amendment to Rule 11-A of the Rules 1959 had specifically been engrafted therein only, for the purpose of facilitating the respondent-company to grant further sub-lease. Thus, it is evident that the High Court decided the case on speculative and hypothetical reasons. [Para 28] [361-F-H]

3.4. According to clause 2(d) of the lease deed the entire project was to be completed within a period of five years. But it is evident from the material on record that construction was just made on the fraction of the entire land. Clause 2 (i) contemplated that, the lessee will not transfer nor sub-let nor relinquish rights without prior permission from the appellant-RIICO. However, it is evident from the record that the respondent-company had negotiated with a third party for development of the land. [Para 30] [362-D-F]

3.5. The cancellation of allotment was made by appellant- RIICO in exercise of its power under Rule 24 of the Rules 1979 read with the terms of the lease agreement. Such an order of cancellation could have been challenged by filing a review application before the competent authority under Rule 24 (aa) and, in the alternative, the respondent-company could have preferred an appeal under Rule 24(bb)(ii) before Infrastructure Development Committee of the Board. The respondent-company ought to have resorted to the arbitration clause provided in the lease deed in the event of a dispute, and the District Collector would have then, decided the case. However, the respondent-company did not resort to either of the statutory remedy, rather preferred a writ petition which could not have been entertained by the High Court. It is a settled law that writ does not lie merely because it is lawful to do so. A person may be asked to exhaust the statutory/alternative remedy available to him in law. [Para 31] [362-F-H; 363-A-B]

3.6. The order of cancellation of allotment in favour of the respondent-company by the appellant is restored. [Para 32] [363-C]

Case Law Reference:

1956 SCR 451	**relied on**	**Para 9**

1964 SCR 45	**relied on**	**Para 9**
2008 (10) SCR 243	**relied on**	**Para 9**
2011 (4) SCR 764	**relied on**	**Para 9**
2011 (12) SCR 473	**relied on**	**Para 9**
JT 2012 (9) SC 260	**relied on**	**Para 9**
1983 (2) SCR 363	**relied on**	**Para 11**
2004 (2) SCR 594	**relied on**	**Para 11**
1998 (1) SCR 988	**relied on**	**Para 11**
2000 (2) SCR 1035	**relied on**	**Para 11**
1989 (1) SCR 743	**relied on**	**Para 12**
1996 (4) Suppl. SCR 762	**relied on**	**Para 12**
2000 (1) Suppl. SCR 581	**relied on**	**Para 13**
2004 (4) Suppl. SCR 662	**relied on**	**Para 16**
2004 (6) Suppl. SCR 535	**relied on**	**Para 16**
2010 (15) SCR 85	**relied on**	**Para 17**
(2012) 8 SCC 197	**relied on**	**Para 18**
2009 (4) SCR 541	**relied on**	**Para 18**
AIR 1940 PC 167	**relied on**	**Para 19**
1959 Suppl. SCR 394	**relied on**	**Para 19**
1966 SCR 430	**relied on**	**Para 19**
1984 (1) SCR 464	**relied on**	**Para 19**
2000 (1) SCR 1239	**relied on**	**Para 19**
2006 (8) Suppl. SCR 178	**relied on**	**Para 19**
2007 (13) SCR 376	**relied on**	**Para 19**

1952 AC 109	**relied on**	**Para 20**
1981 (1) SCR 375	**relied on**	**Para 21**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 7252-7253 of 2003.

From the Judgment & Order dated 30.07.2002 of the High Court of Judicature at Jaipur Bench Jaipur in D.B. Civil Writ Petition No. 5481 of 1994 and D.B. Civil Writ Petition No. 105 of 1997.

WITH

C.A. No. 8222-8223 of 2013.

Dhruv Mehta, Dr. Manish Singhvi, AAG, Milind Kumar, Amit Lubhaya, Pragati Neekhra for the Appellants.

P.S. Patwalia, Rakesh Dwivedi, M.N. Krishnamani, Ajay Singh, Ashok K. Mahajan, Shibashish Misra, Sanskriti Pathak, P.V. Yogeswaran, R. Gopalakrishnan, Sanjay Parikh, Mamta Saxena, Bushra Parveen, A.N. Singh, Aruneshwar Gupta for the Respondents.

The Judgment of the Court was delivered by

DR. B. S. CHAUHAN, J. 1. These appeals have been preferred against the impugned judgment and order dated 30.7.2002 passed by the High Court of Rajasthan (Jaipur Bench) in Civil Writ Petition Nos. 5481/1994 and 105/1997, by which the High Court has allowed the writ petitions filed by the respondent-Diamond and Gem Development Corporation Ltd. (hereinafter referred to as the 'Company'), for quashing the order of cancellation of allotment of land and directing the appellants for providing the approach/access road.

2. As these appeals have been preferred against the common impugned judgment, for the sake of convenience, Civil Appeal Nos. 7252-53/2003 are to be taken to be the leading

case. The facts and circumstances giving rise to these appeals are:

A. That a huge area of land admeasuring 607 Bighas and 5 Biswas situate in the revenue estate of villages Durgapura, Jhalan Chod, Sanganer and Dhol-ka-Bad in District Jaipur, stood notified under Section 4(1) of the Rajasthan Land Acquisition Act, 1953 (hereinafter referred to as the 'Act') on 18.7.1979, for a public purpose i.e. industrial development, to be executed by the appellant Rajasthan State Industrial Development and Investment Corporation (in short 'RIICO').

B. Declaration under Section 6 of the Act was made on 22.6.1982 for the land admeasuring 591 Bighas and 17 Biswas. After meeting all requisite statutory requirements contained in the Act, possession of the land, was taken over by the Government and was subsequently handed over to appellant-RIICO, on 18.10.1982 and 17.11.1983. The Land Acquisition Collector assessed the market value of the land and made an award on 14.5.1984. RIICO made allotment of land admeasuring 105 acres vide allotment letter dated 10.3.1988 to the respondent no.1 company, to facilitate the establishment of a Gem Industrial Estate for the manufacturing of Gem stones.

C. In pursuance of the aforesaid allotment letter, a lease deed was executed between the appellant and respondent-company on 22.5.1989, with a clear stipulation that the land was allotted on an "as is-where-is", and that the respondent-company must complete the said project within a period of 5 years, and further that, in the event that the terms and conditions of the lease agreement were not complied with, the appellant would be entitled to recover its possession in addition to which, various other conditions were also incorporated therein.

D. After possession was taken by the respondent-company, construction could be carried only on a portion of the land allotted to it. As the development work was being carried out at an extremely slow pace, the appellant issued various

notices from time to time, reminding the respondent-company that it was under an obligation to complete the project within a specified period, owing to which, it must accelerate work. Additionally, there also arose some difficulty with respect to the respondent-company's attempts to sub-lease the said premises, or parts thereof, and in view of this, an amendment dated 4.11.1991 was inserted in Rule 11-A of the Rajasthan Land Revenue (Industrial area Allotment) Rules, 1959 (hereinafter referred to as the 'Rules 1959'), enabling the company to sub-lease the said land.

E. The appellant vide notice dated 4.7.1992, informed the respondent-company, that as per clause 2(n) of the lease deed, all construction had to be completed within a stipulated time period of 5 years. The respondent-company began asking the appellant to provide it accessibility via road, from the Jaipur Tonk main road and, as the same was not provided, the respondent-company filed Writ Petition No. 5481 of 1994 before the High Court, seeking the issuance of a direction to the appellant to provide to it, the aforesaid road.

F. During the pendency of the aforesaid writ petition, the appellant expressing its dis-satisfaction with regard to the progress of the development of the said land by the respondent-company, filed a reply to the said writ petition before the High Court stating that it was not under any obligation to provide to the respondent-company the aforementioned approach road, as the lease deed had been executed between them, on the basis of an "as-is-where is" agreement. Further, the appellant issued a show cause notice dated 29.8.1996, to determine the lease in light of the lease agreement, in lieu of the fact that the respondent-company had not made any progress regarding the completion of the project, and even after the expiry of a period of 5 years, only 10% of the total construction stood completed. In pursuance thereof, the lease deed was cancelled vide order dated 1.10.1996, and possession of the land in dispute was taken back by the appellant on 3.10.1996.

G. The respondent-company filed another Writ Petition No. 105 of 1997, challenging the cancellation order dated 1.10.1996 and the taking over of possession by the appellant on 3.10.1996. The appellant contested the said writ petition on the grounds that it was entitled to restoration of possession, as the respondent-company had failed to ensure compliance with the terms and conditions incorporated in the lease deed, according to which, the company was required to complete the said project within a period of 5 years. However, presently, the extent of development completed by it stood at 10%. Therefore, in light of the aforementioned circumstances, the appellant had no choice but to cancel the lease deed and take back possession.

H. The High Court vide its impugned judgment and order, allowed both the writ petitions quashing the order of cancellation, and directed the restoration of possession of the aforesaid land to the respondent-company, and further, also directed the appellant to provide to the respondent-company, the approach/access road demanded by it.

Hence, these appeals.

3. Shri Dhruv Mehta, learned senior counsel appearing on behalf of the appellant-RIICO, and Shri Manish Singhvi, learned Additional Advocate General for the State of Rajasthan have submitted that, as the allotment of the land had been made to the respondent-company on an 'as-is-where-is" basis, there was no obligation on the part of RIICO to provide to it, the said access road. The terms of the contract must be interpreted by court, taking into consideration the intention of the parties and not on the basis of equitable grounds. Moreover, the cancellation of the deed was in accordance with the terms and conditions incorporated in the lease deed, and therefore, in light of the facts and circumstance of the case, the High Court has committed an error, by quashing the order of cancellation and, in issuing a direction for the restoration of possession and for the provision of the access road.

The High Court has mis-interpreted the amendment to Rule 11-A of the Rules 1959, and has thus held that the appellant had no jurisdiction to cancel the said lease, as the respondent-company by virtue of the operation of the amended provision, had become a direct lessee of the State. In such a fact-situation, there was no obligation on the part of the appellant to provide the approach road as it was not the lessor of the respondent-company. In case by virtue of the amendment in Rule 11-A of the Rules 1959, the State Government became the lessor, the appellant-RIICO lost the title/interest over the property which had been acquired by it on making payment of the huge money and that too, without getting any refund. Such an interpretation leads to absurdity. Thus, the appeals deserve to be allowed.

4. Per contra, Shri P.S. Patwalia, learned senior counsel appearing for the respondent-company, has submitted that the judgment and order of the High Court does not require any interference whatsoever, for the reason that the respondent-company had been invited to establish and develop the Gem Stone industrial park at Jaipur. In view of the fact, that the amendment to Rule 11-A of the Rules 1959 was made exclusively to facilitate the respondent-company to sub-lease a part of the developed premises, the High Court has rightly held that the State Government became the lessor and that, RIICO had no concern whatsoever in relation to the said matter, owing to which, it had no competence to cancel the lease. In the light of the fact that RIICO was in possession of other lands surrounding the land in question, the High Court has directed it to provide to the respondent-company, an access road on equitable grounds, taking into consideration the fact that, in the event that the respondent-company's area remained land locked, it would be impossible for it to develop the project, and has stated that not providing the access road was in fact, the basic reason for delay in development. Thus, the appeals lack merit and, are liable to be dismissed.

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

Before proceeding further, it may be pertinent to refer to the relevant statutory provisions, and certain terms of the lease deed.

Rule 11-A of the Rules 1959 read :

"……

xx xx xx

Clause (iv) of Rule 11-A.- The Rajasthan State Industrial Development and Investment Corporation Ltd. may sub-lease the leased land or part thereof for industrial purpose; including essential welfare and supporting services. Provided that in the case of Diamond and Gem Development Corporation to whom the land has already been leased out by RIICO for 99 years, the sub-lessee i.e. DGDC may further sublet and the terms and conditions and other provisions contained in the rules in so far as they relate to RIICO shall *mutatis mutandis* apply to DGDC also **as if** the land in question has been let out to them by State Government under Rule 11-A."

(Emphasis added)

6. There has been further amendment to Rule 11-A of the Rules 1959 w.e.f. 12.10.2000, and the relevant part thereof reads as under:

"In Rule 11-A of the said rules, after condition (iv) and before condition (v), the following new condition (iv-a) shall be inserted; namely:-

(iv-a) The sub lessee of the Rajasthan State Industrial Development and Investment Corporation Limited may further sub-lease the sub-leased land or part thereof on such terms and conditions as may be mutually agreed between such sub-lessee and subsequent sub-lessee. The terms and conditions applicable to sub-lessee shall also mutatis mutandis apply to such subsequent sub-lessee".

7. Rajasthan State Industrial & Investment Corporation Limited (Disposal of Land) Rules, 1979 (hereinafter referred to as 'Rules 1979'), deals with the allotment of land by RIICO to entrepreneurs. Relevant rules thereof read as under:

"16. The allottee shall not except with the written consent of the Corporation, be allowed to sublet the constructed premises for industrial purpose only which can be considered on following conditions:

(i) The sub-letting of vacant and/or unutilized land in the industrial areas of the Corporation shall not be allowed.

(ii) That consent of the Managing Director be given to the allottee of the plot (owner) to sublet the whole or part of the constructed premises after the allottee has cleared all the outstanding dues of the Corporation and started the production at the allotted plot on the following conditions:

(iii) xx xx xx

(iv) Permission for transfer of surplus/unutilized land with the units which have come into commercial production shall be granted on payment of premium as may be decided by the Corporation from time to time which is presently equal to 50% rate of development charges at the time of such transfer of difference amount between the prevailing rates of development charges and the rates of development charges on which the allotment was made whichever is higher.

24. **Cancellation**- The Corporation shall have the right to cancel the allotment after issuing 30 days show cause notice to the allottee by the concerned Senior Regional Manager/Regional Manager on any breach of any of these rules, condition of allotment letter and terms of lease

agreement."

8. It may also be pertinent to refer the relevant terms and conditions of lease deed dated 22.5.1989, which read as under:

*"AND WHEREAS the lessor has agreed to demise and the lessor has agreed to take on lease, the piece of land known as plot no. SP-1 Indusrial Area, Sanganer, Phase-II on "**as is where is basis**":*

xx xx xx

*2(b) That the lessee will bear, pay and discharge all service charges as may be decided by the lessor from time to time which for the present would be @ Rs.10.10 (Ten paisa per sq.mtrs.) per year from the date, the lessor provided as **pucca links road** in this area.*

xx xx xx

(d) That the lessee will erect on the demised premises …..and will commence such construction within the period of 6 months and will completely finish the same fit for use and start production within the period of 60 months from the date of these presents or within such the case of these presents, or within such the date of these presents or within such extended period of time as may be allowed by the lessor in writing at its discretion.

xx xx xx

*(g) That the **lessee** will provide and maintain in good repair a **properly constructed approached road** or path alongwith the event across drain to the satisfaction of the lessor/local Municipal Authority leading from the public/ cooperation road to the building to be erected on the demises premises.*

xx xx xx

(i) The lessee will not without the general prior consent in writing of the lessor transfer, sublet, relinquish, mortgage or assign his interest in the demised premises……..

xx xx xx

(m) ……That lessee shall construct and complete the said building and put the demised premises with the buildings constructed thereon to use hereinabove mentioned within 54 calendar months from the date of possession of the said land is handed over to him and in any case within 60 calendar months from the date of this agreement provided that the lessor may at his discretion extend the time hereinbefore provided if in his opinion the delay is caused for reasons beyond the control of the lessee. Provided that utilized land of the allotted plot of land shall revert to the Corporation on the expiry of the prescribed/extended period for starting production/ expansion of the unit.

xx xx xx

(r) The lessee will in each year within 2 months from the expiry of the account in year supply to the lessor a copy of his profit and loss account pertaining to the accounting year and the business run by him in the demised premises.

3(a) Notwithstanding anything hereinbefore contained if there shall have been in opinion of the lessor any breach by the lessor…. or if the lessee fails to commence and complete the buildings in time and manner it shall be lawful for the lessor ….to reenter without taking recourse to the Court of law up on the demised premises or any part there of his name of whole and there on this demise

shall absolutely cease and determine and the money paid by the Lessee by virtue of these preset shall stand forfeited to the lessor without prejudice to rights of the lessor here under with interest thereon at @19% per annum and the Lessee shall not be entitled to any compensation whatsoever.

xx xx xx

3(h) Every dispute, difference or question touching or arising out or in respect of this agreement to the subject matter shall be referred to the sole arbitrator, the Collector of the District wherein the leased plot is situated or a, person appointed by him. The decision of such arbitrator shall be final and binding on the parties."

Before entering into merits of the case, it is required to deal with the legal issues involved herein:

I. Approbate and Reprobate

9. A party cannot be permitted to "blow hot-blow cold", "fast and loose" or "approbate and reprobate". Where one knowingly accepts the benefits of a contract, or conveyance, or of an order, he is estopped from denying the validity of, or the binding effect of such contract, or conveyance, or order upon himself. This rule is applied to ensure equity, however, it must not be applied in such a manner, so as to violate the principles of, what is right and, of good conscience. (Vide: *Nagubai Ammal & Ors. v. B. Shama Rao & Ors.,* AIR 1956 SC 593; *C.I.T. Madras v. Mr. P. Firm Muar,* AIR 1965 SC 1216; *Ramesh Chandra Sankla etc. v. Vikram Cement etc.,* AIR 2009 SC 713; *Pradeep Oil Corporation v. Municipal Corporation of Delhi & Anr.,* AIR 2011 SC 1869; *Cauvery Coffee Traders, Mangalore v. Hornor Resources (International) Company Limited,* (2011) 10 SCC 420; and *V. Chandrasekaran & Anr. v. The Administrative Officer & Ors.,* JT 2012 (9) SC 260).

10. Thus, it is evident that the doctrine of election is based

on the rule of estoppel-the principle that one cannot approbate and reprobate is inherent in it. The doctrine of estoppel by election is one among the species of estoppels in pais (or equitable estoppel), which is a rule of equity. By this law, a person may be precluded, by way of his actions, or conduct, or silence when it is his duty to speak, from asserting a right which he would have otherwise had.

II. Mutatis Mutandis - means

11. In *M/s. Ashok Service Centre & Anr. etc. v. State of Orissa,* AIR 1983 SC 394, this court held as under:

"Earl Jowitt's 'The Dictionary of English Law 1959)' defines 'mutatis mutandis' as 'with the necessary changes in points of detail'. Black's Law Dictionary (Revised 4th Edn.1968) defines 'mutatis mutandis' as 'with the necessary changes in points of detail, meaning that matters or things are generally the same, but to be altered when necessary, as to names, offices, and the like…'Extension of an earlier Act mutatis mutandis to a later Act, brings in the idea of adaptation, but so far only as it is necessary for the purpose, making a change without altering the essential nature of the things changed, subject of course to express provisions made in the later Act….In the circumstances the conclusion reached by the High Court that the two Acts were independent of each other was wrong. We are of the view that, it is necessary to read and to construe the two Acts together as if the two Acts are one, and while doing so to give effect to the provisions of the Act which is a later one in preference to the provisions of the Principal Act wherever the Act has manifested an intention to modify the Principal Act…"

Similarly, in *Prahlad Sharma v. State of U.P. & Ors.,* (2004) 4 SCC 113, the phrase '*mutatis mutandis'* has been explained as under:

"The expression "mutatis mutandis" itself implies applicability of any provision with necessary changes in points of detail…."

(See also: *Mariyappa & Ors. v. State of Karnataka & Ors.,* AIR 1998 SC 1334; and *Janba (dead) thr. Lrs. v. Gopikabai (Smt.),* AIR 2000 SC 1771).

Thus, the phrase "*mutatis mutandis*" implies that a provision contained in other part of the statute or other statutes would have application as it is with certain changes in points of detail.

III. Contractual disputes and writ jurisdiction

12. There can be no dispute to the settled legal proposition that matters/disputes relating to contract cannot be agitated nor terms of the contract can be enforced through writ jurisdiction under Article 226 of the Constitution. Thus, writ court cannot be a forum to seek any relief based on terms and conditions incorporated in the agreement by the parties. (Vide: *Bareilly Development Authority & Anr. v. Ajay Pal Singh & Ors.,* AIR 1989 SC 1076; and *State of U.P. & Ors. v. Bridge & Roof Co. (India) Ltd.,* AIR 1996 SC 3515).

13. In *Kerala State Electricity Board & Anr. v. Kurien E. Kalathil & Ors.,* AIR 2000 SC 2573, this Court held that a writ cannot lie to resolve a disputed question of fact, particularly to interpret the disputed terms of a contract observing as under:

"The interpretation and implementation of a clause in a contract cannot be the subject-matter of a writ petition. ….If a term of a contract is violated, ordinarily the remedy is not the writ petition under Article 226. We are also unable to agree with the observations of the High Court that the contractor was seeking enforcement of a statutory contract…..The contract between the parties is in the realm of private law. It is not a statutory contract. The disputes relating to interpretation of the terms and conditions of

such a contract could not have been agitated in a petition under Article 226 of the Constitution of India. That is a matter for adjudication by a civil court or in arbitration if provided for in the contract…. The contractor should have relegated to other remedies."

14. It is evident from the above, that generally the court should not exercise its writ jurisdiction to enforce the contractual obligation. The primary purpose of a writ of mandamus, is to protect and establish rights and to impose a corresponding imperative duty existing in law. It is designed to promote justice (*ex debito justiceiae).* The grant or refusal of the writ is at the discretion of the court. The writ cannot be granted unless it is established that there is an existing legal right of the applicant, or an existing duty of the respondent. Thus, the writ does not lie to create or to establish a legal right, but to enforce one that is already established. While dealing with a writ petition, the court must exercise discretion, taking into consideration a wide variety of circumstances, *inter-alia,* the facts of the case, the exigency that warrants such exercise of discretion, the consequences of grant or refusal of the writ, and the nature and extent of injury that is likely to ensue by such grant or refusal.

15. Hence, discretion must be exercised by the court on grounds of public policy, public interest and public good. The writ is equitable in nature and thus, its issuance is governed by equitable principles. Refusal of relief must be for reasons which would lead to injustice. The prime consideration for the issuance of the said writ is, whether or not substantial justice will be promoted. Furthermore, while granting such a writ, the court must make every effort to ensure from the averments of the writ petition, whether there exist proper pleadings. In order to maintain the writ of mandamus, the first and foremost requirement is that the petition must not be frivolous, and must be filed in **good faith**. Additionally, the applicant must make a demand which is clear, plain and unambiguous. It must be made to an officer having the requisite authority to perform the act demanded. Furthermore, the authority against whom

mandamus is issued, should have rejected the demand earlier. Therefore, a demand and its subsequent refusal, either by words, or by conduct, are necessary to satisfy the court that the opposite party is determined to ignore the demand of the applicant with respect to the enforcement of his legal right. However, a demand may not be necessary when the same is manifest from the facts of the case, that is, when it is an empty formality, or when it is obvious that the opposite party would not consider the demand.

IV. Interpretation of terms of contract

16. A party cannot claim anything more than what is covered by the terms of contract, for the reason that contract is a transaction between the two parties and has been entered into with open eyes and understanding the nature of contract. Thus, contract being a creature of an agreement between two or more parties, has to be interpreted giving literal meanings unless, there is some ambiguity therein. The contract is to be interpreted giving the actual meaning to the words contained in the contract and it is not permissible for the court to make a new contract, however is reasonable, if the parties have not made it themselves. It is to be interpreted in such a way that its terms may not be varied. The contract has to be interpreted without giving any outside aid. The terms of the contract have to be construed strictly without altering the nature of the contract, as it may affect the interest of either of the parties adversely. (Vide: *United India Insurance Co. Ltd. v. Harchand Rai Chandan Lal,* AIR 2004 SC 4794; *Polymat India P. Ltd. & Anr. v. National Insurance Co. Ltd. & Ors.,* AIR 2005 SC 286).

17. In *DLF Universal Ltd. & Anr. v. Director, T. and C. Planning Department Haryana & Ors.,* AIR 2011 SC 1463, this court held:

> *"It is a settled principle in law that a contract is interpreted according to its purpose. The purpose of a contract is the interests, objectives, values, policy that the contract is designed to actualise. ?It comprises joint intent of the parties. Every such contract expresses the autonomy of the contractual parties' private will. It creates reasonable, legally protected expectations between the parties and reliance on its results. Consistent with the character of purposive interpretation, the court is required to determine the ultimate purpose of a contract primarily by the joint intent of the parties at the time the contract so formed. It is not the intent of a single party; it is the joint intent of both parties and the joint intent of the parties is to be discovered from the entirety of the contract and the circumstances surrounding its formation. As is stated in Anson's Law of Contract, "a basic principle of the Common Law of Contract is that the parties are free to determine for themselves what primary obligations they will accept...Today, the position is seen in a different light. Freedom of contract is generally regarded as a reasonable, social, ideal only to the extent that equality of bargaining power between the contracting parties can be assumed and no injury is done to the interests of the community at large." The Court assumes "that the parties to the contract are reasonable persons who seek to achieve reasonable results, fairness and efficiency...In a contract between the joint intent of the parties and the intent of the reasonable person, joint intent trumps, and the Judge should interpret the contract accordingly."*

V. **"As-is-where-is" – means**

18. The phrase, "as is-where-is", has been explained by this Court in *Punjab Urban Planning & Development Authority & Ors. v. Raghu Nath Gupta & Ors.,* (2012) 8 SCC 197**,** holding as under:

> *"We notice that the respondents had accepted the commercial plots with open eyes, subject to the abovementioned conditions. Evidently, the commercial plots were allotted on "as-is-where-is" basis. The allottees*

would have ascertained the facilities available at the time of auction and after having accepted the commercial plots on "as-is-where-is" basis, they cannot be heard to contend that PUDA had not provided the basic amenities like parking, lights, roads, water, sewerage, etc. If the allottees were not interested in taking the commercial plots on "as-is-where-is" basis, they should not have accepted the allotment and after having accepted the allotment on "as-is-where-is" basis, they are estopped from contending that the basic amenities like parking, lights, roads, water, sewerage, etc. were not provided by PUDA when the plots were allotted…"

(See also: *UT Chandigarh Admn. & Anr. v. Amarjeet Singh & Ors.,* (2009) 4 SCC 660).

VI. "As if" – means

19. The expression "as if", is used to make one applicable in respect of the other. The words "as if" create a legal fiction. By it, when a person is "deemed to be" something, the only meaning possible is that, while in reality he is not that something, but for the purposes of the Act of legislature he is required to be treated that something, and not otherwise. It is a well settled rule of interpretation that, in construing the scope of a legal fiction, it would be proper and even necessary, to assume all those facts on the basis of which alone, such fiction can operate. The words "as if", in fact show the distinction between two things and, such words must be used only for a **limited purpose**. They further show that a **legal fiction must be limited to the purpose for which it was created.** (Vide: *Radhakissen Chamria & Ors. v. Durga Prasad Chamria & Anr.,* AIR 1940 PC 167; *Commr. of Income-tax, Delhi v. S. Teja Singh,* AIR 1959 SC 352; *Ram Kishore Sen & Ors. v. Union of India & Ors.,* AIR 1966 SC 644; *Sher Singh v. Union of India & Ors.,* AIR 1984 SC 200; *State of Maharashtra v. Laljit Rajshi Shah & Ors,* AIR 2000 SC 937; *Paramjeet Singh Patheja v. ICDS Ltd.* AIR 2007 SC 168; and *Commissioner*

of Income Tax v. Willamson Financial Services & Ors. (2008) 2 SCC 202).

20. In *East End Dwelling Co. Ltd. v. Finsbury Borough Council,* 1952 AC 109, this Court approved the approach which stood adopted and followed persistently. It set out as under:

"The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs".

21. In *Industrial Supplies Pvt. Ltd. & Anr. v. Union of India & Ors.,* AIR 1980 SC 1858, this Court observed as follows:-

"It is now axiomatic that when a legal fiction is incorporated in a statute, the court has to ascertain for what ***purpose the fiction is created****. After ascertaining the purpose, full effect must be given to the statutory fiction and it should be carried to its logical conclusion. The court has to assume all the facts and consequences which are incidental or inevitable corollaries to giving effect to the fiction. The legal effect of the words 'as if he were' in the definition of owner in Section 3(n) of the Nationalisation Act read with Section 2(1) of the Mines Act is that although the petitioners were not the owners, they being the contractors for the working of the mine in question, were to be treated as such though, in fact, they were not so."* (Emphasis added)

22. The instant case is required to be decided in the light of the aforesaid settled legal propositions.

The terms and conditions incorporated in the lease deed reveal that, the allotment was made on "as-is- where-is" basis. The same was accepted by the respondent-company without any protest, whatsoever. The lease deed further enabled the appellant to collect charges, in case it decided to provide the

approach road. Otherwise, it would be the responsibility of the respondent-company to use its own means to develop such road, and there was absolutely no obligation placed upon the appellant to provide to the respondent the access road. As the respondent-company was responsible for the creation of its own infrastructure, it has no legal right to maintain the writ petition, and courts cannot grant relief on the basis of an implied obligation. The order of the High Court is in contravention of clause 2(g) of the lease deed.

23. The State of Rajasthan had acquired the land in exercise of its eminent domain and transferred the same to the appellant-RIICO after receiving the consideration amount and executed the lease deed in its favour. The State exercised its power in transferring the land to RIICO under the Rules 1959. However, further allotment by RIICO to the respondent-company was under the Rules 1979. Therefore, the High Court committed an error treating that the whole case was governed only under the Rules 1959, and that Rules 1979 had no application at all.

24. The High Court recorded a finding, as regards the submission made on behalf of the appellant-RIICO, stating that the audit conducted by it showing various irregularities and pointing out the mis-appropriation of public funds by the respondent-company, was a matter entirely unrelated to the allotment and development of the said land. Rule 11-A of the Rules 1959, as amended created a legal fiction by which the respondent-company had become a lessee and the State of Rajasthan, the lessor and therefore the order passed by the appellant-RIICO, was wholly without jurisdiction, as after 4.11.1991, RIICO had no authority whatsoever, to cancel the allotment of land made in favour of the respondent-company, since it was only the State of Rajasthan that had the authority to cancel the said allotment; by not providing for an access road, the purpose for which allotment was made by RIICO stood defeated, and this was what had resulted in the delay of

the development of the said land, and in such a fact-situation, cancellation of land was not permissible; there was a constructive obligation on the part of the appellant-RIICO to provide an approach road with respect to the land which was allotted; and that RIICO had failed to co-operate with the respondent-company to accomplish the task it had undertaken, and that the order of cancellation was liable to be set aside for lack of jurisdiction and for want of competence.

25. The aforesaid reasons given by the High Court are mutually inconsistent. When the High Court came to the conclusion that the appellant-RIICO had no competence to deal with the land and to cancel the allotment made in favour of the respondent-company, there was no justification to hold RIICO responsible for providing the approach road. Such a finding could be permissible only if the appellant-RIICO had competence to deal with the land in dispute.

26. The High Court also erred in holding that the provision of providing the access road was an obligation on the part of the appellant-RIICO, deciding this on equitable grounds. The terms of the lease deed clearly stipulated that in case the appellant-RIICO provides the access road, it will be vested with the right to collect the charges incurred by it from the respondent-company, therein, and in the alternative, it would be the obligation of the respondent-company to develop its own infrastructure, and the same would include development of the access road. Therefore, the appellant-RIICO was not under any obligation to provide the said access road.

27. The interpretation given to the amended Rule 11-A of the Rules 1959 by the High Court, takes away the vested right of the appellant-RIICO in the title as well as in the interest that it had acquired in the property, as it had paid the entire amount for the land to the State when possession of land was handed over to it.

Rule 11-A of the Rules 1959 was amended only to

facilitate the respondent-company to grant further sub-lease and not to divest RIICO from its rights and title. It was found necessary in wake of difficulties faced by the respondent-company as it was not permissible for it to grant further sub-lease. Thus, the rule provided a deeming clause/fiction that for the purpose of sub-lease by the respondent-company to further allottees, it would be deemed that the State Government had executed the lease in favour of the respondent-company.

The terms "*mutatis mutandis",* and "as if", used in the amended provisions of Rule 11-A of the Rules 1959 simply facilitated the sub-letting of a part of the premises by the respondent-company, and did not take away the title and rights that the appellant-RIICO had over the land.

The Rule 11-A of the Rules 1959 has further been amended on 12.10.2000 enabling all the allottees of RIICO to sub-lease further. Thus, if the interpretation given by the High Court is accepted, the appellant RIICO looses all its lands and properties and rendered the development authority existing on papers only, without any status/authority.

28. The ultra activist view articulated by the High Court on the basis of supposed intention and imaginative purpose to the amendment act, is uncalled for and ought to have been avoided. It rendered the appellant-RIICO totally insignificant and irrelevant without realising that the appellant-RIICO had autonomous functioning, and the interpretation given by the High Court has devastating effect underlying its status, authority and autonomous functioning. In fact, by interpretation the High Court had conferred an authoritarian role to the State, taking away the right of appellant-RIICO on its property without realising that the amendment to Rule 11-A of the Rules 1959 had specifically been engrafted therein only, for the purpose of facilitating the respondent-company to grant further sub-lease. Thus, it is evident that the High Court decided the case on speculative and hypothetical reasons.

29. The terms incorporated in the lease deed itself provide for timely completion of construction and also for the commencement of production within a stipulated period. Records however, reveal that only 10% of total construction work stood completed by the respondent-company. No proper application was ever filed for seeking extension of time by the respondent-company, as per the Rules. We have been taken through the record.

While providing justification for the non-completion of construction and commencement of production, in very vague terms, it was submitted by the respondent-company that extension of time was sought from statutory authorities. However, the said application did not specify how much more time the company was seeking, and that too, without meeting any requirements provided in the statutory rules.

30. According to clause 2(d) of the lease deed the entire project was to be completed within a period of five years i.e. by 25.5.1994. But it is evident from the material on record that construction was just made on the fraction of the entire land. Clause 2 (i) contemplated that, the lessee will not transfer nor sub-let nor relinquish rights without prior permission from the appellant-RIICO. However, it is evident from the record that the respondent-company had negotiated with a third party for development of the land.

31. The cancellation of allotment was made by appellant-RIICO in exercise of its power under Rule 24 of the Rules 1979 read with the terms of the lease agreement. Such an order of cancellation could have been challenged by filing a review application before the competent authority under Rule 24 (aa) and, in the alternative, the respondent-company could have preferred an appeal under Rule 24(bb)(ii) before Infrastructure Development Committee of the Board. The respondent-company ought to have resorted to the arbitration clause provided in the lease deed in the event of a dispute, and the District Collector, Jaipur would have then, decided the case.

However, the respondent-company did not resort to either of the statutory remedy, rather preferred a writ petition which could not have been entertained by the High Court. It is a settled law that writ does not lie merely because it is lawful to do so. A person may be asked to exhaust the statutory/alternative remedy available to him in law.

32. In view of the above, the appeals deserve to be allowed. Thus, the appeals are allowed. Judgment and order impugned are set aside and the order of cancellation of allotment in favour of the respondent-company by the appellant is restored. However, in the facts and circumstances of the case, there shall be no order as to costs.

B.B.B. Appeals allowed.

SMT. K. VIJAYA LAKSHMI

v.

GOVT. OF ANDHRA PRADESH REPRESENTED BY ITS SECRETARY HOME (COURTS C1) DEPARTMENT AND ANR.

(Civil Appeal No.1389 of 2013)

FEBRUARY 18, 2013

[A.K. PATNAIK AND H.L. GOKHALE, JJ.]

Constitution of India, 1950:

Article 234 – Appointment as Civil Judge denied – On the basis of police report alleging association of the candidate and her husband with banned political party – All the relevant papers of police investigation not placed by State Government to the High Court on administrative side – State itself took decision that her candidature could not be considered in view of adverse police report – Held: Since the complete papers were not placed before High Court on administrative side, it cannot be said that there has been meaningful consultation with High Court as required u/Art. 234 – High Court administration thus failed in discharging its responsibility u/Art. 234 – Direction to State Government to place the Police Report before the High Court on the administrative side.

Article 22(1) – Appointment as Civil Judge – Denied on the basis of police report alleging association of candidate's husband (an advocate) with a banned political party – Plea of the candidate that her husband might have appeared as an advocate for some litigants belonging to that party – Held: The candidate cannot be made to suffer for the role of her husband who was discharging his duty as an advocate in furtherance of fundamental rights provided u/Art. 22(1) of the litigants – Also as per rules framed by Bar Council of India,

an advocate is bound to accept any brief and that it is duty of advocate to uphold the interests of his client – Constitution of India, 1950 – Article 22(1) – Advocates Act, 1961 – s. 49 – Bar Council of India Rules – rr. 11 and 15 – Judicial Service.

Judicial Review – Concerning appointment of a civil judge – Permissibility – Held: Judicial review in such matter is permissible, if there is any breach or departure from Art. 234 or Judicial Service Rules – Constitution of India, 1950 – Articles 226 and 234 – Judicial Service.

The appellant, who was a practicing advocate participated in the recruitment process for the post of (Junior) Civil Judge. She was selected for the post and her name appeared in the merit list. But she was not appointed on the ground that her husband, a practicing advocate was having close links with CPI (Maoist) Party which was a prohibited organization.

The appellant filed writ petition challenging the non-inclusion of her name in the list of Junior Civil Judges, as illegal, arbitrary and violative of Art.14 of the Constitution and she sought for mandamus to issue her order of appointment. While contesting the petition, the State Government alleged that the appellant too had close links with CPI (Maoist) Party. The Division Bench of the High Court dismissed the writ petition holding that when the appointing authority i.e. State Government did not find it fit to appoint the concerned candidate to the judicial post, the High Court was not expected to interfere in that decision; and that judicial review was not available in matters where the State was exercising the prerogative power.

In appeal to this Court, a police report was produced whereby it was alleged that the appellant was sympathizer of CPI (Maoist) Party and was also a member of Chaitanya Mahila Samakhya (CMS) a frontal

organization of CPI (Maoist).

Disposing of the appeal, the Court

HELD: 1. The High Court erred on the administrative side in discharging its responsibility under Article 234 of the Constitution, and then on the Judicial side in dismissing the writ petition filed by the appellant. *Prima facie*, on the basis of the material on record, it is difficult to infer that the appellant had links/associations with a banned organization. The finding of the Division Bench in that behalf can not therefore be sustained. There is no material on record to show that CMS was a banned organization or that the appellant was its member. It is also not placed on record in which manner she had participated in any of their activities, and through which programme she tried to intensify the activities of CMS, as claimed in the report. While accepting that her husband may have appeared for some of the activists of CPI (Maoist) to seek bail, the appellant has alleged that the police are trying to frame her due to her husband appearing to oppose the police in criminal matters. [Para 27 and 29] [390-F-H; 391-A-B; 392-C-D]

2. To deny public employment to a candidate solely on the basis of the police report regarding the political affinity of the candidate would be offending the Fundamental Rights under Article 14 and 16 of the Constitution, unless such affinities are considered likely to effect the integrity and efficiency of the candidate, or unless there is clear material indicating the involvement of the candidate in the subversive or violent activities of a banned organization. In the present case there is no material on record to show that the appellant has engaged in any subversive or violent activities. The appellant has denied her alleged association with CPI (Maoist) party or CMS. Respondent No. 1 has accepted that there is no documentary proof that CMS is a frontal

organization of CPI (Maoist). As far as her connection with CPI (Maoist) is concerned, there is no material except the report of police, the *bonafides* of which are very much disputed by the appellant. [Para 25] [389-B-E]

State of Madhya Pradesh vs. Ramashanker Raghuvanshi **AIR 1983 SC 374: 1983 (2) SCR 393 – relied on.**

3. Those who participate in politics, and are opposed to those in power, have often to suffer the wrath of the rulers. It may occasionally result in unjustifiable arrests or detentions. The merit of a democracy lies in recognizing the right of every arrested or detained person to be defended by a legal practitioner of his choice. Article 22(1) of the Constitution specifically lays down that no person shall be denied the right to consult, and to be defended by a legal practitioner of his choice, as a Fundamental Right. All such accused do have the right to be defended lawfully until they are proved guilty, and the advocates have the corresponding duty to represent them, in accordance with law. Taking any contrary view in the facts of the present case will result into making the appellant suffer for the role of her husband who was discharging his duty as an advocate in furtherance of this Fundamental Right of the arrested persons. Rules 11 and 15 of the Rules framed by Bar Council of India also lay down that "an advocate is bound to accept any brief" and that "it shall be the duty of an advocate fearlessly to uphold the interests of his clients". [Paras 19 and 20] [382-F-G; 383-B-C, F-H; 384-B]

A.S. Mohammed Rafi vs. State of Tamil Nadu **2011 (1) SCC 688: 2010 (14) SCR 792 – relied on.**

4.1. Article 234 of the Constitution requires a meaningful consultation with the High Court in the matter of recruitment to judicial service. In view of the mandate

of Article 234, High Court has to take a decision on the suitability of a candidate on the administrative side, and it cannot simply go by the police reports, though such reports will form a relevant part of its consideration. [Para 25] [388-H; 389-A-B]

4.2. In the present case all the relevant papers of the Police Investigation were not forwarded to the High Court on the administrative side to facilitate its decision. On the other hand, the Government itself had taken the decision that appellant's candidature could not be considered in view of the adverse reports. It can not therefore be said that there has been a meaningful consultation with the High Court before arriving at the decision not to appoint the appellant. Article 234 specifically requires that these appointments are to be made after consultation with the State Public Service Commission and the High Court exercising jurisdiction in the concerned State. The High Court may accept the adverse report or it may not. Ultimately, inasmuch as the selection is for the appointment to a judicial post, the Governor will have to be guided by the opinion of the High Court. It is the duty of the Government under Article 234 to forward such reports to the High court, and then it is for the High Court to form its opinion which will lead to the consequential decision either to appoint or not to appoint the candidate concerned. Such procedure is necessary to have a meaningful consultation as contemplated under this Article. Any other approach will mean that whatever is stated by the police will be final, without the same being considered by the High Court on the administrative side. In the present case, the High Court has thrown up its hands, and has not sought any more information from the State Government. Since the report was neither submitted to nor sought by the High Court, there has not been any consideration thereof by the High Court Administration. Thus, there has not been any meaningful

consultation with the High Court on the material that was available with the Government. The High Court administration failed in discharging its responsibility under Article 234 of the Constitution. [Paras 22 and 25] [386-A-F; 389-E-F]

5. The High Court clearly erred in holding that judicial review of the decision concerning the appointment of a Civil Judge was not permissible since that post was a sensitive one. The appointment to the post of a Civil Judge is covered under Article 234 and the State Judicial Service Rules, and if there is any breach or departure therefrom, a judicial review of such a decision can certainly lie. [Para 26] [390-C-E]

Shamsher Singh vs. State of Punjab **AIR 1974 SC 2192: 1975 (1) SCR 814 – followed.**

Union of India vs. Kali Dass Batish **2006 (1) SCC 779: 2006 (1) SCR 261 – distinguished.**

K. Ashok Reddy vs. Govt. of India **1994 (2) SCC 303: 1994 (1) SCR 662 – held inapplicable.**

Council of Civil Service Union vs. Minister for the Civil Service **1984 (3) All ER 935 – referred to.**

6. The Court can not grant the mandamus sought by the appellant to issue an appointment order in her favour. The final decision with respect to the selection is to be left with the appropriate authority. In the present matter the Division Bench ought to have directed the State Govt. to place all the police papers before the High Court on the administrative side, to enable it to take appropriate decision, after due consideration thereof. Accordingly, the State Government is directed to place the police report (produced before the Division Bench of the High Court) for consideration of the High Court on the administrative side. [Paras 29 and 30] [392-D-H]

Harpal Singh Chauhan vs. State of U.P. **1993 (3) SCC 552: 1993 (3) SCR 969 – relied on.**

Lerner v. Casey **(1958) 357 US 468;** *Speiser vs. Randall* **(1958) 357US 513;** *Shankarsan Dash vs. Union of India* **1991 (3) SCC 47: 1991 (2) SCR 567;** *State of Bihar vs. Bal Mukund Sah* **AIR 2000 SC 1296: 2000 (2) SCR 299;** *Supreme Court A.O.R Association vs. Union of India* **(1993) 4 SCC 441: 1993 (2) Suppl. SCR 659– referred to.**

Case Law Reference:

1994 (1) SCR 662	**held inapplicable**	**Para 9, 26**
2006 (1) SCR 261	**distinguished**	**Para 9, 15, 16, 22, 29**
1983 (2) SCR 393	**relied on**	**Para 13, 25**
(1958) 357 US 468	**referred to**	**Para 14**
(1958) 357 US 513	**referred to**	**Para 14**
1991 (2) SCR 567	**referred to**	**Para 17**
2010 (14) SCR 792	**relied on**	**Para 20**
1975 (1) SCR 814	**followed**	**Para 23**
2000 (2) SCR 299	**referred to**	**Para 24**
1984 (3) All ER 935	**referred to**	**Para 26**
1993 (2) Suppl. SCR 659	**referred to**	**Para 26**
1993 (3) SCR 969	**referred to**	**Para 29**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1389 of 2013.

From the Judgment & Order dated 19.03.2009 of the High Court of Andhra Pradesh at Hyderabad in Writ Petition No. 26147 of 2008.

Ranjit Kumar, R. Venkataramani, G.V.R. Choudhary, K. Shivraj Choudhuri, A. Chandra Sekhar, G.N. Reddy, M. Rambabu, S. Nagarajan, Ranjan Kumar, Aljo Joseph, Neelam Singh, Supriya Garg, Shodhan Babu, Munawar Naseem, T.V. Ratnam, G.N. Reddy for the appearing parties.

The Judgment of the Court was delivered by

H.L. GOKHALE J. 1. Leave Granted.

2. This appeal seeks to challenge the judgment and order dated 19.3.2009 rendered by a Division Bench of Andhra Pradesh High Court in Writ Petition No. 26147 of 2008. By that order the said writ petition of the appellant disputing her non-appointment to the post of a Civil Judge in Andhra Pradesh, has come to be dismissed.

Facts leading to this appeal

3. The appellant herein is an advocate practicing in the courts at Markapur, District Prakasam in the State of Andhra Pradesh. The Andhra Pradesh High Court (Respondent No.2 herein) had invited applications for the appointments to 105 posts of (Junior) Civil Judges (including 84 posts by direct recruitment) by its Notification No.1/2007-RC dated 14.5.2007. A written examination was conducted for that purpose on 28.10.2007, and those who qualified therein, were called for an interview. After the interviews, some 81 candidates from amongst the direct recruits (and 17 by transfer) were selected by a committee of Hon'ble Judges of the High Court, and this selection was approved by the Full Court on the administrative side. The appellant was one of those who were selected, and her name figured at S.No.26 in the list of selected candidates from the general category.

4. However, it so transpired that whereas the other selected candidates were issued appointment letters, the appellant was not. She, therefore, applied on 3.11.2008 under the provisions of The Right to Information Act, 2005, to find out

the reason of her non-appointment. She received a letter dated 11.11.2008 from the respondent No.1 which gave the following reason therefor:

> *"I am directed to invite your attention to the reference 2nd cited, and to inform you that, adverse remarks were reported in the verification report, that your husband Sri Srinivasa Chowdary, who is practicing as an Advocate in the Courts at Markapur is having close links with CPI (Maoist) Party which is a prohibited organization."*

5. The appellant was shocked to learn the above reason for her non-appointment. Although nothing was stated against her in that letter, according to her what was stated against her husband was also false. She, therefore, filed a Writ Petition bearing No. 26147 of 2008 in the High Court of Judicature of Andhra Pradesh, and prayed that a writ of mandamus be issued to declare that the non-inclusion of her name in the list of Junior Civil Judges issued on 23.10.2008 was illegal, arbitrary and in violation of Article 14 of the Constitution of India (Constitution for short), and consequently a direction be issued to the respondents to forthwith issue an order of appointment to her.

6. The respondents contested the matter by filing their affidavits in reply. This time the Respondent No 1 alleged that the appellant too had close links with the CPI (Maoist) party. Paragraphs 4 and 5 of the affidavit of respondent No. 1 stated as follows:-

> *"It is further submitted that the Superintendent of Police, has reported that in re-verification of character and antecedents of Karanam Vijaya Lakshmi D/o K. Balaguravaiah, Mangali Manyam, Markapur, Prakasam District who is selected as Junior Civil Judge shows that the confidential intrinsic intelligence collected recently with regard to the movements of CPI (Maoist), it came to light that Smt. K. Vijaya Lakshmi (Sl. No.26 in the selected list) D/o K. Balaguravaiah r/o Mangali Manyam,*

Markapur who is selected for the post of Junior Civil Judge and her husband Srinivasa Chowdary s/o Sambasiva Rao who is practicing as an advocate in the Courts at Markapur are having close links with CPI (Maoist) Party, which is a prohibited organization and also in touch with UG cadre of the CPI (Maoist) Party.

Further it is submitted that the CPI (Maoist) is a prohibited Organization by the Government and as the candidate Smt. K. Vijaya Lakshmi Sl. No.26 in the selected list D/o K. Balaguravaiah r/o Mangali Manyam, Markapur and her husband Srinivasa Chowdary S/o Sambasiva Rao who is practicing as an Advocate in the Courts at Markapur are having close links with CPI (Maoist) Party, which is a prohibited organization and also in touch with UG cadre of the CPI (Maoist) Party the Government feel that she should not be offered the appointment to the post of Junior Civil Judge."

7. The appellant filed a rejoinder on 8.2.2009, and denied all the allegations as being false and incorrect.

8. A counter affidavit was filed on behalf of the Respondent No. 2, by the Registrar General of the High Court. In Para 4 of this affidavit it was stated that the appellant was provisionally selected by the High Court for the appointment to the post of a Civil Judge, along with other candidates. A provisional list of 98 selected candidates was sent to the first respondent Government of Andhra Pradesh to issue orders approving the select list, after duly following the formalities like verification of antecedents. The first respondent, vide its G.O.Ms. 164 Home (Cts. C1) Dept. dated 23.10.2008, did thereafter issue the order approving the Selection of 94 candidates. However, as far as the appellant is concerned, the affidavit stated that the first respondent vide its memo dated 8.5.2008, had requested the Superintendent of Police, Prakasam District, to get verified the character and antecedents of the appellant and other candidates. Thereafter, the affidavit

stated:-

"*...The 1st Respondent through the letter dated 25.10.2008 informed the High Court that the candidature of the petitioner could not be considered as it was reported in her antecedents verification report that she had links with prohibited organization.*

It is respectfully submitted that this Respondent has no role to play in the matter since the 1st Respondent is the appointing authority in respect of Civil Judge (Junior Division). Hence no relief can be claimed against this respondent."

Thus, as can be seen, the High Court Administration was informed through a letter that the appellant had links with a prohibited organisation, but the affidavit does not state that the High Court was informed as to which was that organization, or as to how the appellant had links with that organization. The High Court has also not stated whether it made any inquiry with the Respondent No. 1 as to which was that organization, and in what manner the appellant was connected with it. Besides, as can be seen from the affidavit, the Government at its own level had taken the decision in this matter that the candidature of the appellant could not be considered due to the adverse report, and conveyed it to the High Court. This decision was accepted by the High Court, as it is, by merely stating that it had no role to play since the Respondent No 1 was the appointing authority.

9. When the Writ Petition came up before a Division Bench of the High Court, the Division Bench by its order dated 18.9.2008 called upon the respondents to produce the material in support of the report which had been submitted by the Superintendent of Police, Prakasam District. The report and the supporting material was tendered to the Division Bench, and after going through the same the Bench held in para 19 of its judgment that 'the allegations appearing from the antecedent

verification report show links/associations with the banned organization'. The Division Bench relied upon judgment of this court in *K. Ashok Reddy Vs. Govt. of India* reported in 1994 (2) SCC 303 to state that judicial review is not available in matters where the State was exercising the prerogative power, and applied it in the present case since the appointment of the candidate concerned was to be made to a sensitive post of a judge. The Division Bench also referred to and relied upon the judgment of this Court in *Union of India Vs. Kali Dass Batish* reported in 2006 (1) SCC 779 to the effect that when the appointing authority has not found it fit to appoint the concerned candidate to a judicial post, the court is not expected to interfere in that decision. The Division Bench therefore dismissed the writ petition by its impugned judgment and order.

10. Being aggrieved by this decision, the appellant has filed the present appeal. When the matter reached before this Court, the respondents were called upon to produce the report which was relied upon before the High Court. After a number of adjournments, the report was ultimately produced alongwith an affidavit of one M.V. Sudha Syamala, Special Officer (I/C). A document titled **'Report over the activities of CPI (Maoist) activists and their sympathizers'** dated 15.9.2008 by Inspector of Police, District Special Branch, Ongole was annexed with that affidavit. Para 5 of this report made certain adverse remarks against the appellant. This para 5 reads as follows:-

> *"5. Kasukurthi Vijayalakshmi, Advocate, Markapur CPI (Maoist) frontal organization member and sympathizer of CPI (Maoist):- She is wife of Srinivasarao @ Srinivasa Chowdary. She is a sympathizer of CPI (Maoist) party. She is a member of Chaitanya Mahila Samakhya (CMS), a frontal organization of CPI (Maoist). She along with other members Nagireddy Bhulakshmi @ Rana and Cherukuri Vasanthi, Ongole town is trying to intensify the activities of CMS in Prakasam district, especially in Markapuram area."*

One more affidavit was filed on behalf of the first respondent, viz, that of one Shri Kolli Raghuram Reddy who produced along therewith some of the documents of the police department, known as 'A.P. Police Vachakam'. He, however, accepted in para 5 of this affidavit that:-

> *"There is no particular documentary proof that the Chaitanya Mahila Samakhya is a frontal organization to the CPI (Maoist) except the above publication in A.P. Police Vachakam part III."*

11. The appellant filed a reply affidavit and denied the allegations. She stated that she was not a member of CPI (Maoist), nor did she have any connection with the banned organization or with any of its leaders. She disputed that any such organization, by name CMS existed, and in any case, she was not a member of any such organization. She submitted that her husband must have appeared in some bail applications of persons associated with this party, but she has never appeared in any such case. She further stated that her husband was a member of a panel of advocates who had defended political prisoners, against whom the district police had foisted false cases, and those cases had ended in acquittals. She disputed the bona-fides of the police department in making the adverse report, and relied upon the resolutions passed by various bar associations expressing that her husband was being made to suffer for opposing the police in matters of political arrests. We may note at this stage that the Respondent No. 2 has not filed any counter in this appeal.

Submissions of the rival parties

12. Mr. Ranjit Kumar, learned senior counsel for the appellant submitted that the respondents have changed their stand from time to time. Initially, all that was stated was that the

husband of the appellant was having close links with CPI (Maoist) party, which is a prohibited organization. Subsequently, it was alleged that the appellant was also having connection with the same party, and lastly it was said that she was a member of CMS, which was named to be a Maoist Frontal Organization. The learned Counsel called upon the respondents to produce any document to show that CMS was in any way a Frontal Organization of CPI (Maoist), but no such material has been produced before us.

13. Reliance was placed by Mr. Ranjit Kumar, on the judgment of this Court in *State of Madhya Pradesh Vs. Ramashanker Raghuvanshi* reported in AIR 1983 SC 374. That was a case concerning the respondent who was a teacher. He was absorbed in a Govt. school on 28.2.1972 but his service was terminated on 5.11.1974, on the basis of an adverse report of Deputy Superintendent of Police. The High court of Madhya Pradesh quashed that termination order, for being in violation of Article 311 of the Constitution. This Court (per O. Chinappa Reddy, J.) while upholding the judgment of the High Court, elaborated the concepts of freedom of speech, expression and association enshrined in the constitution. It referred to some of the leading American judgments on this very issue. The Court noted that the political party 'Jansangh' or RSS, with which the respondent was supposed to be associated, was not a banned organization, nor was there any report that the respondent was involved in any violent activity. The Court observed that it is a different matter altogether if a police report is sought on the question of the involvement of the candidate in any criminal or subversive activity, in order to find out his suitability for public employment. But otherwise, it observed in para 3:-

"……Politics is no crime'. Does it mean that only True Believers in the political faith of the party in power for the time being are entitled to public employment?..... Most students and most young men are exhorted by

national leaders to take part in political activities and if they do get involved in some form of agitation or the other, is it to be to their ever-lasting discredit? Some times they get involved because they feel strongly and badly about injustice, because they are possessed of integrity and because they are fired by idealism. They get involved because they are pushed into the forefront by elderly leaders who lead and occasionally mislead them. Should all these young men be debarred from public employment? Is Government service such a heaven that only angels should seek entry into it?"

This Court therefore in terms held that any such view to deny employment to an individual because of his political affinities would be offending Fundamental Rights under Articles 14 and 16 of the Constitution.

14. In paragraph 7 of its judgment the Court referred to the observations of Douglas, J. in *Lerner Vs. Casey* which are to the following effect:-

"7. *In Lerner v. Casey, (1958) 357 US 468 Douglas, J. said:*

"We deal here only with a matter of belief. We have no evidence in either case that the employee in question ever committed a crime, ever moved in treasonable opposition against this country. The only mark against them — if it can be called such — is a refusal to answer questions concerning Communist Party membership. This is said to give rise to doubts concerning the competence of the teacher in the Beilan case and doubts as to the trustworthiness and reliability of the subway conductor in the Lerner case....

There are areas where government may not probe . . . But government has no business penalizing a citizen merely for his beliefs or associations. It is government

action that we have here. It is government action that the Fourteenth and First Amendments protect against . . . Many join associations, societies, and fraternities with less than full endorsement of all their aims."

Thereafter, in para 9 this Court once again quoted Douglas, J's statement in *Speiser Vs. Randall* (1958) 357 US 513 to the following effect:-

"9……..Advocacy which is in no way brigaded with action should always be protected by the First Amendment. That protection should extend even to the ideas we despise……."

Ultimately this Court dismissed that petition. What it observed in paragraph 10 thereof, is equally relevant for our purpose. This para reads as follows:-

"*10. We are not for a moment suggesting, that even after entry into Government service, a person may engage himself in political activities. All that we say is that he cannot be turned back at the very threshold on the ground of his past political activities. Once he becomes a Government servant, he becomes subject to the various rules regulating his conduct and his activities must naturally be subject to all rules made in conformity with the Constitution."*

15. Mr. Venkataramni, learned senior counsel appearing for the respondents, on the other hand, drew our attention to the judgment of a bench of three judges of this Court in *Union of India Vs. Kali Dass Batish* (supra), which was relied upon by the Division Bench. That was a case where the first respondent was a candidate for the post of a judicial member in the Central Administrative Tribunal. The selection committee, under the chairmanship of a judge of this Court, had selected him for consideration. When his antecedents were verified by the Intelligence Bureau, a noting was made by the Director (AT),

Ministry of Personnel, on 25.10.2001, to the following effect:-

"……..(i) In legal circles, he is considered to be an advocate of average caliber. (ii) It is learnt that though he was allotted to the Court of Justice R.L. Khurana, the learned Judge was not happy with his presentation of cases and asked the Advocate General to shift him to some other court, which was done. (iii) He was a contender for the Shimla AC seat on BJP ticket in 1982 and 1985. When he did not get the ticket, he worked against the party and was expelled from the party in 1985. He was subsequently re-inducted by the party in 1989….."

The Director, however, gave him the benefit of doubt, since his name had been recommended by a selection committee headed by a Judge of Supreme Court. The Joint Secretary, Ministry of Personnel also made a similar note. The Secretary, Ministry of Personnel, however, made a note that he need not be appointed, since his performance was poor. The Minister of State made a note that the departmental recommendations be sent to the Chief Justice of India (C.J.I.). When the proposal was subsequently submitted with the confidential memorandum to the C.J.I., he concurred with the memorandum submitted by the Secretary, Ministry of Personnel, and the name of the first respondent was dropped.

16. It is on this background that first respondent *Kali Dass Batish* (supra) approached the Himachal Pradesh High Court, which directed that his case be reconsidered afresh. When that judgment was challenged, this Court noted the above referred facts, and held that when the appropriate decision-making procedure had been followed, and the C.J.I. had accepted the opinion of the Ministry to drop the candidature of the first respondent, there was no reason for the High Court to interfere with that decision. Provisions of the Administrative Tribunals Act, 1985 required a consultation with the C.J.I. under Section 6(3) thereof. That, having been done, and the first respondent

having not been found suitable, there was no case for reconsideration. Mr. Venkataramni tried to emphasize that the involvement in political activities was the factor which went against the respondent no.1 in that case, and so it is for the appellant herein. However, as we can see from that judgment, the political connection was not the relevant factor which went against Kali Dass Batish. Principally, it is the fact that the he was reported to be a mediocre advocate which led to the rejection of his candidature.

17. It was also submitted on behalf of the respondents that the name of a candidate may appear in the merit list but he has no indefeasible right to an appointment. Reliance was placed on the judgment of a Constitution Bench of this Court in *Shankarsan Dash Vs. Union of India* reported in 1991 (3) SCC 47. We must however, note that while laying down the above proposition, this Court has also stated that this proposition does not mean that the State has the license for acting in an arbitrary manner. The relevant paragraph 7 of this judgment reads as follows:-

> *"7. It is not correct to say that if a number of vacancies are notified for appointment and adequate number of candidates are found fit, the successful candidates acquire an indefeasible right to be appointed which cannot be legitimately denied. Ordinarily the notification merely amounts to an invitation to qualified candidates to apply for recruitment and on their selection they do not acquire any right to the post. Unless the relevant recruitment rules so indicate, the State is under no legal duty to fill up all or any of the vacancies. However, it does not mean that the State has the license of acting in an arbitrary manner. The decision not to fill up the vacancies has to be taken bona fide for appropriate reasons. And if the vacancies or any of them are filled up, the State is bound to respect the comparative merit of the candidates, as reflected at the*

> *recruitment test, and no discrimination can be permitted……"*

Consideration of the rival submissions:

Duties of an advocate in the context of Article 22(1) of the Constitution, and the provisions of the Advocates Act, 1961:

18. We have noted the submissions of the rival parties on the issue of denial of appointment on the basis of a police report. The appellant has denied any association with CPI (Maoist) party or CMS. She has, however, stated that maybe her husband had appeared as an advocate for some persons associated with the CPI (Maoist) Party in their bail applications. Initially, as stated in the first respondent's letter dated 11.11.2008, the basis of the adverse police report against the appellant was that her husband is having close links with the CPI (Maoist) party, which is a prohibited organization. Mr. Ranjit Kumar submitted that the appellant can't be made to suffer because of her husband appearing for some litigant, and secondly he asked: 'in any case can her husband be criticized for appearing to seek any bail order for a person on the ground that, the person belongs to CPI (Maoist) party?' As an advocate, he was only discharging his duties for the litigants who had sought his assistance.

19. We quite see the merit of this submission. Those who are participating in politics, and are opposed to those in power, have often to suffer the wrath of the rulers. It may occasionally result in unjustifiable arrests or detentions. The merit of a democracy lies in recognizing the right of every arrested or detained person to be defended by a legal practicenor of his choice. Article 22(1) of our Constitution specifically lays down the following as a Fundamental Right:-

> "*22.* ***Protection against arrest and detention in certain cases-*** *(1) No person who is arrested shall be detained*

in custody without being informed, as soon as may be, of the grounds for such arrest ***nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice****."*

(emphasis supplied)

All such accused do have the right to be defended lawfully until they are proved guilty, and the advocates have the corresponding duty to represent them, in accordance with law. Taking any contrary view in the facts of the present case will result into making the appellant suffer for the role of her husband who is discharging his duty as an advocate in furtherance of this Fundamental Right of the arrested persons. We cannot ignore that during the freedom struggle, and even after independence, many leading lawyers have put in significant legal service for the political and civil right activists, arrested or detained. In the post independence era we may refer, in this behalf, to the valuable contribution of Late Sarvashri M.K. Nambiar, (Justice) V.M. Tarkunde, and K.G. Kannabiran (from Andhra Pradesh itself) to name only a few of the eminent lawyers, who discharged this duty by representing such arrested or detained persons even when they belonged to banned organizations.

20. We may, at this stage, note that the Bar Council of India, which is a regulating body of the advocates, has framed rules under Section 49 of the Advocates Act, 1961. Chapter-II of Part-VI thereof, lays down the Standards of Professional Conduct and Etiquette. Section-I, consisting of rules 1 to 10 thereof, lays down the duties of the advocates to the court, whereas Section-II lays down the duties to the client. Rules 11 and 15 of this Section are relevant for us. These two rules read as follows:-

"*11. An advocate is bound to accept any brief in the Courts or Tribunals or before any other authorities in or before which he proposes to practice at a fee consistent*

with his standing at the Bar and the nature of the case. Special circumstances may justify his refusal to accept a particular brief.

.....

15. It shall be the duty of an advocate fearlessly to uphold the interests of his clients by all fair and honourable means without regard to any unpleasant consequences to himself or any other. He shall defend a person accused of a crime regardless of his personal opinion as to the guilt of the accused, bearing in mind that his loyalty is to the law which requires that no man should be convicted without adequate evidence."

In *A.S. Mohammed Rafi Vs. State of Tamil Nadu* reported in 2011 (1) SCC 688, this Court was concerned with the resolution passed by a Bar Association not to defend accused policemen in criminal cases. This Court in terms held that such resolutions violate the right of an accused to be defended, which right is specifically recognised under Article 22(1) of the Constitution as a Fundamental Right, and such resolutions are null and void.

Requirements for the appointment of a judicial officer, under Article 234 of Constitution and Judicial Service Rules:

21. In this appeal, we are concerned with the question as to whether the first respondent (the Govt. of Andhra Pradesh) and the second respondent (the High Court) have proceeded correctly in the matter of appointment of the appellant. In this behalf we must refer to Article 234 of the Constitution, which is the governing article when it comes to the recruitment of persons other than District Judges to the judicial service. This article reads as follows:-

"234. Recruitment of persons other than district judges to the judicial service – *Appointment of persons*

other than district judges to the judicial service of a State shall be made by the Governor of the State in accordance with rules made by him in that behalf after consultation with the State Public Service Commission and with the High Court exercising jurisdiction in relation to such State."

22. In the instant case, appointments to the posts of Civil Judges are governed by the Andhra Pradesh State Judicial Service Rules, 2007 framed under Articles 233, 234, 235, 237 proviso to Article 309 and proviso to Article 320(3) of the Constitution. Rule 4 (1) of these rules declares that the Governor of the State shall be the Appointing Authority for the categories of District Judges and Civil Judges. Rule 4 (2) (d) lays down that the appointments to the category of civil Judges shall be by direct recruitment from among the eligible advocates on the basis of written and viva-voce test, as prescribed by the High Court. Accordingly, in the present case an advertisement was issued, and written and oral tests were conducted. The appellant appeared for the same and was declared successful in both the tests. Thereafter her name figured in the select list. It was at this stage that the investigation was carried out by the Intelligence Bureau, which gave an adverse report about her. We do not find from the affidavit of the Registrar General, filed during the hearing of the Writ Petition, that all relevant papers of the police investigation were submitted to the High Court on the administrative side. Now, the question arises viz. as to whether it was proper for the respondent No. 1 to decide on its own that the candidature of the appellant could not be considered on the bias of that report? The police report dated 15.9.2008 was produced before the Division Bench only when the respondent No. 1 was called upon to produce the material relied upon against the appellant. And if the report was adverse, was it not expected of the respondent no.1 to forward all those relevant papers to the High Court on administrative side for its consideration? This is what was done in the case of **Kali Dass Batish (supra)** wherein an adverse report was received after

the inclusion of the name of the respondent no.1 in the select list, and the report was forwarded to the C.J.I. In the present case it has not been placed on record that all such papers were forwarded to the High Court on the administrative side to facilitate its decision. On the other hand the Government itself had taken the decision that appellant's candidature could not be considered in view of the adverse reports. It can not therefore be said that there has been a meaningful consultation with the High Court before arriving at the decision not to appoint the appellant. Article 234 specifically requires that these appointments are to be made after consultation with the State Public Service Commission and the High Court exercising jurisdiction in the concerned state. The High Court may accept the adverse report or it may not. Ultimately, inasmuch as the selection is for the appointment to a judicial post, the Governor will have to be guided by the opinion of the High Court. In the present case as is seen from the affidavit of the Registrar-General in reply to the Writ Petition, in view of the letter from the Home Department, the High Court has thrown up its hands, and has not sought any more information from the first respondent. It is the duty of the Government under Article 234 to forward such reports to the High court, and then it is for the High Court to form its opinion which will lead to the consequential decision either to appoint or not to appoint the candidate concerned. Such procedure is necessary to have a meaningful consultation as contemplated under this Article. Any other approach will mean that whatever is stated by the police will be final, without the same being considered by the High Court on the administrative side.

23. In *Shamsher Singh Vs. State of Punjab* reported in AIR 1974 SC 2192, a Constitution bench of this Court was concerned with a matter where the Punjab and Haryana High Court had handed over the work of conducting an enquiry against a judicial officer to the Vigilance Department of the Punjab Government. This Court called it as an act of 'self-abnegation'. Para 78 of this judgment reads as follows:-

"78. The High Court for reasons which are not stated requested the Government to depute the Director of Vigilance to hold an enquiry. It is indeed strange that the High Court which had control over the subordinate judiciary asked the Government to hold an enquiry through the Vigilance Department. The members of the subordinate judiciary are not only under the control of the High Court but are also under the care and custody of the High Court. The High Court failed to discharge the duty of preserving its control. The request by the High Court to have the enquiry through the Director of Vigilance was an act of self abnegation. The contention of the State that the High Court wanted the Government to be satisfied makes matters worse The Governor will act on the recommendation of the High Court. That is the broad basis of Article 235. The High Court should have conducted the enquiry preferably through District Judges. The members of the subordinate judiciary look up to the High Court not only for discipline but also for dignity. The High Court acted in total disregard of Articles 235 by asking the Government to enquire through the Director of Vigilance."

24. In *State of Bihar Vs. Bal Mukund Sah* reported in AIR 2000 SC 1296, a Constitution bench of this Court was concerned with the issue as to whether it was permissible to lay down the recruitment procedure for the district and subordinate judiciary by framing rules under Article 309 without having a consultation with the High Court, in the teeth of Articles 233 to 235. This Court examined the scheme of the relevant articles of the Constitution and the rules framed by Government of Bihar, in this behalf. Paragraph 20 of this judgment is relevant for our purpose, and it reads as follows:-

"*20. Part VI of the Constitution dealing with the States, separately deals with the executive in Chapter II, the State Legislature under Chapter III and thereafter*

Chapter IV dealing with the Legislative Powers of the Governor and then follows Chapter V dealing with the High Courts in the States and Chapter VI dealing with the Subordinate Courts. It is in Chapter VI dealing with the Subordinate Courts that we find the provision made for appointment of District Judges under Article 233, recruitment of persons other than the District Judges to the Judicial Services under Article 234 and also Control of the High Court over the Subordinate Courts as laid down by Article 235. Article 236 deals with the topic of 'Interpretation' and amongst others, defines by sub-article (b) the expression "judicial service" to mean "a service consisting exclusively of persons intended to fill the post of District Judge and other civil judicial posts inferior to the post of District Judge." It becomes, therefore, obvious that, the framers of the Constitution separately dealt with 'Judicial Services' of the State and made exclusive provisions regarding recruitment to the posts of District Judges and other civil judicial posts inferior to the posts of the District Judge. Thus these provisions found entirely in a different part of the Constitution stand on their own and quite independent of Part XIV dealing with Services in general under the 'State'. Therefore, Article 309, which, on its express terms, is made subject to other provisions of the Constitution, does get circumscribed to the extent to which from its general field of operation is carved out a separate and exclusive field for operation by the relevant provisions of Articles dealing with Subordinate Judiciary as found in Chapter VI of Part VI of the Constitution to which we will make further reference at an appropriate stage in the later part of this judgment."

25. These judgments clearly lay down the principles which guide the interpretation and role of Articles 233 to 235 of the Constitution to safeguard the independence of the subordinate judiciary. Article 234 requires a meaningful consultation with the High Court in the matter of recruitment to judicial service. In view

of the mandate of Article 234, High Court has to take a decision on the suitability of a candidate on the administrative side, and it cannot simply go by the police reports, though such reports will, of course, form a relevant part of its consideration. As held in paragraph 3 of *Ramashankar Raghuvanshi* (supra) to deny a public employment to a candidate solely on the basis of the police report regarding the political affinity of the candidate would be offending the Fundamental Rights under Article 14 and 16 of the Constitution, unless such affinities are considered likely to effect the integrity and efficiency of the candidate, or (we may add) unless there is clear material indicating the involvement of the candidate in the subversive or violent activities of a banned organization. In the present case there is no material on record to show that the appellant has engaged in any subversive or violent activities. The appellant has denied her alleged association with CPI (Maoist) party or CMS. Respondent No. 1 has accepted that there is no documentary proof that CMS is a frontal organization of CPI (Maoist). And as far as her connection CPI (Maoist) is concerned, there is no material except the report of police, the bonafides of which are very much disputed by the appellant. Besides, since the report was neither submitted to nor sought by the High Court, there has not been any consideration thereof by the High Court Administration. Thus, there has not been any meaningful consultation with the High Court on the material that was available with the Government. The High Court administration has thus failed in discharging its responsibility under Article 234 of the Constitution.

26. The Division Bench has relied upon the observations of this Court in *K. Ashok Reddy* (supra) to bring in the principle of prerogative power to rule out judicial review. In that matter the petitioner had sought a declaration concerning the judges of the High Courts that they are not liable to be transferred. One of his submissions was that there is absence of judicial review in the matter of such transfers, and the same is bad in law. As noted in the impugned judgment, in *K. Ashok Reddy* (supra),

this Court did refer to the observations of Lord Roskill in *Council of Civil Service Union v. Minister for the Civil Service* reported in 1984 (3) All ER 935 that many situations of exercise of prerogative power are not susceptible to judicial review, because of the very nature of the subject matter such as making of treaties, defence of realm, and dissolution of Parliament to mention a few. Having stated that, as far as the transfer of judges is concerned, this court in terms held that there was no complete exclusion of judicial review, instead only the area of justiciability was reduced by the judgment in *Supreme Court A.O.R Association Vs. Union of India* reported in (1993) 4 SCC 441. The reliance on the observations from K. *Ashok Reddy* (supra) was therefore totally misplaced. Besides, the appointment to the post of a Civil Judge is covered under Article 234 and the State Judicial Service Rules, and if there is any breach or departure therefrom, a judicial review of such a decision can certainly lie. The High Court, therefore, clearly erred in holding that judicial review of the decision concerning the appointment of a Civil Judge was not permissible since that post was a sensitive one.

Hence, the conclusion:

27. Here we are concerned with a question as to whether the appellant could be turned back at the very threshold, on the ground of her alleged political activities. She has denied that she is in any way connected with CPI (Maoist) or CMS. There is no material on record to show that this CMS is a banned organization or that the appellant is its member. It is also not placed on record in which manner she had participated in any of their activities, and through which programme she tried to intensify the activities of CMS in Markapuram area, as claimed in paragraph 5 of the report quoted above. While accepting that her husband may have appeared for some of the activists of CPI (Maoist) to seek bail, the appellant has alleged that the police are trying to frame her due to her husband appearing to oppose the police in criminal matters. Prima facie, on the basis

of the material on record, it is difficult to infer that the appellant had links/associations with a banned organization. The finding of the Division Bench in that behalf rendered in para 19 of the impugned judgment can not therefore be sustained.

28. We may as well note at this stage, that on selection, the Civil Judges remain on probation for a period of two years, and the District Judges and the High Court have ample opportunity to watch their performance. Their probation can be extended if necessary, and if found unsuitable or in engaging in activities not behoving the office, the candidates can be discharged. The relevant rules of the Andhra Pradesh State Judicial Service being Rule Nos. 9, 10 and 11 read as follows:-

"*9.* ***Probation and officiation:***

(a) Every person who is appointed to the category of District Judges by direct recruitment from the date on which he joins duty shall be on probation for a period of two years.

(b) Every person who is appointed to the category of District Judges otherwise than on direct recruitment shall be on officiation for a period of two years.

(c) Every person who is appointed to the category of Civil Judges shall be on probation for a period of two years.

(d) The period of probation or officiation, may be extended by the High Court by such period, not exceeding the period of probation or officiation, as the case may be, as specified in clauses (a) to (c) herein above.

10. **Confirmation/Regularisation:** A person who has been declared to have satisfactorily completed his period of probation or officiation as the case may be shall be

confirmed as a full member of the service in the category of post to which he had been appointed or promoted, as against the substantive vacancy which may exist or arise.

11. **Discharge of unsuitable probationers:** If at the end of the period of probation or the period of extended probation, the Appointing authority on the recommendation of the High Court, considers that the probationer is not suitable to the post to which he has been appointed, may by order discharge him from service after giving him one month's notice or one month's pay in lieu thereof."

29. In view of this constitutional and legal framework, we are clearly of the view that the High Court has erred firstly on the administrative side in discharging its responsibility under Article 234 of the Constitution, and then on the Judicial side in dismissing the writ petition filed by the appellant, by drawing an erroneous conclusion from the judgment in the case of *Kali Dass Batish* (supra). Having stated so, the Court can not grant the mandamus sought by the appellant to issue an appointment order in her favour. As held by this Court in para 17 of *Harpal Singh Chauhan Vs. State of U.P.* reported in 1993 (3) SCC 552, the court can examine whether there was any infirmity in the decision making process. The final decision with respect to the selection is however to be left with the appropriate authority. In the present matter the Division Bench ought to have directed the State Govt. to place all the police papers before the High Court on the administrative side, to enable it to take appropriate decision, after due consideration thereof.

30. Accordingly, the impugned judgment and order dated 19.3.2009 rendered by the Division Bench of the Andhra Pradesh High Court is hereby set-aside. The first respondent State Government is directed to place the police report (produced before the Division Bench) for the consideration of the High Court on the administrative side. The first respondent should do so within two weeks from the receipt of a copy of

this judgment. The selection committee of the High Court shall, within four weeks thereafter consider all relevant material including this police report, and the explanation given by the appellant, and take the appropriate decision with respect to the appointment of the appellant, and forward the same to the respondent no 1. The first respondent shall issue the consequent order within two weeks from the receipt of the communication from the High Court. This appeal and the Writ Petition No. 26147 of 2008 filed by the appellant in the High Court will stand disposed off with this order. In the facts of this case, we refrain from passing any order as to the cost.

K.K.T. Appeal disposed of.

THE STATE OF A.P. & ORS.

v.

M/S. STAR BONE MILL & FERTILISER CO.

(Civil Appeal No. 6690 of 2004)

FEBRUARY 21, 2013

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

Property Law – Ownership and title – Suit filed by respondent in 1974 on basis of registered sale deed dated 11-11-1959 for declaration of title – Trial court decreed the suit, holding that appellant-Government was not the owner of the suit property, and that the respondent had a better title over it – Order upheld by High Court – On appeal, held: The Courts below erred in ignoring the revenue record, particularly, the documents showing that the Government was the absolute owner of the suit property since at least 1920 – Unless M/s A (the vendor of respondent) had valid title, the respondent could not claim any relief whatsoever from court – There was clear admission by respondent in its letter dated 22-5-1970 to the Chief Minister of the State to the effect that it had been cheated by M/s. A which had no title over the suit property, and had executed sale deed in favour of respondent by way of misrepresentation – Documents on record established that M/s A was merely a lessee of the appellant-Government – Sale deed relied upon by the respondent thus invalid and inoperative – Suit filed by respondent accordingly dismissed – Maxims – Nemo dat quid non habet and Nemo plus juris tribuit quam ipse habet.

Evidence Act, 1872 – s.90 – Purpose of – Held: Is to do away with strict rules, as regards requirement of proof, which are enforced in the case of private documents, by giving rise to a presumption of genuineness, in respect of certain documents that have reached a certain age – The period is

to be reckoned backward from the date of the offering of the document, and not any subsequent date, i.e., the date of decision of suit or appeal – Deeds and documents – Ancient documents – Admissibility of.

Evidence Act, 1872 – s.110 – Presumption of title as a result of possession – Held: Can arise only where facts disclose that no title vests in any party.

On 21.5.1943, a lease deed had been executed by the appellant-Government in respect of the land in question in favour of M/s 'A'. The appellant-Government asked M/s 'A' to vacate the land. However, M/s. 'A' remained in possession. On 11.11.1959, the partners of M/s. 'A' executed a sale deed in favour of the respondent for money consideration. The respondent filed a petition seeking permanent lease of the land in his favour whereupon an order was passed by the Ministry for recovery of arrears of rent. The respondent then wrote a letter to the Chief Minister of the State, stating that he had been cheated by M/s. A as it had executed a sale deed in his favour, even though it had no title, and a very high rate of rent was fixed by the department, which should be reduced. The application/petition was rejected. The respondent filed a Writ Petition. The High Court disposed of the writ petition, asking the respondent to approach the appropriate forum, or to make a representation to the State Government. The appellants then served notice upon the respondent under Section 7 of the Land Encroachment Act. The matter was adjudicated under Section 6 of the Land Encroachment Act, and the respondent was directed to vacate the suit land. The respondent filed another Writ Petition before the High Court, however, the same was dismissed, after giving liberty to the respondent to approach the civil court.

The respondent thereafter filed suit for declaration of title and for injunction, restraining the appellants from

evicting the respondent from the property in dispute. The City Civil Court decreed the suit, holding that the Government was not the owner of the suit land, and that the respondent/plaintiff had a better title over it. Aggrieved, the appellants preferred appeal before the High Court, which was dismissed.

In the instant appeal, the appellants *inter alia* contended that the courts below misdirected themselves and did not determine the issue as regards, whether the vendor of the respondent had any title over the suit property which was necessary to determine the validity of the sale deed in favour of the respondent; and that the courts below erred in applying the provisions of Section 90 of the Evidence Act, 1872.

Allowing the appeal, the Court

HELD:1.1. Section 90 of the Evidence Act is based on the legal maxims : *Nemo dat quid non habet* (no one gives what he has not got); and *Nemo plus juris tribuit quam ipse habet* (no one can bestow or grant a greater right, or a better title than he has himself). This section does away with the strict rules, as regards requirement of proof, which are enforced in the case of private documents, by giving rise to a presumption of genuineness, in respect of certain documents that have reached a certain age. The period is to be reckoned backward from the date of the offering of the document, and not any subsequent date, i.e., the date of decision of suit or appeal. Thus, the said section deals with the admissibility of ancient documents, dispensing with proof as would be required, in the usual course of events in usual manner. [Para 7] [405-C-F]

1.2. The High Court erred in holding that the sale deed dated 11.11.1959, must be considered in light of the provisions of Section 90 of the Evidence Act, instead of

the period mentioned therein, thereby treating the appeal as a continuation of the suit. Therefore, the period of 30 years mentioned therein, has been calculated from 1959, till the date of the decision of the appeal, i.e. 22.3.2004. This view itself is impermissible and perverse, and cannot be accepted. [Para 6] [404-H; 405-A-B]

2.1. In the instant case, there has been a clear admission by the respondent/plaintiff in its letter dated 22.5.1970 (Ex.B-39), to the effect that it had been cheated by M/s. A who had no title over the suit land, and sale deed dated 11.11.1959, had thus been executed in favour of the respondent/plaintiff by way of misrepresentation. The said application was rejected vide order dated 18.12.1970. While filing the writ petition, the respondent/ plaintiff did not raise the issue of title of the Forest Department, infact, the dispute was limited only to the extent of the amount of rent, and its case remained the same even in the second writ petition, when it was evicted under the Encroachment Act. The trial court framed various issues, and without giving any weightage to the documents filed by appellant/defendant, decided the case in favour of the respondent/plaintiff, with total disregard to any legal requirements. The courts below have erred in ignoring the revenue record, particularly, the documents showing that the Government was the absolute owner of the suit land since at least 1920. [Para 8] [405-F-H; 406-A-B]

2.2. No person can claim a title better than he himself possess. In the instant case, unless it is shown that M/s. A had valid title, the respondent/plaintiff could not claim any relief whatsoever from court. [Para 9] [406-C]

3. The principle enshrined in Section 110 of the Evidence Act, is based on public policy with the object of preventing persons from committing breach of peace by taking law into their own hands, however good their

title over the land in question may be. It is for this purpose, that the provisions of Section 6 of the Specific Relief Act, 1963, Section 145 of Code of Criminal Procedure, 1973, and Sections 154 and 158 of Indian Penal Code, 1860, were enacted. All the afore-said provisions have the same object. The said presumption is read under Section 114 of the Evidence Act, and applies only in a case where there is either no proof, or very little proof of ownership on either side. The maxim "possession follows title" is applicable in cases where proof of actual possession cannot reasonably be expected, for instance, in the case of waste lands, or where nothing is known about possession one-way or another. Presumption of title as a result of possession, can arise only where facts disclose that no title vests in any party. A person must establish that he has continued possession of the suit property, while the other side claiming title, must make out a case of trespass/ encroachment etc. Where the apparent title is with the plaintiffs, it is incumbent upon the defendant, that in order to displace this claim of apparent title and to establish beneficial title in himself, he must establish by way of satisfactory evidence, circumstances that favour his version. Even, a revenue record is not a document of title. It merely raises a presumption in regard to possession. Presumption of possession and/or continuity thereof, both forward and backward, can also be raised under Section 110 of the Evidence Act. [Para 13] [407-B-E, F-H; 408-A]

Gurunath Manohar Pavaskar & Ors. v. Nagesh Siddappa Navalgund & Ors. **AIR 2008 SC 901: 2007 (13) SCR 77;** *Nair Service Society Ltd. v. K.C. Alexander & Ors. & Ors.* **AIR 1968 SC 1165: 1968 SCR 163 and** *Chief Conservator of Forests, Govt. of A.P. v. Collector & Ors.* **AIR 2003 SC 1805: 2003 (2) SCR 180 – relied on.**

4.1. The courts below have failed to appreciate that mere acceptance of municipal tax or agricultural tax by a person, cannot stop the State from challenging ownership of the land, as there may not be estoppel against the statute. Nor can such a presumption arise in case of grant of loan by a bank upon it hypothecating the property. [Para 14] [408-B]

4.2. The trial court has recorded a finding to the effect that the name of one Raja Ram was shown as Pattadar in respect of the land in dispute and the respondent/plaintiff is in possession, and therefore, the burden of proof was shifted on the government to establish that the suit land belonged to it. However, the respondent/plaintiff could not furnish any explanation as to who was this Raja Ram, Pattadar and how respondent/plaintiff was concerned with it. Moreover, in absence of his impleadment by the respondent/plaintiff such a finding could not have been recorded. [Para 15] [408-C-D]

4.3. The courts below erred in holding, that revenue records confer title, for the reason that they merely show possession of a person. The courts below further failed to appreciate that the sale deed dated 11.11.1959 was invalid and inoperative, as the documents on record established that the vendor was merely a lessee of the Government. The suit filed by the respondent/plaintiff is therefore dismissed. [Paras 16, 17] [408-E-F, G]

Case Law Reference:

2007 (13) SCR 77	**relied on**	**Para 10**
1968 SCR 163	**relied on**	**Para 11**
2003 (2) SCR 180	**relied on**	**Para 12**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6690 of 2004.

From the Judgment & Order dated 22.03.2004 of the High Court of Judicature of Andhra Pradesh at Hyderabad in City Civil Court Appeal No. 72 of 1989.

Amrendra Saran, C.K. Sucharita, Rumi Chanda for the Appellants.

D. Rama Krishna Reddy, Asha Gopalan Nair, for the Respondent.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. This appeal has been preferred against the impugned judgment and order dated 22.3.2004, passed by the High Court of Judicature of Andhra Pradesh at Hyderabad in City Civil Court Appeal No. 72 of 1989, by way of which the Civil Suit filed by the respondent against the appellants, claiming title over the suit land in dispute, has been upheld.

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

A. One Shri M.A. Samad, Assistant Engineer, City Improvement Board, Hyderabad, alongwith his associate, converted the land in dispute measuring 3.525 acres i.e. 17061 sq. yards, in favour of the Forest Department in 1920.

B. The suit land was given on lease on 21.5.1943 to M/s. A. Allauddin & Sons for a fixed time period, incorporating the terms and conditions, that the lessee would not be entitled to extend the existing building in any way, or to erect any structure on the land leased. The lessee was also prohibited from transferring the suit land by any means.

C. The said M/s. A. Allauddin & Sons, a proprietory concern, sent a letter dated 29.9.1945 in response to the eviction notice, informing the appellants that it was not possible for it to remove the factory established on the suit land, and thus,

the said lessee asked the appellants to put up the said property for rent. The said firm, then sent a letter dated 1.5.1951, offering rent of Rs.600/- per annum.

D. The appellants vide letter dated 20.12.1954, informed M/s. A. Allauddin & Sons to vacate the site within a period of one month, or else be evicted in accordance with law, and in that case it would also be liable to pay damages. In spite of receiving such a letter, the said lessee/tenant remained in possession of the suit premises, and continued to pay rent, as is evident from the letter dated 15.8.1956. The appellants, however, vide letter dated 21.2.1958, asked the said lessee/ tenant M/s. A. Allauddin & Sons, yet again, to vacate the suit land.

E. Instead of vacating the suit land, M/s. A. Allauddin & Sons executed a lease deed dated 24.2.1958, and got it registered on 6.4.1958, in favour of Syed Jehangir Ahmed and others (Partners of the respondent firm, M/s Star Bone Mill and Fertiliser Co.), for a period of two years. During the subsistence of the said sub-lease, the partners of the firm M/s. A. Allauddin & Sons, executed a sale deed on 11.11.1959 in favour of the respondent, for a consideration of Rs.45,000/-. The said sale deed was also registered, and possession was handed over to the respondent.

F. The respondent herein filed a petition in 1964 before the Minister for Agriculture & Forest, seeking permanent lease of the suit premises in his favour. On 26.4.1967, an order was passed by the Ministry of Agriculure & Forest in respect of recovery of arrears of rent as regards the said land. The respondent vide letter dated 7.5.1969, offered higher rent to the appellants for the suit land.

G. On 22.5.1970, the respondent wrote a letter to the Chief Minister of Andhra Pradesh (Ex.B-39), stating that he had been cheated by M/s. A. Allauddin & Sons, as it had executed a sale deed in his favour, even though it had no title, and a very high

rate of rent was fixed by the department, which should be reduced and till the matter is finally decided, a rent of Rs. 569/- per month should be accepted. The said application/ petition was rejected by the Assistant Secretary to the Government, Food & Agriculture Department, vide letter dated 18.12.1970.

H. Aggrieved, the respondent filed Writ Petition No. 187 of 1971 wherein an interim order dated 12.1.1971 was passed, to the effect that the recovery of rent for the period prior to 26.4.1969 would be made at the rate of Rs.568/- per month instead of Rs.1279/- per month. Subsequent to 26.4.1969, rent would be recovered at the rate of Rs.1279/- per month. In case, arrears are not paid by the respondent, he would be vacated from the suit land.

I. In view of the interim order of the High Court, the appellants issued a demand notice for a sum of Rs.45,484.62 paise. However, vide order dated 19.10.1971, the High Court directed the respondent to deposit a sum of Rs.30,000/-, in eight monthly installments. The said writ petition was disposed of vide order dated 18.2.1972, asking the respondent to approach the appropriate forum to establish his rights over the suit land, or to make a representation to the State Government for this purpose.

J. The appellants served notice dated 8.4.1974, upon the respondent under Section 7 of the Land Encroachment Act, and the respondent submitted a reply to the said show cause notice on 24.6.1974. The matter was adjudicated and decided on 21.8.1974, under Section 6 of the Land Encroachment Act, and the respondent was directed to vacate the suit land.

K. The respondent filed Writ Petition No. 5222 of 1974 before the High Court, however, the same was dismissed, after giving liberty to the respondent to approach the civil court. Thus, the respondent filed Original Suit No. 582 of 1974 for declaration of title and for injunction, restraining the appellants

from evicting the said respondent/plaintiff from the property in dispute.

The appellants contested the suit by filing a written statement, and on the basis of the pleadings therein, a large number of issues were framed, including whether M/s. A. Allauddin & Sons was actually the owner and possessor of the suit land; and whether it could transfer the suit land to the respondent/plaintiff, vide registered sale deed dated 11.11.1959.

L. The City Civil Court, vide judgment and decree dated 25.4.1989 decreed the suit, holding that the Government was not the owner of the suit land, and that the respondent/plaintiff had a better title over it. Thus, he was entitled for declaration of title, and injunction as sought by him.

M. Aggrieved, the appellants preferred City Civil Court Appeal No. 72 of 1989 before the High Court, challenging the said judgment and decree dated 25.4.1989, which was dismissed vide judgment and decree dated 22.3.2004, affirming the judgment and decree of the trial court.

Hence, this appeal.

3. Shri Amarendra Sharan, learned senior counsel appearing on behalf of the appellants, has submitted that the courts below misdirected themselves and did not determine the issue as regards, whether the vendor of the respondent/plaintiff had any title over the suit property. The same is necessary to determine the validity of the sale deed in favour of the respondent/plaintiff. The issue before the trial court was not whether the Government was the owner of the said land or not. No such issue framed either. Moreover, such an issue could not be framed in view of the admission made by the respondent/plaintiff itself, as it had been paying rent regularly to the Government, and the same was admitted by it, by way of filing an application before the Government stating, that M/s. A.

Allauddin & Sons had cheated it by executing a sale deed in its favour, without any authority/title. It thus, requested the Government to execute a lease deed/rent deed in its favour. It was not its case, that in its earlier two writ petitions filed by it, it had acquired title over the land validly, or that M/s. A. Allauddin & Sons etc., had any title over the said suit land. The lease deed executed by the Government in favour of M/s. A. Allauddin & Sons, dated 21.5.1943 must be considered in light of the provisions of Section 90 of the Evidence Act, 1872 (hereinafter referred to as the 'Evidence Act'), and not the sale deed dated 11.11.1959, as the suit was filed in 1974, just after a period of 15 years of sale, and not 30 years. The courts below have erred in applying the provisions of Section 90 of the Evidence Act. The findings of fact recorded by the courts below are perverse, being based on no evidence and have been recorded by a misapplication of the law. Thus, the appeal deserves to be allowed.

4. On the contrary, Shri D. Rama Krishna Reddy, learned counsel appearing on behalf of the respondent, has opposed the appeal, contending that the findings of fact recorded by the courts below, do not warrant interference by this Court. It is evident from the revenue records that possession is *prima facie* evidence of ownership, and that the same is by itself, a limited title, which is good except to the true owner. The admission and receipt of tax constitutes admission of ownership, and the entries in the revenue record must hence, be presumed to be correct. In the revenue record, one Raja Ram has been shown to be the owner of the land, the Forest Department cannot claim any title or interest therein. The said appeal lacks merit, and is liable to be dismissed.

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

6. Admittedly, the High Court erred in holding that the sale deed dated 11.11.1959, must be considered in light of the provisions of Section 90 of the Evidence Act, instead of the

period mentioned therein, thereby treating the appeal as a continuation of the suit. Therefore, the period of 30 years mentioned therein, has been calculated from 1959, till the date of the decision of the appeal, i.e. 22.3.2004. This view itself is impermissible and perverse, and cannot be accepted. The courts below have not given any reason, whatsoever, for the said lease deed to be treated as having been executed on 21.5.1943, under Section 90 of the Evidence Act and, thus, for believing that the land belonging to the Forest Department, which had in turn, given it to M/s. A. Allauddin & Sons on lease.

7. Section 90 of the Evidence Act is based on the legal maxims : *Nemo dat quid non habet* (no one gives what he has not got); and *Nemo plus juris tribuit quam ipse habet* (no one can bestow or grant a greater right, or a better title than he has himself).

This section does away with the strict rules, as regards requirement of proof, which are enforced in the case of private documents, by giving rise to a presumption of genuineness, in respect of certain documents that have reached a certain age. The period is to be reckoned backward from the date of the offering of the document, and not any subsequent date, i.e., the date of decision of suit or appeal. Thus, the said section deals with the admissibility of ancient documents, dispensing with proof as would be required, in the usual course of events in usual manner.

8. There has been a clear admission by the respondent/plaintiff in its letter dated 22.5.1970 (Ex.B-39), to the effect that it had been cheated by M/s. A. Allauddin & Sons, who had no title over the suit land, and sale deed dated 11.11.1959, had thus been executed in favour of the respondent/plaintiff by way of misrepresentation. The said application was rejected vide order dated 18.12.1970. While filing the writ petition, the respondent/plaintiff did not raise the issue of title of the Forest Department, infact, the dispute was limited only to the extent of the amount of rent, and its case remained the same even in

the second writ petition, when it was evicted under the Encroachment Act. The trial court framed various issues, and without giving any weightage to the documents filed by appellant/defendant, decided the case in favour of the respondent/plaintiff, with total disregard to any legal requirements. The courts below have erred in ignoring the revenue record, particularly, the documents showing that the Government was the absolute owner of the suit land since at least 1920.

9. No person can claim a title better than he himself possess. In the instant case, unless it is shown that M/s. A. Allauddin & Sons had valid title, the respondent/plaintiff could not claim any relief whatsoever from court.

10. In *Gurunath Manohar Pavaskar & Ors. v. Nagesh Siddappa Navalgund & Ors.,* AIR 2008 SC 901, this Court held as under:-

> *"A revenue record is not a document of title. It merely raises a presumption in regard to possession. Presumption of possession and/or continuity thereof both forward and backward can also be raised under Section 110 of the Evidence Act."*

11. In *Nair Service Society Ltd. v. K.C. Alexander & Ors. & Ors.,* AIR 1968 SC 1165, dealing with the provisions of Section 110 of the Evidence Act, this Court held as under:-

> *"Possession may prima facie raise a presumption of title no one can deny but this presumption can hardly arise when the facts are known. When the facts disclose no title in either party, possession alone decides."*

12. In *Chief Conservator of Forests, Govt. of A.P. v. Collector & Ors.,* AIR 2003 SC 1805, this Court held that :

> *"Presumption, which is rebuttable, is attracted when the*

possession is prima facie lawful and when the contesting party has no title."

13. The principle enshrined in Section 110 of the Evidence Act, is based on public policy with the object of preventing persons from committing breach of peace by taking law into their own hands, however good their title over the land in question may be. It is for this purpose, that the provisions of Section 6 of the Specific Relief Act, 1963, Section 145 of Code of Criminal Procedure, 1973, and Sections 154 and 158 of Indian Penal Code, 1860, were enacted. All the afore-said provisions have the same object. The said presumption is read under Section 114 of the Evidence Act, and applies only in a case where there is either no proof, or very little proof of ownership on either side. The maxim "possession follows title" is applicable in cases where proof of actual possession cannot reasonably be expected, for instance, in the case of waste lands, or where nothing is known about possession one-way or another. Presumption of title as a result of possession, can arise only where facts disclose that no title vests in any party. Possession of the plaintiff is not *prima facie* wrongful, and title of the plaintiff is not proved. It certainly does not mean that because a man has title over some land, he is necessarily in possession of it. It infact means, that if at any time a man with title was in possession of the said property, the law allows the presumption that such possession was in continuation of the title vested in him. A person must establish that he has continued possession of the suit property, while the other side claiming title, must make out a case of trespass/encroachment etc. Where the apparent title is with the plaintiffs, it is incumbent upon the defendant, that in order to displace this claim of apparent title and to establish beneficial title in himself, he must establish by way of satisfactory evidence, circumstances that favour his version. Even, a revenue record is not a document of title. It merely raises a presumption in regard to possession. Presumption of possession and/or continuity thereof, both

forward and backward, can also be raised under Section 110 of the Evidence Act.

14. The courts below have failed to appreciate that mere acceptance of municipal tax or agricultural tax by a person, cannot stop the State from challenging ownership of the land, as there may not be estoppel against the statute. Nor can such a presumption arise in case of grant of loan by a bank upon it hypothecating the property.

15. The trial court has recorded a finding to the effect that the name of one Raja Ram was shown as Pattadar in respect of the land in dispute and the respondent/plaintiff is in possession. Therefore, the burden of proof was shifted on the government to establish that the suit land belonged to it. Learned counsel for the respondent/plaintiff could not furnish any explanation before us as to who was this Raja Ram, Pattadar and how respondent/plaintiff was concerned with it. Moreover, in absence of his impleadment by the respondent/ plaintiff such a finding could not have been recorded.

16. The courts below erred in holding, that revenue records confer title, for the reason that they merely show possession of a person. The courts below further failed to appreciate that the sale deed dated 11.11.1959 was invalid and inoperative, as the documents on record established that the vendor was merely a lessee of the Government.

17. In view of the above, we are of the considered opinion that findings of fact recorded by the courts below are perverse and liable to be set aside. The appeal succeeds and is allowed. The judgments of the courts below are hereby set aside. The suit filed by the respondent/plaintiff is dismissed.

B.B.B. Appeal allowed.

M/S. A.S. MOTORS PVT. LTD.
v.
UNION OF INDIA AND ORS.
(Civil Appeal No. 1517 of 2013)

FEBRUARY 21, 2013

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

Contract – Termination of, by respondent-authority – Termination challenged on ground that principles of natural justice requiring a fair hearing to the appellant were not complied with – Held: Termination of the contract was preceded by a show-cause notice issued to the appellant and a hearing provided to it by the competent authority – The show-cause notice enclosed with it all relevant documents – Issue of a show-cause notice and disclosure of material on the basis of which action was proposed to be taken against the appellant was in compliance with the requirement of fairness to the appellant – Absence of any allegation of mala fides against those taking action as also the failure of the appellant to disclose any prejudice, all indicated that the procedure was fair and in substantial, if not strict, compliance with the requirements of audi alteram partem – Principles of natural justice thus stood substantially complied with.

Contract – For collection of fee for using stretch of road on the National Highway – Awarded to appellant – Contract subsequently terminated by respondent-authority – Termination challenged on ground that there was no real basis for the respondent-authority to hold that appellant-contractor had committed any breach of the terms and conditions of the contract warranting its termination – Held: Reports submitted by the agency employed by respondent-authority clearly showed that appellant-contractor was indulging in malpractices – If the report submitted by the

agency against whom the appellant has no allegation of malice or other extraneous considerations to make are accepted, no reason why the same could not furnish a safe basis for the respondent to take action against the appellant especially when it was abusing its position as a contractor, putting the public at large to unnecessary harassment and demanding money not legally recoverable from them – Appellant-contractor, thus, not entitled to claim any relief.

Contract – Termination of, by respondent-authority – Forfeiture of performance security furnished by appellant-contractor– Justification of – Held: Justified – Such forfeiture was available to respondent-authority under the terms of the contract and the provisions of s.74 of the Contract Act did not forbid the same – An aggrieved party is entitled to receive compensation from the party who has broken the contract whether or not actual damage or loss is proved to have been caused by the breach – Contract Act, 1872 – s.72.

Contract – Termination of, by respondent-authority – Revocation of bank guarantee furnished by appellant-contractor – Justification – Held: Not justified as respondent-authority had already recovered the penalty levied by it and also forfeited the performance security – Though in terms of clause 18(b) of the contract, the respondent-authority had the right to estimate the excess of collection by the appellant-contractor and recover the same from it, however, nothing on record whether any such estimation was made by the authority and if so the basis on which that was done – Without a proper estimation of the excess received by the appellant-contractor, it was not open to the respondent-authority to invoke the bank guarantee.

Administrative Law – Natural justice – Rules of – Held: Are not rigid, immutable or embodied rules – To an extent there has been a shift from the earlier thought that even a technical infringement of the rules is sufficient to vitiate action.

Administrative Law – Natural justice – Doctrine of audi alteram partem – Object of – Held: Is to strike at arbitrariness and want of fair play.

National Highway Authority of India Ltd. (NHAI) had allotted to the appellant a contract for collection of fee for use of a 42 km stretch of road on the Morena-Gwalior Section of National Highway No.3. Complaints were made alleging that the appellants had violated contractual stipulations between the parties. This resulted in termination of the collection contract by the competent authority (respondent).

Aggrieved, the appellant filed writ petition. The High Court while dismissing the writ petition upheld the imposition of penalty and forfeiture of performance security by the respondent-authority, but quashed the revocation of bank guarantee.

In the instant appeal, the appellant contended that termination of the contract between the parties was legally bad not only because the principles of natural justice requiring a fair hearing to the appellant were not complied with, but also because there was no real basis for the respondent-authority to hold that the appellant had committed any breach of the terms and conditions of the contract warranting its termination. The issue relating to forfeiture of performance security and revocation of bank guarantee also came up for consideration before this Court.

Dismissing the appeal, the Court

HELD: 1.1. Rules of natural justice are not rigid, immutable or embodied rules that may be capable of being put in straitjacket nor have the same been so evolved as to apply universally to all kind of domestic tribunals and enquiries. What the Courts in essence look

for in every case where violation of the principles of natural justice is alleged is whether the affected party was given reasonable opportunity to present its case and whether the administrative authority had acted fairly, impartially and reasonably. The doctrine of *audi alteram partem* is thus aimed at striking at arbitrariness and want of fair play. A Court examining a complaint based on violation of rules of natural justice is entitled to see whether the aggrieved party had indeed suffered any prejudice on account of such violation. To that extent there has been a shift from the earlier thought that even a technical infringement of the rules is sufficient to vitiate the action. [Para 8] [420-A-C, D-E]

1.2. In the case at hand, the termination of the contract between the parties was preceded by a show-cause notice issued to the appellant and a hearing provided to it by the competent authority. The show-cause notice issued to the appellant enclosed with it all relevant documents including the complaints received against the appellant from various quarters and a copy of the report submitted by the agency engaged for verifying the allegations against the appellant. The appellant had unsuccessfully challenged the show-cause notice in a Writ Petition before the High Court. The High Court had while refusing to interfere in the matter directed the appellant to submit a reply to the notice. The appellant had accordingly appeared before the authority, submitted its written statement and was heard in support of its case that it had not committed any default. In the reply or at the hearing, the appellant had not alleged any mala fide, bias or prejudice against the officers dealing with the matter or the agency employed by them for collecting and verifying facts. Principles of natural justice thus stood substantially complied with. The contention that the appellant should have been given an opportunity to cross-examine the persons whose statements had

been recorded by the agency in the course of its inquiry and verification was rightly rejected by the High Court keeping in view the nature of the inquiry which was primarily in the realm of contract, aimed at finding out whether the appellant had committed any violation of the contractual stipulations between the parties. Issue of a show-cause notice and disclosure of material on the basis of which action was proposed to be taken against the appellant was in compliance with the requirement of fairness to the appellant who was likely to be affected by the proposed termination. Absence of any allegation of mala fides against those taking action as also the failure of the appellant to disclose any prejudice, all indicated that the procedure was fair and in substantial, if not strict, compliance with the requirements of *Audi Alteram Partem.* [Para 15] [425-D-H; 426-A-C]

Suresh Koshy George v. University of Kerala **AIR 1969 SC 198: 1969 SCR 317;** *Keshav Mills Co Ltd. v. Union of India* **(1973) 1 SCC 380: 1973 (3) SCR 22;** *P.D. Agrawal v. State Bank of India* **(2006) 8 SCC 776: 2006 (1) Suppl. SCR 454;** *Maharashtra State Board of Secondary and Higher Education v. K.S. Gandhi & Ors.* **(1991) 2 SCC 716: 1991 (1) SCR 772;** *Maharashtra State Board of Secondary and Higher Secondary Education & Anr. v. Paritosh Bhupeshkumar Sheth & Ors.* **(1984) 4 SCC 27;** *Union of India v. Mohan Lal Kapoor* **(1973) 2 SCC 836: 1974 (1) SCR 797;** *Aligarh Muslim University v. Mansoor Ali Khan* **(2000) 7 SCC 529: 2000 (2) Suppl. SCR 684 – relied on.**

Charan Lal Sahu v. Union of India (Bhopal Gas Disaster) **(1990) 1 SCC 613: 1989 (2) Suppl. SCR 597 – referred to.**

Russel v. Duke of Norfolk **1949 1 All ER 109;** *Ridge v. Baldwin* **(1963) 2 W.L.R. 935 – referred to.**

Administrative Law (Sir Willam Wade), **9th Edn. pp. 468-471 – referred to.**

2.1. There is no error of law, nor is there any perversity in the appreciation of the material available before the respondents. The reports submitted by the agency employed by the respondent-Authority was damning for the appellant and clearly showed that the appellant was indulging in malpractices like charging excess fee from the owners/drivers of the vehicles using the stretch of road covered by the contract. If the report submitted by the agency against whom the appellant has no allegation of malice or other extraneous considerations to make are accepted, there is no reason why the same could not furnish a safe basis for the respondent to take action especially when the appellant was abusing its position as a contractor, putting the public at large to unnecessary harassment and exaction of money not legally recoverable from them. The material collected could and was rightly made a basis for the termination of contract by the competent authority. [Para 19] [428-B-F]

2.2. The appellant was not entitled to claim any relief in exercise of its extra ordinary writ jurisdiction of the High Court. The High Court could have relegated the appellant to seek redress in an appropriate civil action before a competent civil Court, whether for damages or recovery of the amount forfeited by the respondent. The High Court has not done so. It has given partial relief to the appellant to the extent of holding that the invocation of the bank guarantee was not justified in the light of the forfeiture of performance security and the amount of penalty. In any event there is no room for interfering with the order passed by the High Court in exercise of jurisdiction under Article 136 of the Constitution which too is both extraordinary and discretionary in nature. [Para 20] [428-F-H; 429-A-B]

2.3. The appellant had breached the contractual

stipulations, harassed innocent citizens to cough up more than what they were in law required to pay and thus undeservedly enriched itself before it turned to the Court to claim relief in the extraordinary writ jurisdiction of the High Court on equitable considerations. Such an attempt could and ought to have been frustrated by the High Court, as indeed has been done, no matter only partially. [Para 21] [430-B-C]

Halsbury's Laws of England **Fourth Edition Vol.-16, pp.874-876 – referred to.**

3. The High Court has taken the view that apart from a penalty of Rs.2,41,097/-, National Highway Authority had already recovered a sum of Rs.2,20,00,125/- out of the bank drafts furnished by the appellant towards performance security; that thus the total amount received by the authority was more than the amount payable to it under the contract if the same had been performed diligently till the end of the contract period and invocation of the bank guarantee for recovery of any further amount was therefore unjustified. There is no appeal by the Authority against that part of the judgment, although it was argued on behalf of the Authority that in terms of clause 18(b) of the contract, the Authority had the right to estimate the excess of collection by the appellant-contractor and recover the same from it. However, there is nothing on record whether any such estimation was made by the Authority and if so the basis on which that was done. Without a proper estimation of the excess received by the appellant, it was not open to the respondent to invoke the bank guarantee and recover the entire amount of Rs.2,20,00,125/- covered by the same. The High Court was, in that view, correct in holding that invocation of bank guarantee was not justified. [Paras 22, 24] [430-D-F; 431-F-G, H; 432-A-B]

4. Insofar as the recovery of the performance security

of Rs.2,20,00,125/- from out of the bank drafts furnished by the appellant is concerned, such a forfeiture was available to the respondent-Authority under the terms of the contract and the provisions of Section 74 of the Contract Act did not forbid the same. An aggrieved party is entitled to receive compensation from the party who has broken the contract whether or not actual damage or loss is proved to have been caused by the breach and that the Court has, subject to the outer limit of the penalty stipulated, jurisdiction to award such compensation as it deems reasonable having regard to the circumstances of the case. This would essentially be a mixed question of law and fact that a Writ Court could not possibly decide. The appellant could and indeed ought to have sought its remedies in a proper civil action if it questioned the reasonableness of the amount recoverable by the appellant in terms of the contractual stipulations. [Para 25] [432-C-D, E-G]

Fateh Chand v. Balkishan Das **AIR 1963 SC 1405: 1964 SCR 515;** *Union of India v. Ramam Iron Foundry* **(1974) 2 SCC 231: 1974 (3) SCR 556 and** *SAIL v. Gupta Brother Steel Tubes* **(2009) 10 SCC 63 – relied on.**

Case Law reference:

1969 SCR 317	**relied on**	**Para 9**
1949 1 All ER 109	**referred to**	**Para 9**
1973 (3) SCR 22	**relied on**	**Para 10**
(1963) 2 W.L.R. 935	**referred to**	**Para 10**
2006 (1) Suppl. SCR 454	**relied on**	**Para 11**
1989 (2) Suppl. SCR 597	**referred to**	**Para 11**
1991 (1) SCR 772	**relied on**	**Para 12**
(1984) 4 SCC 27	**relied on**	**Para 13**

1974 (1) SCR 797	**relied on**	**Para 13**
2000 (2) Suppl. SCR 684	**relied on**	**Para 14**
1964 SCR 515	**relied on**	**Para 25**
1974 (3) SCR 556	**relied on**	**Para 25**
(2009) 10 SCC 63	**relied on**	**Para 25**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1517 of 2013.

From the Judgment & Order dated 08.08.2007 of the High Court of Madhya Pradesh, Judicature Jabalpur, Bench, Gwalior in Writ Appeal No. 491 of 2007.

A.K. Chitale, Niraj Sharma, Sumit Kumar Sharma for the Appellant.

Gurab Banerjee, ASG, Praveen Jain, Tanupriya, Hacib (for M.V. Kini & Associates) for the Respondents.

The Judgment of the Court was delivered by

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

2. This appeal by special leave arises out of an order dated 8th August, 2007, passed by a Division Bench of the High Court of Madhya Pradesh at Jabalpur whereby Writ Appeal No.491 of 2007 filed by the appellant has been dismissed and the order passed by the learned Single Judge dismissing Writ Petition No.720 of 2007 affirmed. Multiple rounds of litigation between the parties have been aptly recapitulated in the order passed by the Single Judge of the High Court in Writ Petition No.720/2007 and refreshed by the Division Bench of the High Court while dismissing the writ appeal filed against the same. It is in that view unnecessary for us to recount the entire factual background in which the controversy in this appeal arises except to the extent it is absolutely necessary for us to do so for the disposal of this appeal.

3. National Highway Authority of India Ltd. (NHAI for short) invited tenders for award of a contract for collection of fee for the use of National Highways from Km. 61.00 to Km.103 on Morena-Gwalior Section of National Highway No.3. Appellant too among others made an offer which was accepted by the NHAI in terms of its letter dated 14th March, 2006 asking the appellant to submit a demand draft for a sum of Rs.2,20,00,125/- towards performance security and a bank guarantee for a similar amount to be valid for a period of 15 months for the due observance of the terms and conditions contained in the contract. Both these requirements were satisfied by the appellant with the result that a contract for collection of user fee commencing from 1st April, 2006 to 31st March, 2007 was finally allotted in its favour. It is not in dispute that pursuant to the said allotment the appellant started collecting the prescribed fee as per the terms and conditions of the agreement and also started depositing monthly instalments stipulated under the same.

4. Certain violations were in due course noticed by the NHAI including complaints to the effect that the appellant was collecting excess fee from vehicles passing through Toll Plaza. This resulted in the termination of the collection contract by the competent authority in terms of a letter dated 27th July, 2006, and forfeiture of the performance security of Rs.2,20,00,125/-. Termination ordered by the respondent triggered litigation between the parties that took several rounds before the High Court. We are not immediately concerned with the nature of those proceedings and the orders passed in the same from time to time. What is important is that the termination of the contract had once been quashed by the High Court whereupon the same was terminated for a second time after a show-cause notice and a personal hearing to the appellant in compliance with the direction issued by the High Court in its order dated 25th January, 2007.

5. Aggrieved by the fresh termination of the contract as

also the forfeiture ordered by the competent authority, the appellant filed Writ Petition No.720 of 2007 before the High Court of Madhya Pradesh. By his order dated 18th June, 2007, a Single Judge of the High Court allowed the said petition in part and while upholding imposition of penalty and forfeiture of performance guarantee, quashed the revocation of the bank guarantee by the respondent, as unfair and unreasonable having regard to the fact that the respondent had already received Rs.7,33,33,750/- towards collection charges, Rs.2,20,00,125/- towards forfeiture of the performance security and a penalty amount of Rs.2,41,097/- making a total of Rs.9,55,74,970/- which was more than Rs.8,80,00,500/- the amount contracted to be paid to the respondent. The High Court held that the termination of the contract and the forfeiture of the performance security for the breaches committed by the appellant were perfectly justified in the light of the report submitted by the agency deployed by the respondent to collect material regarding overcharging of fee and other violations committed by the appellant.

6. Feeling aggrieved by the order passed by the Single Judge of the High Court the appellant preferred Writ Appeal No.491 of 2007 which was heard and dismissed by a Division Bench of the High Court by its order dated 8th August, 2007. The present appeal assails the correctness of the said order.

7. We have heard learned counsel for the parties at some length who have taken us through the record including the orders passed by the High Court from time to time.

8. It was argued on behalf of the appellant that termination of the contract between the parties was legally bad not only because the principles of natural justice requiring a fair hearing to the appellant were not complied with but also because there was no real basis for the respondent-authority to hold that the appellant had committed any breach of the terms and conditions of the contract warranting its termination. We find no merit in either one of the contentions. The reasons are not far

to see. Rules of natural justice, it is by now fairly well settled, are not rigid, immutable or embodied rules that may be capable of being put in straitjacket nor have the same been so evolved as to apply universally to all kind of domestic tribunals and enquiries. What the Courts in essence look for in every case where violation of the principles of natural justice is alleged is whether the affected party was given reasonable opportunity to present its case and whether the administrative authority had acted fairly, impartially and reasonably. The doctrine of audi alteram partem is thus aimed at striking at arbitrariness and want of fair play. Judicial pronouncements on the subject have, therefore, recognised that the demands of natural justice may be different in different situations depending upon not only the facts and circumstances of each case but also on the powers and composition of the Tribunal and the rules and regulations under which it functions. A Court examining a complaint based on violation of rules of natural justice is entitled to see whether the aggrieved party had indeed suffered any prejudice on account of such violation. To that extent there has been a shift from the earlier thought that even a technical infringement of the rules is sufficient to vitiate the action. Judicial pronouncements on the subject are a legion. We may refer to only some of the decisions on the subject which should in our opinion suffice.

9. In *Suresh Koshy George v. University of Kerala,* AIR 1969 SC 198, this Court while examining the content and the sweep of the rules approved the view expressed in *Russel v. Duke of Norfolk,* [1949] 1 All ER 109 in the following words:

> **"7.** *… … The rules of natural justice are not embodied rules. The question whether the requirements of natural justice have been met by the procedure adopted in a given case must depend to a great extent on the facts and circumstances of the case in point, the constitution of the Tribunal and the rules under which it functions.*
>
> **8.** *In Russel v. Duke of Norfolk, [1949] 1 All ER 109 at p.118, Tucker, L.J., observed:*

"There are, in my view, no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the Tribunal is acting, the subject matter that is being dealt with, and so forth. Accordingly, I do not derive much assistance from the definitions of natural justice which have been from time to time used, but, whatever standard is adopted, one essential is that the person concerned should have a reasonable opportunity of presenting his case."

10. In *Keshav Mills Co Ltd. v. Union of India,* (1973) 1 SCC 380 this Court extracted with approval the observations of Lord Reid in *Ridge v. Baldwin,* (1963) 2 W.L.R. 935 and said:

> **"8.** *... ... We do not think it either feasible or even desirable to lay down any fixed or rigorous yard-stick in this manner. The concept of natural justice cannot be put into a straight-jacket. It is futile, therefore, to look for definitions or standards of natural justice from various decisions and then try to apply them to the facts of any given case. The only essential point that has to be kept in mind in all cases is that the person concerned should have a reasonable opportunity of presenting his case and that the administrative authority concerned should act fairly, impartially and reasonably. Where administrative officers are concerned, the duty is not so much to act judicially as to act fairly. See, for instance, the observations of Lord Parker in In re H.K. (an infant), (1967) 2 QB 617. It only means that such measure of natural justice should be applied as was described by Lord Reid in Ridge v. Baldwin case (supra) as "insusceptible of exact definition but what a reasonable man would regard as a fair procedure in particular*

circumstances". However, even the application of the concept of fair-play requires real flexibility. Everything will depend on the actual facts and circumstances of a case. As Tucker, L.J., observed in Russell v. Duke of Norfolk, [1949] 1 All ER 109:

> "The requirements of natural justice must depend on the circumstances of the case, the nature of the enquiry, the rules under which the tribunal is acting, the subject- matter that is being dealt with and so forth."

11. Reference may also be made to *P.D. Agrawal v. State Bank of India,* (2006) 8 SCC 776, where this Court approved the observations made by Mukharji, J. in *Charan Lal Sahu v. Union of India,* (Bhopal Gas Disaster) (1990) 1 SCC 613, in the following words:

> **"30.** *The principles of natural justice cannot be put in a straitjacket formula. It must be seen in circumstantial flexibility. It has separate facets. It has in recent time also undergone a sea change.*
>
> **31.** *In Ajit Kumar Nag v. G.M. (PJ), Indian Oil Corprn. Ltd. (2005) 7 SCC 764, a three-Judge Bench of this Court opined: (SCC pp.785-86, para 44)*
>
> "44. *We are aware of the normal rule that a person must have a fair trial and a fair appeal and he cannot be asked to be satisfied with an unfair trial and a fair appeal. We are also conscious of the general principle that pre-decisional hearing is better and should always be preferred to post-decisional hearing. We are further aware that it has been stated that apart from laws of men, laws of God also observe the rule of audi alterem partem. It has been stated that the first hearing in human history was given in the Garden of Eden. God did not pass sentence upon Adam and Eve before giving an*

opportunity to show cause as to why they had eaten the forbidden fruit. (See R. v. University of Cambridge [1723] 1 Str 557) But we are also aware that the principles of natural justice are not rigid or immutable and hence they cannot be imprisoned in a straitjacket. They must yield to and change with exigencies of situations. They must be confined within their limits and cannot be allowed to run wild. It has been stated: " 'To do a great right' after all, it is permissible sometimes 'to do a little wrong'." [Per Mukharji, C.J. in Charan Lal Sahu v. Union of India, (Bhopal Gas Disaster) (1990) 1 SCC 613, at 705, para 124.] While interpreting legal provisions, a court of law cannot be unmindful of the hard realities of life. In our opinion, the approach of the court in dealing with such cases should be pragmatic rather than pedantic, realistic rather than doctrinaire, functional rather than formal and practical rather than 'precedential'."

xxx xxx xxx

xxx xxx xxx

39. *Decision of this Court in S.L. Jagmohan, (1980) 4 SCC 379, whereupon Mr Rao placed strong reliance to contend that non- observance of principle of natural justice itself causes prejudice or the same should not be read "as it causes difficulty of prejudice", cannot be said to be applicable in the instant case. The principles of natural justice as noticed hereinbefore, have undergone a sea change. In view of the decisions of this Court in State Bank of Patiala v. S.K. Sharma, (1996) 3 SCC 364 and Rajendra Singh v. State of M.P., (1996) 5 SCC 460 the principle of law is that some real prejudice must have been caused to the complainant. The Court has shifted from its earlier concept that even a small violation shall result in the order being rendered a nullity. To the principle/doctrine of audi alteram partem, a clear distinction has been laid down between the cases where*

there was no hearing at all and the cases where there was mere technical infringement of the principle. The Court applies the principles of natural justice having regard to the fact situation obtaining in each case. It is not applied in a vacuum without reference to the relevant facts and circumstances of the case. It is no unruly horse. It cannot be put in a straitjacket formula. (See Viveka Nand Sethi v. Chairman, J&K Bank Ltd. (2005) 5 SCC 337 and State of U.P. v. Neeraj Awasthi, (2006) 1 SCC 667. See also Mohd. Sartaj v. State of U.P., (2006) 2 SCC 315)

(emphasis supplied)

12. In *Maharashtra State Board of Secondary and Higher Education v. K.S. Gandhi & Ors.,* (1991) 2 SCC 716, this Court while reiterating the legal position observed:

> **"22.** *… … The omnipresence and the omniscience (sic) of the principle of natural justice acts as deterrence to arrive at arbitrary decision in flagrant infraction of fair play. But the applicability of the principles of natural justice is not a rule of thumb or a strait-jacket formula as an abstract proposition of law. It depends on the facts of the case, nature of the inquiry and the effect of the order/ decision on the rights of the person and attendant circumstances."*

13. In *Maharashtra State Board of Secondary and Higher Secondary Education & Anr. v. Paritosh Bhupeshkumar Sheth & Ors.* (1984) 4 SCC 27, this Court reiterated the the observations made by Matthew, J. in *Union of India v. Mohan Lal Kapoor,* (1973) 2 SCC 836 that it was not expedient to extend the horizons of natural justice involved in the audi alteram partem rule to the twilight zone of mere expectations, however great they might be.

14. We may finally refer to the decision of this Court in *Aligarh Muslim University v. Mansoor Ali Khan,* (2000) 7 SCC

529, where this Court with approval quoted the following observations of Sir Willam Wade (Administrative Law, 9th Edn. pp.468-471)

> *"… … it is not possible to lay down rigid rules as to when the principles of natural justice are to apply, nor as to their scope and extent… There must also have been some real prejudice to the complainant; there is no such thing as a merely technical infringement of natural justice. The requirements of natural justice must depend on the facts and circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter to be dealt with and so forth."*

15. Coming to the case at hand we find that the termination of the contract between the parties was preceded by a show-cause notice issued to the appellant and a hearing provided to it by the competent authority. The show-cause notice issued to the appellant on 24th November, 2006 enclosed with it all relevant documents including the complaints received against the appellant from various quarters and a copy of the report submitted by the agency engaged for verifying the allegations against the appellant. The appellant had unsuccessfully challenged the show-cause notice in Writ Petition No.6338 of 2006, before the High Court. The High Court had while refusing to interfere in the matter directed the appellant to submit a reply to the notice. The appellant had accordingly appeared before the authority on 12th January, 2007, submitted its written statement and was heard in support of its case that it had not committed any default. In the reply or at the hearing, the appellant had not alleged any mala fide, bias or prejudice against the officers dealing with the matter or the agency employed by them for collecting and verifying facts. Principles of natural justice thus stood substantially complied with. The contention that the appellant should have been given an opportunity to cross-examine the persons whose statements had been recorded by the agency in the course of its inquiry

and verification was rightly rejected by the High Court keeping in view the nature of the inquiry which was primarily in the realm of contract, aimed at finding out whether the appellant had committed any violation of the contractual stipulations between the parties. Issue of a show-cause notice and disclosure of material on the basis of which action was proposed to be taken against the appellant was in compliance with the requirement of fairness to the appellant who was likely to be affected by the proposed termination. Absence of any allegation of mala fides against those taking action as also the failure of the appellant to disclose any prejudice, all indicated that the procedure was fair and in substantial, if not strict, compliance with the requirements of Audi Alteram Partem. The first limb of the challenge mounted by the appellant, therefore, fails and is hereby rejected.

16. Coming then to the question whether the respondent-Authority had material enough to justify termination of the contract. The High Court has referred in detail to the report submitted by the agency deployed for collection of evidence and verification of the allegations and come to the conclusion that the respondent was perfectly justified in adopting the method and the procedure adopted by it in the instant case for collection of information and evidence regarding the alleged malpractices being committed by the appellant. The Single Judge of the High Court has while dealing with this aspect observed:

> *"There is no allegations of mala fide, personal prejudice or bias against any of the members of agency which conducted the discreet inquiry. In the facts and circumstances of the case I am of the considered view that the method adopted by the National Highway Authority to detect the illegalities being committed by the petitioner is a fair and reasonable method and it has not caused any prejudice or bias to the petitioner. There is no material available on record on the basis of which the*

report submitted by the agency as contained in Annexure R/7 can be discarded by this Court, this report cannot be rejected\ merely on the ground that it is collected behind the back of the petitioner. The nature of irregularity committed by the petitioner can be detected only if a discreet enquiry in the manner as done by the respondents have acted in a manner which is violative of the principle of natural justice. The report submitted was placed before the petitioner he was given opportunity of submitting his defence and explanation both in writing and personally. Records indicated that petitioner was unable to produce any cogent material to show that this report is unsustainable and cannot be relied upon."

17. In the appeal preferred against the above order, the appellant had made a grievance only in regard to two aspects covered by question nos. (III) and (V) , formulated by the Single Judge in the following words:

(III) Whether the action for termination of the contract is done by the competent authority and whether cancellation of the contract is based on proof of breach committed by the petitioner?

(V) Whether the provision of Section 74 of the Contract Act applies in the present case and forfeiture of the performance security and revocation of bank guarantee is arbitrary and unfair warranting interference by this Court?"

18. While dealing with question No.III above, the Division Bench held:

"In respect of issue No. III, the learned Writ Court while relying upon various facts brought on record gave a categorical finding in paragraph 21 that the modus operandi adopted by the petitioner of charging higher rate from road was a clear breach of contract and under clause

18(a) of the Contract Agreement, the same was determined, and also entitled the national Highway Authority of India to impose and realize the penalty for such breach as stipulated therein. In our considered opinion the Writ Court did not faulter in recording the aforesaid finding."

19. There is, in our opinion, no error of law, nor is there any perversity in the appreciation of the material available before the respondents. The reports submitted by the agency employed by the respondent- Authority was damning for the appellant and clearly showed that the appellant was indulging in malpractices like charging excess fee from the owners/ drivers of the vehicles using the stretch of road covered by the contract. Nothing in particular has been pointed out to us to persuade us to take a contrary view. If the report submitted by the agency against whom the appellant has no allegation of malice or other extraneous considerations to make are accepted, we see no reason why the same could not furnish a safe basis for the respondent to take action especially when the appellant was abusing its position as a contractor, putting the public at large to unnecessary harassment and exaction of money not legally recoverable from them. The material collected could and was rightly made a basis for the termination of contract by the competent authority.

20. The upshot of the findings recorded by the High Court which we have affirmed in the foregoing paragraphs is that the appellant was not entitled to claim any relief in exercise of its extra ordinary writ jurisdiction of the High Court. The High Court could have relegated the appellant to seek redress in an appropriate civil action before a competent civil Court, whether for damages or recovery of the amount forfeited by the respondent. The High Court has not done so. It has given partial relief to the appellant to the extent of holding that the invocation of the bank guarantee was not justified in the light of the forfeiture of performance security and the amount of penalty. In

any event we see no room for interfering with the order passed by the High Court in exercise of our jurisdiction under Article 136 of the Constitution of India which too is both extraordinary and discretionary in nature. We may in this connection refer to the following passage from Halsbury's Laws of England Fourth Edition Vol.-16 pages 874-876, which sums up the legal position in England as to the right of a party who has not come to the Court with perfect propriety of conduct and with clean hands, to claim an equitable relief.

> *1305. He who comes into equity must come with clean hands. A court of equity refuses relief to a plaintiff whose conduct in regard to the subject matter of the litigation has been improper. This was formerly expressed by the maxim "he who has committed iniquity shall not have equity", and relief was refused where a transaction was based on the plaintiff's fraud or misrepresentation, or where the plaintiff sought to enforce a security improperly obtained, or where he claimed a remedy for a breach of trust which he had himself procured and whereby he had obtained money. Later it was said that the plaintiff in equity must come with perfect propriety of conduct, or with clean hands. In application of the principle a person will not be allowed to assert his title to property which he has dealt with so as to defeat his creditors or evade tax, for he may not maintain an action by setting up his own fraudulent design.*
>
> *The maxim does not, however, mean that equity strikes at depravity in a general way; the cleanliness required is to be judged in relation to the relief sought, and the conduct complained of must have an immediate and necessary relation to the equity sued for; it must be depravity in a legal as well as in a moral sense. Thus, fraud on the part of a minor deprives him of his right to equitable relief notwithstanding his disability. Where the transaction is itself unlawful it is not necessary to have*

> *recourse to this principle. In equity, just as at law, no suit lies in general in respect of an illegal transaction, but this is on the ground of its illegality, not by reason of the plaintiff's demerits."*

21. Judged in the light of the above, the appellant had breached the contractual stipulations, harassed innocent citizens to cough up more than what they were in law required to pay and thus undeservedly enriched itself before it turned to the Court to claim relief in the extraordinary writ jurisdiction of the High Court on equitable considerations. Such an attempt could and ought to have been frustrated by the High Court, as indeed has been done, no matter only partially.

22. That brings us to the only other ground of challenge relating to invocation of the Bank Guarantee by the National Highway Authority of India which according to the appellant was arbitrary and unfair in the facts and circumstances of the case. The High Court has taken the view that apart from a penalty of Rs.2,41,097/-, National Highway Authority had already recovered a sum of Rs.2,20,00,125/- out of the bank drafts furnished by the appellant towards performance security. The total amount, thus, received by the authority was more than the amount payable to it under the contract if the same had been performed diligently till the end of the contract period. Invocation of the bank guarantee for recovery of any further amount was in that view held to be unjustified by the High Court.

23. There is no appeal by the Authority against that part of the judgment, although it was argued on behalf of the Authority that in terms of clause 18(b) of the contract, the Authority had the right to estimate the excess of collection by the appellant-contractor and recover the same from it. Clause 18 may be extracted in extenso at this stage:

> *"18. Penalty for charging excess fee :*
>
> *(a) In case, it is observed and/or established to the*

satisfaction of the Authority that the Contractor has charged fee in excess of the prescribed rate, the Authority may terminate the contract forthwith and/or may impose a penalty of Rs. One lakh or an amount equivalent of one day's fee receivable by the Authority, which ever is higher and may provide the Contractor another opportunity of continuing the Fee Collection. However, in no case, the authority shall afford more than one opportunity to the Contractor.

(b) The Authority also, reserves the right to estimate the excess collection of fee made by the Contractor and recover the same, which will be over and above the penalty imposed and to be recovered from the Contractor.

(c) The termination under this clause shall make the Contractor liable for unconditional forfeiture of the Performance Security."

24. It is evident from a simple reading of the above that the Authority was competent to terminate the contract if the appellant was found charging in excess of the prescribed rate of fee. Apart from termination of the contract any violation in the nature of excess fees being charged could result in imposition of a penalty in terms of clause 18(a) (supra). What is significant is that in terms of clause 18 (b) besides termination of the contract and levy of penalty the Authority was also entitled to estimate the excess collection made by the appellant and recover the same from it. There is nothing on record before us whether any such estimation was made by the Authority and if so the basis on which that was done. The failure of the Authority to estimate accurately could jeopardise its claim for recovery by a simple invocation of the bank guarantee. It may have been a different matter if the Authority had estimated the excess amount accurately and sought to recover the same by invocation of the bank guarantee but without a proper

estimation of the excess received by the appellant, it was not open to the respondent to invoke the bank guarantee and recover the entire amount of Rs.2,20,00,125/- covered by the same. The High Court was, in that view, correct in holding that invocation of bank guarantee was not justified having regard to the fact that the Authority had already recovered the penalty levied by it and also forfeited the performance security amount of Rs.2,20,00,125/- in the form of bank drafts furnished by the appellant.

25. Insofar as the recovery of the performance security of Rs.2,20,00,125/- from out of the bank drafts furnished by the appellant is concerned, we have no difficulty in holding that such a forfeiture was available to the respondent-Authority under the terms of the contract and the provisions of Section 74 of the Contract Act did not forbid the same. The scope of Section 74 has been the subject matter of several pronouncements of this Court including the Constitution Bench decisions in *Fateh Chand v. Balkishan Das* AIR 1963 SC 1405, *Union of India v. Ramam Iron Foundry* (1974) 2 SCC 231 and *SAIL v. Gupta Brother Steel Tubes* (2009) 10 SCC 63. The common thread that runs through all these pronouncements is that an aggrieved party is entitled to receive compensation from the party who has broken the contract whether or not actual damage or loss is proved to have been caused by the breach and that the Court has, subject to the outer limit of the penalty stipulated, jurisdiction to award such compensation as it deems reasonable having regard to the circumstances of the case. This would essentially be a mixed question of law and fact that a Writ Court could not possibly decide. The appellant could and indeed ought to have sought its remedies in a proper civil action if it questioned the reasonableness of the amount recoverable by the appellant in terms of the contractual stipulations.

26. In the result this appeal fails and is dismissed but in the facts and circumstances, without any order as to costs.

B.B.B. Appeal dismissed.

SOM RAJ @ SOMA
v.
STATE OF H.P.
(Criminal Appeal No. 1772 of 2008)

FEBRUARY 22, 2013

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

Penal Code, 1860 – s.302 – Assault with deadly weapon on vital part of the body causing death of a person – Appellant inflicted blow with a 'darat' (agricultural implement having a large cutting blade) on the back of the deceased's head – The blow proved to be fatal – Conviction of appellant u/s.302 – Justification of – Held: Justified – Appellant chose the sharp side of the 'darat' and not the blunt side – The ferocity with which the blow was struck clearly emerges from the fact that the blow resulted in cutting through the skull of the deceased and caused a hole therein, resulting in exposing the brain tissue – It is not the case of the appellant, that the occurrence arose out of a sudden quarrel or in the heat of the moment – It is not even his case, that he had retaliated as a consequence of provocation at the hands of the deceased – Five witnesses stated in unison, that appellant was in the process of inflicting a second blow on the deceased, when they caught hold of him, whereupon one of them (PW6) snatched the 'darat' from the appellant, and threw it away – In such a situation, it would be improper to treat / determine the culpability of the appellant by assuming, that he had inflicted only one injury on the deceased – Appellant must be deemed to have committed the offence of 'culpable homicide amounting to murder' u/s.302 IPC, as he had struck the 'darat' blow, with the intention of causing such bodily injury, which he knew was so imminently dangerous, that it would in all probability cause the death of the deceased.

The prosecution case was that while a '*bhandara*'

(ceremonial feast) was being held at the residence of PW2, the accused-appellant started quarrelling with PW1's brother and then assaulted him with a '*darat*' (a traditional agricultural implement) on the back portion of his head. The further case of the prosecution was that when appellant was in the process of giving a second blow, PW-1 alongwith others caught hold of him and snatched the '*darat*' from his hands. PW1's brother died subsequently. Almost all the witnesses were related to the deceased, as also the appellant. A large number of relatives collectively deposed against the appellant, whereas, only his brother (DW5) deposed in his favour. The trial court rejected the alternate version of the incident as stated by DW5 and convicted the appellant under Section 302 IPC. The conviction was affirmed by the High Court and, therefore, the instant appeal.

Dismissing the appeal, the Court

HELD: 1. On merits, there can hardly be any doubt about the fact, that the appellant inflicted the fatal blow with a 'darat' on the back of the head of the deceased. The affirmation, that the aforesaid blow had been inflicted by the appellant emerges from the statements of PW1, PW2, PW3, PW6 and PW8. All the aforesaid witnesses were present at the place of occurrence. There is no reason to doubt the veracity of their statements. The statement of DW5 is insufficient to overturn the statements of the prosecution witnesses. It is untrustworthy. [Para 6] [445-B-E, F]

2.1. It is apparent from the factual narration of the witnesses produced by the prosecution, that the appellant was not carrying the 'darat' but had picked up the same from the house of PW2. A 'darat' is a traditional agricultural implement used for cutting branches of trees. It is also used by butchers for beheading goats and sheep. A 'darat' has a handle and a large cutting blade.

Having picked up the 'darat' for committing an assault on the deceased, it is apparent that the appellant was aware of the nature of injury he was likely to cause with the weapon of incident. From the statements of the two Doctors (PW4 and PW5), the nature of injuries caused to the deceased has been brought out. A perusal thereof leaves no room for doubt, that the appellant had chosen the sharp side of the 'darat' and not the blunt side. The ferocity with which the aforesaid blow was struck clearly emerges from the fact that the blow resulted in cutting through the skull of the deceased and caused a hole therein, resulting in exposing the brain tissue. When a blow with a deadly weapon is struck with ferocity, it is apparent that the assailant intends to cause bodily injury of a nature which he knows is so imminently dangerous, that it must in all probability cause death. The place where the blow was struck (at the back of the head of the deceased) by the appellant, also leads to the same inference. It is not the case of the appellant, that the occurrence arose out of a sudden quarrel. It is also not his case, that the blow was struck in the heat of the moment. It is not even his case, that he had retaliated as a consequence of provocation at the hands of the deceased. He has therefore no excuse, for such an extreme act. Another material fact is the relationship between the parties. The appellant was an uncle to the deceased. In such circumstances, there is hardly any cause to doubt the intent and knowledge of the appellant. [Para 11] [458-B-H; 459-A-B]

2.2. Besides, it would be incorrect to treat the instant incident as one wherein a single blow had been inflicted by the accused. As many as five witnesses of the occurrence have stated in unison, that the appellant was in the process of inflicting a second blow on the deceased, when they caught hold of him, whereupon one of them (PW6) snatched the 'darat' from the appellant, and threw

it away. In such a situation, it would be improper to treat/determine the culpability of the appellant by assuming, that he had inflicted only one injury on the deceased. The appellant must be deemed to have committed the offence of 'culpable homicide amounting to murder' under Section 302 of IPC, as he had struck the 'darat' blow, with the intention of causing such bodily injury, which he knew was so imminently dangerous, that it would in all probability cause the death of the deceased. The appellant was thus justifiably convicted of the offence under Section 302 of IPC and sentenced to undergo rigorous imprisonment for life. [Para 11] [459-B-G]

Jagrup Singh v. State of Haryana **(1981) 3 SCC 616: 1981 (3) SCR 839;** *Jagtar Singh v. State of Punjab* **(1983) 2 SCC 342 and** *State of Andhra Pradesh v. Rayavarapu Punnayya & Anr.* **1977 (1) SCR 601: (1976) 4 SCC 382 – referred to.**

Case Law Reference:

1981 (3) SCR 839	**referred to**	**Para 8**
(1983) 2 SCC 342	**referred to**	**Para 8**
(1976) 4 SCC 382	**referred to**	**Para 10**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1772 of 2008.

From the Judgment & Order dated 13.04.2007 of the High Court of Himachal Pradesh, Shimla in Criminal Appeal No. 607 of 2003.

Shashi Bhushan Kumar for the Appellant.

Naresh K. Sharma for the Respondent.

The Judgment of the Court was delivered by

JAGDISH SINGH KHEHAR, J. 1. Consequent upon an

intimation to the police, by Dr. B.M. Gupta (PW5), Senior Medical Officer, Community Health Centre, Indora (hereinafter referred to as the CHC, Indora); the statement of Nek Ram, (PW1) was recorded at the CHC, Indora, on 29.7.2000; leading to the registration of First Information Report bearing no.123 of 2000 under Section 302 of the Indian Penal Code, 1860, at Police Station, Indora. The aforesaid statement was recorded by ASI Shiv Kanya (PW12). In his statement, Nek Ram (PW1) asserted that there was a 'bhandara' (feast for devotees, during a Hindu ceremonial congregation) following a 'yagya' (Hindu ritual ceremony) at the residence of Kishan Singh (PW2) at village Khanda Saniyal on 29.7.2000. Nek Ram (PW1) disclosed, that he along with his brother Sardari Lal (since deceased) had been invited to the 'bhandara' and were present at the residence of Kishan Singh (PW2). The complainant Nek Ram (PW1) affirmed, that he was helping in serving food at the 'bhandara'. Whilst he was in the kitchen at about 9.30 p.m., he (Nek Ram, PW1) was informed by his nephew Sohan (PW3) and Shamsher Singh (PW8) that the accused-appellant Som Raj alias Soma was quarrelling with his brother Sardari Lal. On being so informed, he had immediately reached the place of altercation, and had found the accused-appellant Som Raj assaulting his brother Sardari Lal. He also pointed out, that he had seen Som Raj picking up a 'darat' (a traditional agricultural implement used by agriculturists in northern India, for cutting branches of trees. It is also used by butches for beheading goats and sheep. The implement has a handle and a large cutting blade), from the house of Kishan Singh (PW2) and giving his brother Sardari Lal a blow with it, on the back portion of his head. After the first blow, the accused-appellant was in the process of giving a second blow when the complainant Nek Ram (PW1) along with others present at the place of occurrence, had caught hold of him. The 'darat' was then snatched from his hands. According to Nek Ram (PW1), blood was oozing from the injury suffered by Sardari Lal. Accordingly, Sardari Lal was immediately taken to the CHC, Indora. Sardari

Lal had reached the hospital at about 10.45 p.m. He was declared dead at about 11.15 p.m.

2. Consequence upon the registration of First Information Report no.123 of 2000 at Police Station, Indora, on 29.7.2000, the Police initiated investigation into the matter. On completion of the same, the accused-appellant was sent to face trial for commission of the offence under Section 302 of the Indian Penal Code. During the course of the trial, the prosecution examined as many as 13 witnesses including six witnesses of occurrence (Nek Ram - PW1, Kishan Singh - PW2, Sohan - PW3, Mohinder Singh - PW6, Vakil Singh - PW7 and Shamsher Singh - PW8). The prosecution also examined two doctors who had examined Sardari Lal when he was taken to the CHC, Indora. One of them had treated Sardari Lal when he was brought to the CHC, Indora, whereas the other had conducted the post mortem examination. The other witnesses were formal police witnesses. The prosecution also produced various exhibits to prove the charge levelled against the accused-appellant.

3. The statement of the accused-appellant was recorded under Section 313 of the Code of Criminal Procedure after the prosecution had concluded its evidence. In his statement under Section 313 of the Code of Criminal Procedure, the accused-appellant projected a different version of the incident. According to the accused-appellant, there was an altercation between his brother Hari Singh (DW5) at the entrance of the residence of Kishan Singh (PW2) during which a "gorkha" (a Nepali living in India) named Rana gave a 'darat' blow to his elder brother Hari Singh (DW5) which accidentally hit the deceased Sardari Lal. He further stated, that information about the occurrence (as narrated by him) was given by his brother Hari Singh (DW5) to the Magistrate, Nurpur, on the day following the incident, i.e., on 30.7.2000. The accused-appellant examined five witnesses in his defence including Hari Singh (DW5) and Dr. V.K. Singla (DW2), Medical Officer, Community Health Centre, Choori, who

had examined Hari Singh - DW5 and had recorded the injuries found on his person.

4. Having narrated a birds eye view, of the accusation levelled against the accused-appellant as also his defence, it is considered expedient to summarily narrate the assertions made by witnesses produced by the prosecution, in respect of the occurrence of 29.7.2000 :

(i) Nek Ram, the complainant, was examined by the prosecution as PW1. He affirmed that on 29.7.2000, he and his brother Sardari Lal, had gone to the house of Kishan Singh (PW2), for a 'bhandara'. He deposed that he (Nek Ram - PW1) along with Sohan (PW3), Mohinder Singh (PW6) and others were helping in serving food at the 'bhandara'. At about 8.00-8.30 p.m., Sohan (PW3) and Shamsher Singh (PW8) came to him while he was serving meals to the guests, and told him about exchange of hot words between Sardari Lal (deceased) and Som Raj (the accused-appellant) in the courtyard of Kishan Singh (PW2). Thereupon he asserted, that he had proceeded to the courtyard where he saw the accused-appellant Somraj giving a 'darat' blow to Sardari Lal (the deceased) which landed on the back portion of his head. He pointed out, that when the accused-appellant made a second attempt for giving a second 'darat' blow to Sardari Lal, he (Nek Ram - PW1), Mohinder Singh (PW6), Sohan (PW3), Kishan Singh (PW2) and others overpowered Sardari Lal. He further asserted, that Mohinder Singh (PW6) had snatched the 'darat' from the hands of the accused-appellant Som Raj and had thrown it away. He also testified, that having received the 'darat' blow, Sardari Lal had fallen on the ground, and was bleeding profusely. Sardari Lal

was immediately taken to the CHC, Indora, where he succumbed to his injuries. He confirmed, that the Police had reached the hospital and had recorded his statement. He also stated, that the accused-appellant Som Raj alias Soma was his uncle. The statement of Nek Ram (PW1) was in consonance with the prosecution version of the occurrence. During the course of his cross-examination, Nek Ram (PW1) was confronted with the version of the incident depicted by the accused-appellant during the course of his statement recorded under Section 313 of the Code of Criminal Procedure. Nek Ram (PW1), however, denied the correctness thereof.

(ii) Kishan Singh, at whose residence the 'bhandara/yagna' was held, was examined as PW2. He reiterated the factual position of the occurrence, in identical terms and in consonance with the statement of Nek Ram (PW1). While doing so, he also affirmed that the accused-appellant had tried to inflict a second blow with the 'darat' on Sardari Lal. However, he was held by those at the spot, and the 'darat' was snatched from his hands by Mohinder Singh (PW6). He also reiterated, that on receipt of the injury at the hands of the accused-appellant, Sardari Lal had fallen down and blood was oozing from his head. He also deposed, that he had recovered the 'darat' used by Som Raj and had handed over the same to the Police, during the course of investigation. He also acknowledged, that the 'darat' produced in the court was the same one with which Sardari Lal had been assaulted by the accused-appellant. As in the case of Nek Ram (PW1), Kishan Singh (PW2) was also confronted with the version of the incident narrated by the accused-appellant during the course of his cross-examination. He, however, denied the same.

(iii) Karnail Singh was examined by the prosecution as PW3. The statement of Karnail Singh (PW3) was on the same lines as those of Nek Ram (PW1) and Kishan Singh (PW2). He too was confronted during the course of cross-examination with the version of the accused-appellant, namely, that the injury in question had been caused by a "gorkha" named Rana. The aforesaid suggestion put to the witness, was denied by him.

(iv) Mohinder Singh appeared before the Trial Court and recorded his statement as PW6. He affirmed the quarrel between the rival parties, namely, the deceased Sardari Lal and the accused-appellant, Som Raj. He also acknowledged, that Kishan Singh (PW2) and Nek Ram (PW1) had caught hold of the accused. He admitted, that he had seen the accused-appellant with the 'darat' in his hand. He also admitted, that he had snatched the 'darat' from the hands of the accused-appellant, and had thrown it away. He admitted having seen the injury on the head of Sardari Lal, who had fallen to the ground, and was in a pool of blood. He however denied in his examination-in-chief, that he had actually seen the incident by asserting, that he did not know how the deceased Sardari Lal had received the injury. Based on the aforesaid statement made by Mohinder Singh (PW6), he was declared hostile, and was permitted to be cross-examined by the Public Prosecutor. During the course of his cross-examination, he again acknowledged having seen the 'darat' in the hands of the accused-appellant Som Raj, and additionally, that the accused-appellant who had inflicted the first blow with the 'darat' on the person of Sardari lal. He further confirmed that the accused-appellant had also tried to inflict another blow on Sardari Lal, but was

prevented by him and others from doing so. He testified, that he had caught the hands of the accused-appellant, and had thereby stopped him from inflicting the second blow. He also reiterated, that he had forcibly snatched the 'darat' from the hands of the accused-appellant, and had thrown it away. Mohinder Singh (PW6) was cross-examined on the same lines as the previous three witnesses referred to above, but he reiterated the factual position recorded by him in his examination-in-chief, as also during the course of his cross-examination by the Public Prosecutor.

(v) The prosecution then produced Vakil Singh as PW7. Vakil Singh affirmed before the Trial Court, that he had seen the deceased Sardari Lal lying in an injured condition, and he was informed that the injuries on Sardari Lal were caused by the accused-appellant Som Raj with a 'darat'. He asserted, that when he had seen Sardari Lal in the injured condition during which he could not speak anything. People who had gathered at the place of occurrence, had informed him that the accused-appellant had run away from the spot after inflicting injuries on Sardari Lal. Based on the fact that Vakil Singh (PW7) was denying of having himself witnessed the incident, he was declared hostile. Thereupon, the Public Prosecutor was permitted to cross-examine him. When confronted with the statement made to the Police, he reiterated that his statement had not been recorded correctly. He stated, that he had not seen the accused Som Raj inflicting injuries on the person of the deceased Sardari lal. He however deposed that the people who had gathered at the place of the occurrence had informed him, that the accused-appellant Som Raj had inflicted injuries on the person of the

deceased Sardari Lal with a 'darat'. He also denied the version of the accused pertaining to the "gorkha' named Rana.

(vi) Shamsher Singh (PW8) was the last of the witnesses of occurrence. He fully supported the prosecution version of the incident. He deposed on the same lines as Nek Ram (PW1), Kishan Singh (PW2), Karnail Singh (PW3) and Mohinder Singh (PW6). He also endorsed the fact, that the accused-appellant Som Raj had tried to inflict a second blow with the 'darat', but had not succeeded in doing so because Nek Ram (PW1), Kishan Singh (PW2) and Mohinder Singh (PW6) had caught hold of him. He also denied the version narrated by the accused-appellant.

5. In so far as the accused-appellant is concerned, after recording his statement under Section 313 of the Code of Criminal Procedure, he examined five witnesses in his defence. The statement of Dr. Deepak Sharma, Block Medical Officer Gangath was recorded as DW1. DW1 affirmed that on 30.7.2007, he had examined Hari Singh (DW5) and had found bruises over his lower jaw and also found three shaky teeth. During the course of his cross-examination, he acknowledged that no application was filed by Hari Singh (DW5) before him, requiring him to conduct his medical examination. He denied as incorrect, the suggestion that he had prepared the medico-legal certificate (Exhibit D3) in connivance with Hari Singh (DW5). He also acknowledged, that the injuries suffered by Hari Singh, could result from falling on a hard surface. Dr. V.K. Singla, Medical officer CHC, Choori, was examined as DW2. DW2 stated that on 31.7.2000 (two days after the occurrence), he had examined Hari Singh in his capacity as Dental Surgeon, Gangath, and had given his opinion as at Exhibit D1. Harnam Singh, Havaldar Head Constable, Police Station Nurpur, appeared as DW3. He confirmed that a rapat roznamacha (entry in the Daily Diary of the Police Station) was recorded at

Police Station Nurpur, in respect of the injuries suffered by Hari Singh. He pointed out, that no action had been taken in the matter, as the incident in question was within the jurisdiction of Police Station, Indora. The statement of Dev Raj, Hawaldar Head Constable, Police Station, Indora, was recorded as DW4. He merely produced the original 'rapat roznamcha' of Police Station, Indora, to affirm the factual position depicted by Harnam Singh, Havaldar Head Constable (DW3). The statement of Hari Singh was recorded as DW5. In his statement, he acknowledged, that the accused-appellant was his younger brother and the deceased Sardari Lal was his nephew. He also acknowledged, that he alongwith his family members, attended the 'yagya' held by Kishan Singh (PW2) at his residence on 29.7.2000. During the course of his deposition, he attempted to provide an alibi to the accused-appellant by asserting, that the accused-appellant Som Raj had gone to Chintpurni on the date of occurrence. He further stated, that Som Raj was visiting their other younger brother who lived at Chintpurni. He also endeavoured to substantiate the factual position asserted by the accused-appellant in his statement under Section 313 of the Code of Criminal Procedure. In this behalf he deposed, that a 'gorkha' named Rana had an altercation with him outside the house of Kishan Singh (PW2). During the aforesaid altercation, Rana had given him a blow on his mouth, which had resulted in one broken tooth. He further stated, that when the aforesaid Rana attempted a second blow with a 'darat' at him, he had ducked, whereupon the blow had landed on the deceased Sardari Lal, which resulted in the death of Sardari Lal. Hari Singh (DW5) further testified, that he had lodged a report with the police. He deposed, that he had also gone to the Civil Hospital, Nurpur for treatment, whereupon he was referred to the Dental Surgeon at Gangath. Hari Singh (DW5) deposed further, that having noted down his complaint, the same was forwarded by Police Station, Nurpur, to the Police Station, Indora.

6. Based on the statements of witnesses noticed hereinabove, we shall endeavour to answer the legal issues

canvassed at the hands of the learned counsel for the accused-appellant. Suffice it to state, that almost all the witnesses, whose statements have been noticed hereinabove including the deceased, as well as, the accused-appellant, are cousins, nephews or uncles. Consequently, it is apparent, that a large number of relations have collectively deposed against the accused-appellant, whereas, only the brother of the accused-appellant Hari Singh (DW5) has deposed in his favour. On merits, there can hardly be any doubt about the fact, that the accused-appellant inflicted the fatal blow with a 'darat' on the back of the head of the deceased Sardari Lal. The said singular blow proved to be fatal. The affirmation, that the aforesaid blow had been inflicted by the accused-appellant emerges from the statements of Nek Ram (PW1), Kishan Singh (PW2), Sohan (PW3), Mohinder Singh (PW6) and Shamsher Singh (PW8). All the aforesaid witnesses were present at the place of occurrence. All the aforesaid witnesses were related to the deceased Sardari Lal, as also the accused-appellant Som Raj. There is no reason for us to doubt the veracity of their statements. In order to set up an alternative version, the accused-appellant has narrated his own version of the incident, wherein he acknowledges his presence at the 'bhandara/yagna' held at the residence of Kishan Singh (PW2) on 29.7.2000, when the occurrence in question took place. The statement of Hari Singh (DW5), in our considered view, is insufficient to overturn the statements of the prosecution witnesses. The statement of Hari Singh (DW5), to our mind, does not inspire any confidence. The statement of Hari Singh (DW5), in our considered view, was recorded at the behest of the accused-appellant, who is his real brother. We would describe it as untrustworthy. In view of the overwhelming evidence produced by the prosecution, we have no doubt in our mind, that the fatal 'darat' blow was inflicted by the accused-appellant Som Raj on the back of the head of the deceased Sardari Lal. We, therefore, affirm the aforesaid conclusion drawn by the Trial Court, as well as, by the High Court.

7. It would be relevant to mention, that learned counsel for

the accused-appellant vehemently contended that even if the singular fatal blow is taken to have been inflicted by the accused-appellant Som Raj, he could only be punished for the offence under Section 304 Part-II of the Indian Penal Code, and not for the offence of murder under Section 302. In this behalf, it was the submission of the learned counsel, that there was no premeditation to commit the offence on the date of occurrence. It was also pointed out, that the evidence produced by the prosecution, does not reveal any prior enmity between the accused-appellant and the deceased. Therefore, according to learned counsel, the action should be treated as 'culpable homicide not amounting to murder'. It was sought to be explained, that the action attributed to the accused-appellant, did not include any ingredient of intention of causing such bodily injury as is likely to cause death. To support his aforesaid submission, it was vehemently contended, that all the prosecution witnesses had stated in unison, that the accused-appellant had inflicted a singular blow on the deceased Sardari Lal.

8. In order to support his aforesaid contention, learned counsel for the appellant, in the first instance, placed reliance on the judgment of this Court in *Jagrup Singh Vs. State of Haryana,* (1981) 3 SCC 616, wherein this Court held as under:-

> "5. In assailing the conviction, learned Counsel for the appellant contends that the appellant having struck a solitary blow on the head of the deceased with the blunt side of the *gandhala*, can be attributed with the knowledge that it would cause an injury which was likely to cause death and not with any intention to cause the death of the deceased. The offence committed by the appellant, therefore, amounted to culpable homicide not amounting to murder, punishable under Section 304, Part II of the Code. He further contends, in the alternative, that there could be no doubt that the appellant acted in the heat of the moment when he hit the deceased

and is, therefore, entitled to the benefit of Exception 4 of Section 300 of the Code. On the other hand, learned Counsel for the State contends that the matter squarely falls within clause Thirdly of Section 300 of the Code. He submits that merely because the appellant rendered a solitary blow with the blunt side of the *gandhala on* the head would not necessarily imply that the offence amounted to culpable homicide not amounting to murder punishable under Section 304, Part II of the Code.

6. There is no justification for the assertion that the giving of a solitary blow on a vital part of the body resulting the death must always necessarily reduce the offence to culpable homicide not amounting to murder punishable under Section 304, Part II of the Code. If a man deliberately strikes another on the head with a heavy log of wood or an iron rod or even a *lathi* so as to cause a fracture of the skull, he must, in the absence of any circumstances negativing the presumption, be deemed to have intended to cause the death of the victim or such bodily injury as is sufficient to cause death. The whole thing depends upon the intention to cause death, and the case may be covered by either clause Firstly or clause Thirdly. The nature of intention must be gathered from the kind of weapon used, the part of the body hit, the amount of force employed and the circumstances attendant upon the death.

xxx xxx xxx xxx xxx

9. Looking at the totality of the evidence, it would not be possible to come to the conclusion that when the appellant struck the deceased with the blunt side of the *gandhala*, he intended to cause such bodily injury as was sufficient in the ordinary course of

nature to cause death. A *gandhala* is a common agricultural implement consisting of a flat, rectangular iron strip, three sides of which are blunt, embedded in a wooden handle. The length of the iron strip is in continuation of the wooden handle and the end portion is sharp, which is used to dig holes in the earth to set up fencing on embankments in the field. If a man is hit with the blunt side on the head with sufficient force, it is bound to cause, as here, death. There can be no doubt that it was used with certain amount of force because there was cerebral compression. But that by itself is not sufficient to raise an inference that the appellant intended to cause such bodily injury as was sufficient to cause death. He could only be attributed with the knowledge that it was likely to cause an injury which was likely to cause the death. The matter, therefore, does not fall within clause Thirdly of Section 300 of the Code."

Reliance was also placed on the decision rendered by this Court in *Jagtar Singh Vs. State of Punjab,* (1983) 2 SCC 342, wherein it has been held as under:-

"5. The only question that we are called upon to examine in the facts and circumstances of this case is whether the appellant could be said to have committed murder of deceased Narinder Singh punishable under Section 302 of the Indian Penal Code.

6. A quarrel took place on the spur of the moment. The appellant never expected to meet the deceased. When the deceased was just passing by the road in front of the house of the appellant, his forehead dashed with the *parnala* of the house of the appellant which provoked the deceased to remonstrate the appellant. It is in evidence that

there was exchange of abuses and at that time appellant gave a blow with a knife which landed on the chest of the deceased.

7. Undoubtedly, PW 2 Dr H.S. Gill opined that the blow on the chest pierced deep inside the chest cavity resulting in the injury to the heart and this injury was sufficient in the ordinary course of nature to cause death. The question is whether in the circumstances in which the appellant gave a blow with a knife on the chest, he could be said to have intended to cause death or he could be imputed the intention to cause that particular injury which has proved fatal? The circumstances in which the incident occurred would clearly negative any suggestion of premeditation. It was in a sudden quarrel to some extent provoked by the deceased, that the appellant gave one blow with a knife. Could it be said that para 3 of Section 300 is attracted. We have considerable doubt about the conclusion reached by the High Court. We cannot confidently say that the appellant intended to cause that particular injury which is shown to have caused death. There was no premeditation. There was no malice. The meeting was a chance meeting. The cause of quarrel though trivial was just sudden and in this background the appellant, a very young man gave one blow. He could not be imputed with the intention to cause death or the intention to cause that particular injury which has proved fatal. Neither para 1 nor para 3 of Section 300 would be attracted. We are fortified in this view by the decision of this Court in *Jagrup Singh* v. *State of Haryana, (1981) 3 SCC 616*. It was subsequently followed in *Randhir Singh* v. *State of Punjab, (1981) 4 SCC 484,* and *Kulwant Rai* v. *State of Punjab, (1981) 4 SCC 245*. Following the ratio of

the aforementioned decisions, we are of the opinion that the appellant could not be convicted for having committed murder of the deceased Narinder Singh. His conviction for an offence under Section 302, IPC and sentence of imprisonment for life are liable to be set aside.

8. The next question is what offence the appellant is shown to have committed? In a trivial quarrel the appellant wielded a weapon like a knife. The incident occurred around 1.45 noon. The quarrel was of a trivial nature and even in such a trivial quarrel the appellant wielded a weapon like a knife and landed a blow in the chest. In these circumstances, it is a permissible inference that the appellant at least could be imputed with a knowledge that he was likely to cause an injury which was likely to cause death. Therefore, the appellant is shown to have committed an offence under Section 304 Part II of the IPC and a sentence of imprisonment for five years will meet the ends of justice.

9. Accordingly this appeal is partly allowed. The conviction of the appellant for an offence under Section 302, IPC and sentence of imprisonment for life are set aside. Appellant is convicted for having committed an offence under Section 304 Part II of the Indian Penal Code and he is sentenced to suffer RI for five years. Conviction of the appellant for an offence under Section 304 and the sentence imposed for the same are confirmed. Both the substantive sentences are directed to run concurrently."

9. In order to controvert the aforenoticed submission advanced at the hands of the learned counsel for the accused-appellant, it was the vehement assertion of the learned counsel

for the respondent State, that the weapon of offence would constitute a material basis for determining the purely legal contention advanced at the hands of the learned counsel for the appellant. It was pointed out, that a 'darat' had been used by the accused-appellant for inflicting the blow on the deceased Sardari Lal. It was submitted, that a 'darat' is used by agriculturalists for cutting branches and trees. It was also submitted, that butchers use a 'darat' for beheading goats and sheeps. Based on the aforesaid factual position it was submitted, that the very nature of the weapon of offence is sufficient to infer, that the accused-appellant had the intention of causing such bodily injury as is likely to cause death. It was also the contention of the learned counsel for the respondent State, that it would be wrongful to adjudicate the present controversy under the assumption, that the accused-appellant had caused a singular injury. As a matter of fact, it was the vehement contention of the learned counsel for the respondent State, that the accused-appellant was in the process of inflicting a second 'darat' blow on the deceased Sardari Lal, but was prevented from doing so by those present at the place of occurrence. Insofar as the instant aspect of the matter is concerned, learned counsel for the respondent State placed reliance on the statements of Nek Ram (PW1), Kishan Singh (PW2), Sohan (PW3), Mohinder Singh (PW6) and Shamsher Singh (PW8), who unequivocally stated, that they had caught hold of the accused-appellant when he was in the process of inflicting a second 'darat' blow on the deceased. They all affirmed, that the 'darat' was snatched away from the accused-appellant by Mohinder Singh (PW6). Accordingly, it was contended, that left to himself, the accused-appellant would have inflicted a second blow, and probably still further blows, had he not been restrained by those present at the place of occurrence. Besides the aforesaid, there is a third reason highlighted by the learned counsel for the respondent State, namely, the place on the body of the deceased and the nature of injury caused to the deceased. Insofar as the instant aspect of the matter is concerned, it was submitted, that the injury in

question was inflicted on the head of the deceased Sardari Lal. Learned counsel invited our attention to the statements of Dr. Suman Saxena (PW4) and Dr. B.M. Gupta (PW5). Having examined Sardari Lal, they had deposed, that the deceased bore an incised wound 6 cm x 4 cm brain deep, cutting parts of the underlying bone. The injury under reference was caused just lateral to the midline on the left side of the occipital bone. The underlying brain tissue, according to these witnesses, could be seen and felt through a hole at the place of the wound. The size of the hole in the occipital bone was 3 cm x 2 cm. The underlying brain membranes were found to have been torn off, and brain tissues were found lacerated. It was accordingly his submission, that the fact that the accused-appellant had aimed the 'darat' blow on the head of the deceased with such force, that it caused a hole in the occipital bone and exposed the brain, was sufficient to arrive at the conclusion, that the same was inflicted with the intention, that it would cause death of the person hit.

10. In order to support his contention, that the offence committed by the accused-appellant constitutes 'culpable homicide amounting to murder', reliance was placed by the learned State counsel on the decision rendered by this Court in *State of Andhra Pradesh Vs. Rayavarapu Punnayya & Anr.,* (1976) 4 SCC 382, wherein it has been held as under:-

> "13. The academic distinction between 'murder' and 'culpable homicide not amounting to murder' has vexed the courts for more than a century. The confusion is caused, if courts losing sight of the true scope and meaning of the terms used by the legislature in these sections, allow themselves to be drawn into minutae abstractions. The safest way of approach to the interpretation and application of these provisions seems to be to keep in focus the keywords used in the various clauses of Sections 299 and 300. The following comparative table will be helpful in appreciating the points of distinction between the two offences.

Section 299	Section 300
A person commits culpable homicide if the act by which the death is caused is done –	*Subject to certain exceptions* culpable homicide is muder if the act by which the death is caused is done -
INTENTION	
(a) with the intention of death; or	(1) with the intention of causing causing death; or
(b) with the intention of such bodily injury as is *likely* to cause death; or	(2) with the intention of causing causing such bodily injury as the *offender knows to be likely to* cause the death *of the person to whom* the harm is caused; or
	(3) with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is *sufficient in the ordinary course of nature* to cause death; or
KNOWLEDGE	
(c) with the knowledge that the act is *likely* to cause death	(4) with the knowledge that act is so *imminently dangerous that it must in all probability cause death* or such bodily injury as is likely to cause death, and without any excuse for incurring the risk of causing death or such injury as is mentioned above.

14. Clause (*b*) of Section 299 corresponds with clauses (2) and (3) of Section 300. The distinguishing feature of the mens rea requisite under clause (2) is the knowledge possessed by the offender regarding the particular victim being in such a peculiar condition or state of health that the internal harm caused to him is likely to be fatal, notwithstanding the fact that such harm would not in the ordinary way of nature be sufficient to cause death of a person in normal health or condition. It is noteworthy that the "intention to cause death" is not an essential requirement of clause (2). Only the intention of *causing* the *bodily injury* coupled with the offender's *knowledge* of the likelihood of such injury causing the death of the particular victim, is sufficient to bring the killing within the ambit of this clause. This aspect of clause (2) is borne out by Illustration (*b*) appended to Section 300.

15. Clause (*b*) of Section 299 does not postulate any such knowledge on the part of the offender. Instances of cases falling under clause (2) of Section 300 can be where the assailant causes death by a fist blow intentionally given *knowing* that the victim is suffering from an enlarged liver, or enlarged spleen or diseased heart and such blow is likely to cause death of that *particular* person as a result of the rupture of the liver, or spleen or the failure of the heart, as the case may be. If the assailant had no such knowledge about the disease or special frailty of the victim, nor an intention to cause death or bodily injury sufficient in the ordinary course of nature to cause death, the offence will not be murder, even if the injury which caused the death, was intentionally given.

16. In clause (3) of Section 300, instead of the words "likely to cause death" occurring in the

corresponding clause (*b*) of Section 299, the words "sufficient in the ordinary course of nature" have been used. Obviously, the distinction lies between a bodily injury *likely* to cause death and a bodily injury *sufficient in the ordinary course* of nature to cause death. The distinction is fine but real, and, if overlooked, may result in miscarriage of justice. The difference between clause (*b*) of Section 299 and clause (3) of Section 300 is one of the degree of probability of death resulting from the intended bodily injury. To put it more broadly, it is the degree of probability of death which determines whether a culpable homicide is of the gravest, medium or the lowest degree. The word "likely" in clause (*b*) of Section 299 conveys the sense of 'probable' as distinguished from a mere possibility. The words "bodily injury … sufficient in the ordinary course of nature to cause death" mean that death will be the "most probable" result of the injury, having regard to the ordinary course of nature.

17. For cases to fall within clause (3), it is not necessary that the offender intended to cause death, so long as the death ensues from the intentional bodily injury or injuries sufficient to cause death in the ordinary course of nature. *Rajwant* v. *State of Kerala, AIR 1966 SC 1874,* is an apt illustration of this point.

18. In *Virsa Singh* v. *State of Punjab, AIR 1958 SC 465,* Vivian Bose, J. speaking for this Court, explained the meaning and scope of clause (3), thus (at p. 1500):-

"The prosecution must prove the following facts before it can bring a case under Section 300, "thirdly". First, it must establish quite objectively, that a bodily injury is present; secondly the nature of the injury must be proved. These are purely objective

investigations. It must be proved that there was an intention to inflict that particular injury, that is to say, that it was not accidental or unintentional or that some other kind of injury was intended. Once these three elements are proved to be present, the enquiry proceeds further, and fourthly it must be proved that the injury of the type just described made up of the three elements set out above was sufficient to cause death in the ordinary course of nature. This part of the enquiry is purely objective and inferential and has nothing to do with the intention of the offender."

19. Thus according to the rule laid down in *Virsa Singh case* of even if the intention of accused was limited to the infliction of a bodily injury sufficient to cause death in the ordinary course of nature, and did not extend to the intention of causing death, the offence would be 'murder'. Illustration (*c*) appended to Section 300 clearly brings out this point.

20. Clause (*c*) of Section 299 and clause (4) of Section 300 both require knowledge of the probability of the act causing death. It is not necessary for the purpose of this case to dilate much on the distinction between these corresponding clauses. It will be sufficient to say that clause (4) of Section 300 would be applicable where the knowledge of the offender as to the probability of death of a person or persons in general — as distinguished from a particular person or persons — being caused from his imminently dangerous act, approximates to a practical certainty. Such knowledge on the part of the offender must be of the highest degree of probability, the act having been committed by the offender without any excuse for incurring the risk of causing death or such injury as aforesaid.

21. From the above conspectus, it emerges that whenever a court is confronted with the question whether the offence is 'murder' or 'culpable homicide not amounting to murder', on the facts of a case, it will be convenient for it to approach the problem in three stages. The question to be considered at the first stage would be, whether the accused has done an act by doing which he has caused the death of another. Proof of such causal connection between the act of the accused and the death, leads to the second stage for considering whether that act of the accused amounts to "culpable homicide" as defined in Section 299. If the answer to this question is prima facie found in the affirmative, the stage for considering the operation of Section 300 of the Penal Code, is reached. This is the stage at which the court should determine whether the facts proved by the prosecution bring the case within the ambit of any of the four clauses of the definition of 'murder' contained in Section 300. If the answer to this question is in the negative the offence would be 'culpable homicide not amounting to murder', punishable under the *first* or the *second* part of Section 304, depending, respectively, on whether the second or the third clause of Section 299 is applicable. If this question is found in the positive, but the case comes within any of the exceptions enumerated in Section 300, the offence would still be 'culpable homicide not amounting to murder', punishable under the first part of Section 304, of the Penal Code.

22. The above are only broad guidelines and not cast-iron imperatives. In most cases, their observance will facilitate the task of the court. But sometimes the facts are so intertwined and the second and the third stages so telescoped into each other, that it

may not be convenient to give a separate treatment to the matters involved in the second and third stages."

11. We shall now venture to apply the parameters laid down by this Court, to determine whether the accused-appellant herein can be stated to have intentionally caused such bodily injury to the deceased, as he knew was so imminently dangerous, that it would in all probability cause his death. First and foremost, it is apparent from the factual narration of the witnesses produced by the prosecution, that the accused-appellant was not carrying the 'darat' but had picked up the same from the house of Kishan Singh (PW2). A 'darat', as noticed above, is a traditional agricultural implement used for cutting branches of trees. It is also used by butchers for beheading goats and sheep. A 'darat' has a handle and a large cutting blade. Having picked up the 'darat' for committing an assault on the deceased, it is apparent that the accused-appellant was aware of the nature of injury he was likely to cause with the weapon of incident. From the statements of Dr. Suman Saxena (PW4) and Dr. B.M. Gupta (PW5), the nature of injuries caused to the deceased has been brought out. A perusal thereof would leave no room for doubt, that the accused-appellant had chosen the sharp side of the 'darat' and not the blunt side. The ferocity with which the aforesaid blow was struck clearly emerges from the fact that the blow resulted in cutting through the skull of the deceased and caused a hole therein, resulting in exposing the brain tissue. When a blow with a deadly weapon is struck with ferocity, it is apparent that the assailant intends to cause bodily injury of a nature which he knows is so imminently dangerous, that it must in all probability cause death. The place where the blow was struck (at the back of the head of the deceased) by the accused-appellant, also leads to the same inference. It is not the case of the accused-appellant, that the occurrence arose out of a sudden quarrel. It is also not his case, that the blow was struck in the heat of the moment. It is not even his case, that he had retaliated as a

consequence of provocation at the hands of the deceased. He has therefore no excuse, for such an extreme act. Another material fact is the relationship between the parties. The accused-appellant was an uncle to the deceased. In such circumstances, there is hardly any cause to doubt the intent and knowledge of the accused-appellant. Besides the aforesaid factual position, it would be incorrect to treat the instant incident as one wherein a single blow had been inflicted by the accused. As many as five witnesses of the occurrence have stated in unison, that the accused-appellant was in the process of inflicting a second blow on the deceased, when they caught hold of him, whereupon one of them (Mohinder Singh – PW6) snatched the 'darat' from the accused-appellant, and threw it away. In such a situation, it would improper to treat/determine the culpability of the accused-appellant by assuming, that he had inflicted only one injury on the deceased. Keeping in mind the parameters of the judgments referred to by the learned counsel for the rival parties (which have been extracted above), we have no doubt in our mind, that the accused-appellant must be deemed to have committed the offence of 'culpable homicide amounting to murder' under Section 302 of the Indian Penal Code, as the accused-appellant Som Raj had struck the 'darat' blow, with the intention of causing such bodily injury, which he knew was so imminently dangerous, that it would in all probability cause the death of Sardari Lal. Having recorded the aforesaid conclusion, we are satisfied, that the accused-appellant was justifiably convicted of the offence under Section 302 of the Indian Penal Code and sentenced to undergo Rigorous Imprisonment for life, as also, to pay a fine of Rs.10,000/- (and in default, to undergo further simple imprisonment for a period of one year).

12. In view of our aforesaid conclusions, the instant appeal being devoid of merit, is dismissed.

B.B.B. Appeal dismissed.

STATE OF KERALA AND OTHERS
v.
SNEHA CHERIYAN AND ANOTHER
(Civil Appeal No. 1643 of 2013)

FEBRUARY 22, 2013

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

Service Law – Re-appointment – Of teachers – In aided schools in the State of Kerala – Minimum continuous service in an academic year – If a pre-requisite for raising claim for re-appointment u/r.51A in view of r.7A(3) – Held: Sub rule (3) of r.7A cannot be read in isolation, it has to be read in light of the proviso to r.51A – Requirement of preventing the aided school managers in creating short-term vacancies and appointing several persons in those vacancies so as to make them claimants u/r.51A – Looking to the mischief or evil sought to be remedied, purposive construction required to be adopted – A teacher relieved from service under rr.49 and 53, is entitled to get preference for appointment under r.51A only if the teacher has a minimum prescribed continuous service in an academic year as on the date of relief – Kerala Education Rules, 1959 – Chapter XIV A – r.7A(3) r/w r.51A.

Words and Phrases – Duration of vacancy – Meaning of.

In the State of Kerala, the power for appointment of teachers in aided schools is conferred on Managers of such schools under Section 11 of the Kerala Education Act, 1958 while the salary and other benefits are to be borne by the State Government under Section 9 of the Act. Qualified teachers so appointed when relieved as per Rule 49 or 52 of the Kerala Education Rules, 1959 (KER) or on account of termination of vacancies have preference for appointment to future vacancies as per Rule 51A of Chapter XIV A of the KER.

The Government issued an order G.O.(P) No.169/ 04.G.Edn. dated 15.06.2004 stating that the claim for re-appointment under Rule 51A of the KER would be limited to those who had been appointed against regular/ leave vacancies having a duration of not less than one academic year. Further, it was also stated that vacancies having duration of less than one academic year would be filled up on daily wage basis and in order to give effect to that Government order, it was ordered that necessary amendments would be made to sub-rule (3) of Rule 7A, Chapter XIV A of the KER. The Government of Kerala in exercise of the powers conferred under Section 36 of the Act amended the KER vide its notification dated G.O.(P) No. 121/2005/G. Edn. Dated 16.04.2005.

In the instant appeals, the question which arose for consideration was whether a minimum continuous service in an academic year is a pre-requisite for raising a claim for re-appointment under Rule 51A of Chapter XIV A of the Kerala Education Rules, 1959 (KER) in view of sub-rule (3) of Rule 7A of the same chapter of the KER.

Allowing the appeals, the Court

HELD: 1. Rule 51A of the Chapter XIVA of the KER states qualified teachers in aided schools who are relieved on account of termination of vacancies shall have preference for re-appointment in future vacancies in the aided schools. One cannot read sub rule (3) of Rule 7A in isolation, it has to be read in the light of the proviso to Rule 51A, they have to be read as parts of an integral whole and as being interdependent. Legislature has recognized that interdependency since both sub rule (3) of Rule 7A and the proviso to Section 51A were inserted by the same amendment in the year 2005. [Paras 17, 18] [473-E, F-G]

2. The expression "vacancies" used in sub-rule (3) to Rule 7 means 'posts which remain unoccupied". Rule

does not say that the duration of vacancy is to be determined from the time when the vacancy occurs to the time when it expires. Duration means the time during which something continues, i.e the continuance of the incumbent. [Para 19] [473-H; 474-A-B]

3. The Notification dated 10.06.2008 only says if the period of appointment does not cover one academic year i.e. the re-opening of the school after summer vacation to the closing day for summer vacation, the appointment shall be made only on daily wage basis. So also if the period commences after the beginning of the re-opening day, but extends either next academic year/years the period upto the first vacation shall be approved on daily wages only which does not take away the right of the managers of the aided schools to appoint teachers in vacancies that may arise by way of promotion, death, resignation etc. Restriction is only with respect to the minimum tenure/period for a new appointee to become a 51A claimant, that is the object and purpose of sub-rule (3) to Rule 7A read with proviso to Rule 51A of Chapter XIV-A of the KER. [Para 20] [474-D-G]

4. The object and purpose of the Notification dated 16.04.2005 issued by the Government in exercise of the powers conferred under Section 36 of the Kerala Education Act is to curb the unhealthy practices adopted by certain managers of aided schools by creating short-term vacancies or appointing several persons in a relatively long leave vacancies itself thereby making several 51A claimants against one and the same vacancy. The object and purpose of the above-mentioned notification is also to end the practice of creation of multiple claimants in anticipatory vacancies creating more 51A claimants imposing huge financial commitment to the Government. [Para 21] [474-G-H; 475-A-B]

5. Sub-rule (3) to Rule 7A does not restrict the right

of the managers of various schools in making the regular appointments in the established vacancies, what it does is to prevent the misuse of that provision and to prevent the aided school managers in creating short-term vacancies and appointing several persons in those vacancies so as to make them claimants under Rule 51A. Looking to the mischief or evil sought to be remedied, one has to adopt a purposive construction of sub-rule (3) of Rule 7A read with proviso to Rule 51A of Chapter XIV-A of the KER. [Para 22] [475-C-D]

6. The expression "vacancy" used in sub-rule (3) to Rule 7A has to be read along with the expression "academic year" so as to achieve the object and purpose of the amended sub-rule (3) to Rule 7A so as to remedy the mischief. Evil, which was sought to be remedied was the one resulting from vide spread unethical and unhealthy practices followed by certain aided school managers in creating short term vacancies during the academic year. This Court is adopting such a course, not because there is an ambiguity in the statutory provision but to reaffirm the object and purpose of sub-rule (3) to Rule 7A read with proviso to Section 51A and the Government Order dated 10.06.2008. [Para 23] [475-E-G]

7. The following directions are accordingly given:

(i) A teacher, who was relieved from service under Rules 49 and 53 of Chapter XIVA of the KER, is entitled to get preference for appointment under Rule 51A only if the teacher has a minimum prescribed continuous service in an academic year as on the date of relief.

(ii) The Manager of an aided school can, however, appoint teachers in vacancies occurred due to death, retirement, promotion, resignation, long-term leave etc. provided they are established vacancies and the approval can be granted subject to the conditions under Rule 49 of Chapter XIV A of the KER.

(iii) Approval can also be granted to appointments made to the approved vacancies arising and continuing beyond 31st March due to sanctioning of additional divisions.

(iv) The Manager can make appointments in school even if the duration of which is less than one academic year but on daily wages basis and if the duration of vacancy exceeds one academic year that can be filled up on scale of pay basis.

(v) The Manager is free to appoint teachers on a regular basis from the re-opening date itself against regular established vacancies and need not wait for the appointments till completion of the staff fixation as per the KER.

(vi) Teachers who have been appointed in the midst of the academic year and not completed the requisite minimum continuous service before vacation will not be entitled to get vacation salary. [Para 26] [476-E-H; 477-A-E]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1643 of 2013.

From the Judgment & Order dated 06.04.2009 of the High Court of Kerala at Ernakulam in W.P.(C) No. 2563 of 2009.

C.A. Nos. 1644, 1645, 1646, 1647, 1648, 1649, 1650, 1651, 1652, 1653, 1654, 1655, 1656, 1657, 1658, 1659, 1660, 1661, 1662, 1663, 1664, 1665, 1666, 1667, 1668, 1669, 1670, 1671, 1672, 1673, 1674, 1675, 1676, 1677, 1678, 1679, 1680,

1681, 1682, 1683, 1684, 1685, 1686, 1687, 1688, 1689, 1690, 1691, 1692, 1693, 1694, 1695, 1696, 1697, 1698, 1699, 1700, 1701, 1702, 1703, 1704, 1705, 1706, 1707, 1708, 1709, 1710, 1711, 1712, 1713, 1714, 1715, 1716, 1717, 1718, 1719, 1720, 1721, 1722, 1723, 1724, 1725, 1726, 1727, 1728, 1729, 1730, 1731, 1732, 1733, 1734, 1735, 1736, 1737 of 2013, 5620, 5621, 5622, 5623, 5624, 5625, 5626, 5627, 5628, 5629, 5630, 5631, 5632, 5633, 5634, 5635, 5636, 5637, 5638, 5639, 5640 of 2010, 1104, 1106, 1107, 1105 of 2011, 1738, 1739 of 2013, 245, 248 of 2011, 1740, 1741, 1742, 1743, 1744, 1745, 1746, 1747, 1748, 1749, 1750, 1751, 1752, 1753, 1754, 1755, 1756, 1757, 1758, 1759, 1760, 1761, 1762, 1763, 1764, 1765, 1766, 1767, 1768, 1769, 1770, 1771, 1772, 1773, 1774, 1775, 1776, 1777, 1778, 1779, 1780, 1781, 1782, 1783, 1784, 1785 of 2013.

V.Giri, Jogy Scaria, K.K. Sudheesh, Mohammed Sadique, P.V. Dinesh for the Appellants.

C.S. Rajan, A. Raghunath, Roy Abraham, Reena Roy, Seema Jain, Vimlesh Kumar, Himinder Lal, Raghenth Basant, Senthil Jagadeesan, P.A. Noor Muhamed, Giffara S., K. Rajeev, Lawyer's Knit & Co., S.C. Patel, T.T.K. Deepak & Co., Liz Mathew, P.S. Sudheer, K.L. Taneja, K.V. Mohan, C.N. Sree Kumar, C.K. Sasi, Nishe Rajen Shonker, Radha Shyam Jena, Giresh Kumar, Vijay Kumar, Meharia & Company, Ajay Kumar, Abhisth Kumar for the Respondents.

The Judgment of the Court was delivered by

K.S. RADHAKRISHNAN, J. Delay condoned.

1. Leave granted.

2. We are in these cases called upon to decide whether a minimum continuous service in an academic year is a pre-requisite for raising a claim for re-appointment under Rule 51A of Chapter XIV A of the Kerala Education Rules, 1959 (for short

' the KER') in view of sub-rule (3) of Rule 7A of the same chapter of the KER.

3. In the State of Kerala, the power for appointment of teachers in aided schools is conferred on Managers of such schools under Section 11 of the Kerala Education Act, 1958 (for short 'the Act') while the salary and other benefits are to be borne by the State Government under Section 9 of the Act. Qualified teachers who are so appointed when relieved as per Rule 49 or 52 or on account of termination of vacancies shall have preference for appointment to future vacancies as per Rule 51A of Chapter XIV A of the KER. Therefore, when vacancy arises, the Manager is bound to comply with the procedure under Rule 51A and cannot deny that statutory claim. When once a valid appointment is given to the teachers and such appointments are approved *ipso facto* they become entitled to the benefits under Rule 51A.

4. The Management and the teachers, it is generally known, started misusing the above statutory provisions for getting preference for future appointments by effecting appointments by creating vacancies during the academic year. Such unethical and unhealthy practices led to creation of anticipatory vacancies and multiple claimants under Rule 51A causing drain on State exchequer since the State is paying the salary. The Government in order to check such practices issued an order G.O.(P) No.169/04.G.Edn. dated 15.06.2004 stating that the claim for re-appointment under Rule 51A of the KER would be limited to those who had been appointed against regular/ leave vacancies having a duration of not less than one academic year. Further, it was also stated that vacancies having duration of less than one academic year would be filled up on daily wage basis and in order to give effect to that Government order, it was ordered that necessary amendments would be made to sub-rule (3) of Rule 7A, Chapter XIV A of the KER.

5. The Government of Kerala in exercise of the powers

conferred under Section 36 of the Act amended the KER vide its notification dated G.O.(P) No. 121/2005/G. Edn. Dated 16.04.2005.

Unamended sub-rule (3) of Rule 7A reads as follows:

"Vacancies the duration of which is two months or less shall not be filled up any appointment"

Amended sub-rule (3) of Rule 7A reads as follows:

"Vacancies the duration of which is less than one academic year shall not be filled up."

The explanatory note to the above-mentioned Rules reads as follows:

"(This does not form part of the notification but is intended to indicate the general purpose).

Under the existing sub-rule (3) of Rule 7A Chapter XIV A, General Education Rules vacancies the duration of which is two months or less shall not be filled up by any appointment. Managements of aided schools are appointing teachers in short leave vacancies the duration of which is more than two months and it results in huge financial commitment to Government. After detailed examination of the matter Government inter alia issued order as per G.O.(P) 169/2004/G. Edn dated 15.06.2004 to the effect that claim for appointment under rule 51A of the Kerala Education Rule be limited to those who have been appointed against regular/leave vacancies having a duration of not less than one academic year. The Government has now decided to give statutory validity to the above Government order.

The notification is intended to achieve the above object."

6. The Government issued another clarificatory order

G.O.(P) No. 31/06GE dated 19.01.2006 dealing with the appointment of teachers in short vacancies which is not of much relevance, but for completeness, the operative portion of the same is given below:

"In the above circumstances, Government are pleased to clarify that the condition in Para 6 of G.O. (P) No. 169/2004/GE dated 15.06.2004 shall not apply to the appointments on promotions to the post of Head Master, to the appointments given under Rule 43, Chapter XIV A KERs and to the reappointments of those who had acquired the claim under Rule 51A, Chapter XIV A KERs, if the reappointment is to a vacancy having the duration of more than 2 months as existed prior to the amendment. Necessary amendment to the rules shall be made to this effect and the Director of Public Instruction shall furnish proposals for the same."

7. The Government of Kerala later issued a clarificatory order vide G.O. (P) No. 104/2008/G Edn. Dated 10.06.2008 regarding the nature of appointment and admissibility of vacation salary as per Rule 49 of Chapter XIV A of the KER to teachers appointed in leave / regular vacancies making it applicable to appointments in both leave vacancies and regular vacancies. The operative portion of clauses 5, 6 and 7 reads as follows:

"5. As per rule 7A (3) of Chapter XIV A KER, if the period of appointment is less than one academic year, the appointment cannot be approved on regular basis. This has caused many doubts among various quarters, requiring clarification regarding the nature of appointment and admissibility of vacation salary as per Rule 49 of Chapter XIVA KER to teacher appointed in - leave / regular vacancies. In view of the above, the following orders are issued with immediate effect. These are applicable to appointments in both leave vacancies and regular vacancies:-

(i) If the period of appointments does not cover one academic year (i.e. from the re-opening day of the school after summer vacation to the closing day for summer vacation), the appointment shall be made only on daily wages.

(ii) If the period of appointments commences after the beginning of the re-opening day but extends over the next academic year/years, the period up to the first vacation shall be approved on daily wages only. Re-appointment can be approved on regular basis, only if the duration of the period of re-appointment completes one academic year. If the period of re-appointment is also less than one academic year, that re-appointment will also be considered only on daily wages basis. In short, fractions of an academic year will not be considered for approval on regular basis;

(iii) In the case of appointment of Rule 51A claimants, promotion of Rule 43 claimants and appointment / promotion of teachers as Headmasters, temporary Headmaster/teachers-in-charge, approval will be granted on regular basis if the period of appointment is more than 2 months;

(iv) The appointments made against training vacancies shall also be filled up on daily wages only except in the case of (iii) above;

(v) If a leave substitute, appointed on daily wages continues in service without any break for one full academic year consequent to extension of leave, the appointment shall be revised and approved as on regular basis. However, if different leave substitutes are appointed to the same post, this benefit shall not be extended to them;

(vi) Appointments in leave vacancy and regular vacancy shall be treated separately;

(vii) The admissibility of vacation salary as provided in rule 49 Chapter XIV A KER will not be applicable to appointments on daily wage basis. Necessary amendments to this effect in the KER shall be made separately.

6. The claim under Rule 51A Chapter XIVA KER will not be admissible to those teachers appointed on daily wage basis.

7. This order will take effect from the date of the order only. The approval of appointments given prior to this order shall not be reviewed."

8. The main challenge is with regard to the validity of clause 5(i) and (ii) of the above mentioned that Government order which according to the respondents go contrary to sub-rule (3) of Rule 7A, Chapter XIV A of the KER and hence *ultra vires* and unenforceable.

9. Shri, C.S. Rajan, learned senior counsel appearing for some of the respondents submitted that sub-rule (3) of Rule 7A speaks of "vacancies" the duration of which is less than one "academic year" which means if the vacancy is having a duration of one academic year or more, appointment can be made to fill up the same. Learned senior counsel pointed out that the term of appointment need not be co-terminus with the term of the vacancy. Further, it was pointed out that if in fact, the vacancy is having a duration of one academic year or more, even if, there is some delay in making the appointment, such appointment will have to be approved since Rule 7A speaks of duration of vacancy and not duration of appointment.

10. Shri P.A. Noor Muhamed, learned counsel appearing for some of the respondents while submitting written arguments pointed out that as per the scheme of the KER and conjoint

reading of the provisions of Chapter XXIII and sub-rule (3) of Rule 7A and Rule 49 under Chapter XIV A of the KER it is clear that "time of appointment" is immaterial and what is material is the "duration of vacancies". Further, it was pointed out that as per the scheme contemplated under the provisions in Chapter XXIII of the KER, appointments in regular vacancies can be made only after the receipt of orders of departmental authorities on staff fixation which is in turn based on the students' strength as well, which can be ascertained only after the beginning of the academic year. It was pointed out that merely because appointment was not made in consonance of the first academic year, approval of appointments cannot be denied ignoring the fact that the vacancy in which the appointment made runs to more than one academic year. The delay, if any, in making appointment is not due to the fault of the teachers and hence they shall not be penalized.

11. Learned counsel appearing for the respondents therefore submitted that the impugned G.O. dated 10.06.2008 is contrary to sub-rule (3) of Rule 7A of the KER and has rightly been declared so by the High Court which calls for no interference by this Court.

12. Shri V. Giri, learned senior counsel appearing for the State of Kerala submitted that the Government have issued the notification dated 14.06.2005 amending Sub rule (3) of Rule 7A followed by the Government order dated 10.06.2008, so as to avoid the unhealthy practices followed by certain aided school managers by appointing teachers in short spells thereby creating more 51A claimants creating multiple claims. Learned senior counsel submitted that the Government Order is only a clarification to the statutory amendment made in sub-rule (3) of Rule 7A of the Rules. Learned senior counsel also submitted that there is no restriction in the matter of appointment of teachers in anticipated vacancies due to retirements, promotions, resignations etc. provided it is an established vacancy which could be anticipated well in advance. Learned senior counsel submitted that the Managers of the aided

schools are free to appoint teachers on regular basis from the starting of the academic year against regular/established vacancies and they need not wait for appointments till completion of staff fixation as per the provisions under KER. Learned senior counsel also submitted that the Managers can make appointments in anticipation of sanction of additional posts by the educational authorities as per Rule 12B Chapter XXIII of the KER and such posts shall be deemed to have been created from the date of appointments.

13. Learned senior counsel also submitted that permanency/promotional vacancy which are in existence on the beginning of the academic year though filled up during the academic year is also not covered by the impugned notification so also the vacancies which arise due to death are also not hit by the impugned notification. Further, it is also pointed out that leave vacancies which are in existence on the beginning of the academic year can also be filled up during the academic year which also are not covered by the impugned notification.

14. We have heard learned counsel on either side at length. WP (C) No. 2563 of 2009 against which SLP (C) No. 22332 of 2009 arises was treated as the main case by the High Court, hence we treat that case as the leading case for disposal of these batches of appeals since questions of law arise for consideration are the same.

15. Shri Shinoj T. Elias, High School Assistant (HSA) (English) who was working in St. Mary's Higher Secondary School, Morakkala, an aided school, applied for leave from 08.07.2008 to 07.07.2013 and the leave was granted by the Manager of that school. The first respondent (herein) who was the writ petitioner before the High Court was appointed in that vacancy on 06.10.2008 and the period of her appointment would normally expire only on 07.07.2013. The Manager of the school forwarded that appointment order for approval to the District Educational Officer (DEO). But the DEO approved the appointment from 06.10.2008 to 31.03.2009 only on daily wage

basis based on the Government order dated 10.06.2008. Based on the impugned G.O. dated 10.06.2008, it was pointed out by the first respondent before the High Court that the vacancy had duration of five years and therefore her appointment should have been approved without any time limit in the same scale of pay applicable to HSAs. Reliance was placed on sub-rule (3) of Rule 7A of the Rules which was found favour by the Division Bench of the High Court.

16. We may before examining the scope of sub-rule (3) of Rule 7A and the proviso to Section 51A read with the Government Order dated 10.06.2008 examine the scheme of the Act and the KER and the object and purpose of sub rule 3 of Rule 7A as well as the impugned order dated 10.06.2008. We have already indicated that as per the Kerala Education Act and the KER, the Manager of the aided School is free to make appointment of teachers in their respective schools who are qualified according to the Rules and the entire salary and other allowances have to be borne by the State Government.

17. Rule 51A of the Chapter XIVA of the KER states qualified teachers in aided schools who are relieved on account of termination of vacancies shall have preference for re-appointment in future vacancies in the aided schools. Rule 43, Chapter XIV A of the KER states that the vacancies in any higher grade of pay shall be filled up by promotion in the lower grade according to the seniority.

18. We cannot read sub rule (3) of Rule 7A in isolation, it has to be read in the light of the proviso to Section 51A, they have to be read as parts of an integral whole and as being interdependent. Legislature has recognized that interdependency since both sub rule (3) of Rule 7A and the proviso to Section 51A were inserted by the same amendment in the year 2005.

19. The expression "vacancies" used in sub-rule (3) to Rule 7 means 'posts which remain unoccupied". Rule does not say

that the duration of vacancy is to be determined from the time when the vacancy occurs to the time when it expires. Duration means the time during which something continues, i.e the continuance of the incumbent. As stated in the Notification dated 15.06.2004 the vacancies having a duration of less than one academic year can be filled up on daily wage basis. Sub-rule (3) to Rule 7A uses the expression "academic year". Rule 2A of Chapter VII of the KER refers to the academic year, which reads as follows:

> "**2A**. Academic year shall be deemed to commence on the re-opening day and terminate on the last day before the summer vacation."

20. Rule 1 of Chapter VII says "all schools shall be closed for the summer vacation every year on the first working day on March and re-opened on the first working day of June unless otherwise notified by the Director." The Notification dated 10.06.2008 only says if the period of appointment does not cover one academic year i.e. the re-opening of the school after summer vacation to the closing day for summer vacation, the appointment shall be made only on daily wage basis. So also if the period commences after the beginning of the re-opening day, but extends either next academic year/years the period upto the first vacation shall be approved on daily wages only which does not take away the right of the managers of the aided schools to appoint teachers in vacancies that may arise by way of promotion, death, resignation etc. Restriction is only with respect to the minimum tenure/period for a new appointee to become a 51A claimant, that is the object and purpose of sub-rule (3) to Rule 7A read with proviso to Rule 51A of Chapter XIV-A of the KER.

21. The object and purpose of the Notification dated 16.04.2005 issued by the Government in exercise of the powers conferred under Section 36 of the Kerala Education Act is to curb the unhealthy practices adopted by certain managers of aided schools by creating short-term vacancies or appointing

several persons in a relatively long leave vacancies itself thereby making several 51A claimants against one and the same vacancy. The object and purpose of the above-mentioned notification is also to end the practice of creation of multiple claimants in anticipatory vacancies creating more 51A claimants imposing huge financial commitment to the Government.

22. Sub-rule (3) to Rule 7 does not restrict the right of the managers of various schools in making the regular appointments in the established vacancies, what it does is to prevent the misuse of that provision and to prevent the aided school managers in creating short-term vacancies and appointing several persons in those vacancies so as to make them claimants under Rule 51A. Looking to the mischief or evil sought to be remedied, we have to adopt a purposive construction of sub-rule (3) of Rule 7A read with proviso to Rule 51A of Chapter XIV-A of the KER.

23. We are inclined to adopt such a construction since the stand of the respondents is that Rule 7A speaks of "duration of vacancies" and not "duration of appointment". The expression "vacancy" used in sub-rule (3) to Rule 7A has to be read along with the expression "academic year" so as to achieve the object and purpose of the amended sub-rule (3) to Rule 7A so as to remedy the mischief. Evil, which was sought to be remedied was the one resulting from vide spread unethical and unhealthy practices followed by certain aided school managers in creating short term vacancies during the academic year. We are adopting such a course, not because there is an ambiguity in the statutory provision but to reaffirm the object and purpose of sub-rule (3) to Rule 7A read with proviso to Section 51A and the Government Order dated 10.06.2008.

24. We notice later the Government passed yet another GO(P) 56/11/Gen.Edn dated 26.02.2011 clarifying the earlier GO dated 15.06.2004 and 10.06.2008. The operative portion of the same reads as under:

> "1. Approval can be granted subject to the conditions under Rule 49 Chapter XIV-A of the K.E.R. for the appointments to the vacancies arising due to the existing teachers' retirement, resignation, death long leave etc. and to the approved vacancies arising and continuing beyond 31st March due to sanctioning of additional divisions.
>
> 2. Appointments for a duration of less than 8 months in an academic year can be approved on daily wage basis and appointments of a duration of more than that are to be approved as regular (on pay scale)."

25. We have referred to the above GO, for the sake of completeness, which has of course no bearing on the interpretation which we have placed on sub-rule (3) to Rule 7A read with the proviso to Rule 51A of Chapter XIV-A of the KER, but may have application on facts in certain cases which have to be decided independently.

26. We are, therefore, inclined to allow these appeals and set aside the judgment of the Division Bench with the following directions:

(i) A teacher, who was relieved from service under Rules 49 and 53 of Chapter XIVA of the KER, is entitled to get preference for appointment under Rule 51A only if the teacher has a minimum prescribed continuous service in an academic year as on the date of relief.

(ii) The Manager of an aided school can, however, appoint teachers in vacancies occurred due to death, retirement, promotion, resignation, long-term leave etc. provided they are established vacancies and the approval can be granted subject to the conditions under Rule 49 of Chapter XIV A of the KER.

(iii) Approval can also be granted to appointments made to the approved vacancies arising and continuing beyond 31st March due to sanctioning of additional divisions.

(iv) The Manager can make appointments in school even if the duration of which is less than one academic year but on daily wages basis and if the duration of vacancy exceeds one academic year that can be filled up on scale of pay basis.

(v) The Manager is free to appoint teachers on a regular basis from the re-opening date itself against regular established vacancies and need not wait for the appointments till completion of the staff fixation as per the KER.

(vi) Teachers who have been appointed in the midst of the academic year and not completed the requisite minimum continuous service before vacation will not be entitled to get vacation salary.

27. Appeals are accordingly allowed and disposed of as above setting aside the judgment of the High Court but there will be no order as to costs.

B.B.B. Appeals allowed.

ESHA EKTA APARTMENTS CO-OPERATIVE HOUSING SOCIETY LIMITED AND OTHERS

v.

MUNICIPAL CORPORATION OF MUMBAI AND OTHERS

(Civil Appeal No. 7934 of 2012)

FEBRUARY 27, 2013

[G.S. SINGHVI AND SUDHANSU JYOTI MUKHOPADHAYA, JJ.]

Urban Development – Maharashtra Regional and Town Planning Act, 1966 – ss.44, 45, 47, 52 to 57 – Illegal and unauthorized construction made by developers/builders – Demolition order – Plea of flat buyers for regularization of construction – Held: By rejecting the prayer for regularization of the floors constructed in wanton violation of the sanctioned plan, the Deputy Chief Engineer of the Mumbai Municipal Corporation and the Appellate Authority demonstrated their determination to ensure planned development of the city – The 1966 Act does not mandate regularization of construction made without obtaining the required permission or in violation thereof – The 1963 Act too does not entitle the flat buyers to seek a mandamus for regularization of unauthorized/illegal construction – The 1991 Regulations also cannot be invoked for regularization of the disputed construction because the same were enforced much later – The flat buyers had entered into agreements with the developers/builders much before commencement of the construction – They were aware of the facts and had consciously occupied the flats illegally constructed by the developers/builders – No case made out for directing the respondents to regularize construction made in violation of the sanctioned plan – No authority administering municipal laws and other similar laws can encourage such violation – The Courts are also expected to refrain from exercising equitable jurisdiction for regularization

of illegal and unauthorized constructions – Flat buyers, however, free to avail appropriate remedy against the developers/builders – Mumbai Municipal Corporation Act, 1888 – ss.337, 351 and 354A – Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 – ss.2(c), 3(2), 4, 7(2) & 13 – Development Control Rules for Greater Mumbai, 1967 – Development Control Regulations for Greater Mumbai, 1991.

Orders were passed by Deputy Chief Engineer, Building Proposals (City) of the Mumbai Municipal Corporation and the Appellate Authority refusing to regularize illegal constructions raised by developers/ builders. Even though the Planning Authority had not sanctioned the plans, the developers/builders had constructed additional floors and utilized the Floor Space Index (FSI) far in excess of what was permitted by the Mumbai Municipal Corporation Act, 1888 and the Development Control Rules for Greater Mumbai, 1967.

The Municipal Corporation of Mumbai issued notices under Section 351 of the 1888 Act, giving details of the illegal structures proposed to be demolished. The housing societies concerned submitted their respective replies which were rejected by the Corporation, whereupon they filed Long Cause Suits for quashing the notices issued under Section 351 of the 1888 Act and the rejection order passed by the Corporation. They also filed applications for restraining the Corporation from demolishing the illegal portions of the buildings.

The trial Court dismissed the applications for temporary injunction and further rejected the contention of the members of the housing societies that they had purchased the flats without knowing that the same were illegally constructed by the developers/builders.

The appeals filed by the housing societies and their members were dismissed by the High Court, and, therefore the instant appeals. The Supreme Court, keeping in view that demolition of the illegal and unauthorized construction would adversely affect the flat buyers and their families and that a writ petition filed by them for regularization of the disputed construction was pending before the High Court, considered it appropriate to transfer the same to this Court.

Various questions therefore came up for consideration before this Court, viz. 1) whether the orders passed by the Deputy Chief Engineer and the Appellant Authority refusing to regularize the illegal constructions were legally sustainable; 2) whether the flat buyers were not aware of the facts and should not be penalized for the illegalities committed by the developers/ builders; 3) whether in view of the Development Control Regulations for Greater Mumbai, 1991, the Corporation should be directed to regularize the additional FSI by charging appropriate penalty; and that 4) whether in view of Circular No.CHE/2005/DP/GEN dated 4.2.2011 (issued by the Corporation for regularization of the illegal construction by charging penalty), this Court may exercise power under Article 142 of the Constitution for directing regularization of the disputed construction else the flat buyers will be deprived of the only shelter available to them.

Dismissing the appeals and the transferred cases, the Court

HELD: 1.1. By rejecting the prayer for regularization of the floors constructed in wanton violation of the sanctioned plan, the Deputy Chief Engineer and the Appellate Authority have demonstrated their determination to ensure planned development of the commercial capital of the country and the orders passed

by them have given a hope to the law abiding citizens that someone in the hierarchy of administration will not allow unscrupulous developers/builders to take law into their hands and get away with it. [Para 3] [494-D-F]

1.2. The Deputy Chief Engineer had rejected the request made by the architect for exemption of the area of staircase, lift and lift lobby from FSI by observing that the same is not in conformity with Clause 35(2)(c) of the 1991 Regulations because the Corporation had decided the proposal prior to coming into force of those regulations and the permissible FSI had already been exhausted. The Appellate Authority agreed with the Deputy Chief Engineer that the 1991 Regulations cannot be invoked for regularization of the disputed construction because the same were enforced much after rejection of the amended plans and the plot in question is situated in CRZ area. The reasons assigned by the Deputy Chief Engineer and the Appellate Authority are in consonance with the law laid down by this Court. The Appellate Authority had rightly declined to invoke the 1991 Regulations for entertaining the prayer made by the architect for regularization of the constructions made in violation of the sanctioned plan. [Paras 34, 35, 36] [518-F-H; 519-A-B; 522-E]

Suresh Estates Private Limited v. Municipal Corporation of Greater Mumbai **(2007) 14 SCC 439: 2007 (13) SCR 882 – relied on.**

2. The argument that the flat buyers should not be penalized for the illegality committed by the lessee and the developers/builders in raising construction in violation of the sanctioned plan has no merit. The flat buyers had entered into agreements with the developers/builders much before commencement of the construction. They were aware of the fact that the revised plans submitted by the architect had not been approved by the

Planning Authority and the developers/builders had foretold them about the consequence of rejection of the revised plans. Therefore, there is no escape from the conclusion that the flat buyers had consciously occupied the flats illegally constructed by the developers/builders. In this scenario, the only remedy available to them is to sue the lessee and the developer/builder for return of the money and/or for damages and they cannot seek a direction for regularization of the illegal and unauthorized construction made by the developers/builders. [Para 37] [522-F-H; 523-A-B]

3. An analysis of the provisions of the Maharashtra Regional and Town Planning Act, 1966 make it clear that any person who undertakes or carries out development or changes the use of land without permission of the Planning Authority is liable to be punished with imprisonment. At the same time, the Planning Authority is empowered to require the owner to restore the land to its original condition as it existed before the development work was undertaken. The scheme of these provisions do not mandate regularization of construction made without obtaining the required permission or in violation thereof. [Para 39] [525-E-G]

4. Circular No. CHE/2005/DP/GEN dated 4.2.2011 (issued by the Corporation for regularization of illegal construction by charging penalty) cannot be invoked for entertaining the prayer for regularization. That circular only contains the procedure for regularization of unauthorized works/structures. It neither deals with the issues relating to entitlement of the applicant to seek regularization nor lays down that the Planning Authority can regularize illegal construction even after dismissal of the appeal filed under Section 47 of the 1966 Act. Therefore, the procedure laid down in Circular dated 4.2.2011 is of no avail to the flat buyers. [Para 40] [525-H; 526-A-B]

5. Though the argument that the developers / builders / promoters are responsible for the illegal construction finds support from the provisions of the Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963, but that does not help the housing societies and their members because there is no provision under that Act for condonation of illegal/ unauthorized construction by the developers/builders and promoters or regularization of such construction. The 1963 Act obligates the promoter to obtain sanctions and approvals from the concerned authority and disclose the same to the flat buyers. The Act also provides for imposition of penalty on the promoters. However, the provisions contained therein do not entitle the flat buyers to seek a mandamus for regularization of the unauthorized/illegal construction. [Paras 41, 44] [526-C-D; 532-H; 533-A]

Jayantilal Investments v. Madhuvihar Cooperative Housing Society **(2007) 9 SCC 220: 2007 (1) SCR 677 – relied on.**

6. The petitioners in the transferred case have failed to make out a case for directing the respondents to regularize the construction made in violation of the sanctioned plan. No authority administering municipal laws and other similar laws can encourage violation of the sanctioned plan. The Courts are also expected to refrain from exercising equitable jurisdiction for regularization of illegal and unauthorized constructions else it would encourage violators of the planning laws and destroy the very idea and concept of planned development of urban as well as rural areas. [Para 45] [533-B-D]

Royal Paradise Hotel (P) Ltd. v. State of Haryana and Ors. **(2006) 7 SCC 597: 2006 (5) Suppl. SCR 396 – held inapplicable.**

Friends Colony Development Committee v. State of Orissa **(2004) 8 SCC 733: 2004 (5) Suppl. SCR 818;** *Shanti Sports Club v. Union of India* **(2009) 15 SCC 705: 2009 (13) SCR 710;** *Priyanka Estates International Pvt. Ltd. v. State of Assam* **(2010) 2 SCC 27: 2009 (16) SCR 80 and** *Dipak Kumar Mukherjee v. Kolkata Municipal Corporation and others* **(2012) 10 SCALE 29 – referred to.**

7. There is no impediment in the implementation of notices issued by the Corporation under Section 351 of the 1888 Act and order passed by the competent authority. The Corporation is expected to take action in the matter at the earliest. This Court also directs that the State Government and its functionaries/officers as also the officers/employees of the Corporation shall not put any hurdle or obstacle in the implementation of notices issued under Section 351 of the 1888 Act. The flat buyers shall be free to avail appropriate remedy against the developers/builders. [Paras 46, 47 and 48] [533-E-G]

Case Law Reference:

2004 (5) Suppl. SCR 818	**referred to**	**Para 1**
2006 (5) Suppl. SCR 396	**relied on**	**Para 1, 45**
2009 (13) SCR 710	**referred to**	**Para 1**
2009 (16) SCR 80	**referred to**	**Para 1**
(2012) 10 SCALE 29	**referred to**	**Para 1**
2007 (13) SCR 882	**relied on**	**Para 35**
2007 (1) SCR 677	**relied on**	**Para 43**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7934 of 2012.

From the Judgment & Order dated 24.08.2011 of the High Court of Judicature at Bombay in Appeal from Order No. 1124 of 2010.

WITH

C.A. Nos. 7935, 7936, 7937 & 7938 of 2012

T.C. (C) No. 55 of 2012.

G.E. Vahanvati, AG, Dr. A.M. Singhvi, Ravi Shankar Prasad, Pallav Shishodia, Dushyant Dave, C.U. Singh, Raju Ramachandran, Abhimanyu Bhandari, Aakansha Munjhal, Harish Pandey, Naveen Kumar, S. Sukumaran, R.A. Malandkar, J.J. Xavier, Anand Sukumar, Bhupesh Kumar Pathak, C. Mukund, Pankaj Jain, Saravana Raja P.V., Kavita Wadia, Chitesh, Kavin Gulati, Rashmi Singh, Kumar Kartikay, Vasu Sharma, Pushpinder Singh for the appearing parties.

The Judgment of the Court was delivered by

G.S. SINGHVI, J. 1. In last five decades, the provisions contained in various municipal laws for planned development of the areas to which such laws are applicable have been violated with impunity in all the cities, big or small, and those entrusted with the task of ensuring implementation of the master plan, etc., have miserably failed to perform their duties. It is highly regrettable that this is so despite the fact that this Court has, keeping in view the imperatives of preserving the ecology and environment of the area and protecting the rights of the citizens, repeatedly cautioned the concerned authorities against arbitrary regularization of illegal constructions by way of compounding and otherwise. In *Friends Colony Development Committee v. State of Orissa* (2004) 8 SCC 733, this Court examined the correctness of an order passed by the Orissa High Court negating the appellant's right to be heard in a petition filed by the builder who had raised the building in violation of the sanctioned plan. While upholding the appellant's plea, the two-Judge Bench observed:

"……Builders violate with impunity the sanctioned building plans and indulge in deviations much to the prejudice of the planned development of the city and at the

peril of the occupants of the premises constructed or of the inhabitants of the city at large. Serious threat is posed to ecology and environment and, at the same time, the infrastructure consisting of water supply, sewerage and traffic movement facilities suffers unbearable burden and is often thrown out of gear. Unwary purchasers in search of roof over their heads and purchasing flats/apartments from builders, find themselves having fallen prey and become victims to the designs of unscrupulous builders. The builder conveniently walks away having pocketed the money leaving behind the unfortunate occupants to face the music in the event of unauthorised constructions being detected or exposed and threatened with demolition. Though the local authorities have the staff consisting of engineers and inspectors whose duty is to keep a watch on building activities and to promptly stop the illegal constructions or deviations coming up, they often fail in discharging their duty. Either they don't act or do not act promptly or do connive at such activities apparently for illegitimate considerations. If such activities are to stop some stringent actions are required to be taken by ruthlessly demolishing the illegal constructions and non-compoundable deviations. The unwary purchasers who shall be the sufferers must be adequately compensated by the builder. The arms of the law must stretch to catch hold of such unscrupulous builders……

The conduct of the builder in the present case deserves to be noticed. He knew it fully well what was the permissible construction as per the sanctioned building plans and yet he not only constructed additional built-up area on each floor but also added an additional fifth floor on the building, and such a floor was totally unauthorised. In spite of the disputes and litigation pending he parted with his interest in the property and inducted occupants on all the floors, including the additional one. Probably he was under the impression that he would be able to either

escape the clutches of the law or twist the arm of the law by some manipulation. This impression must prove to be wrong.

In all developed and developing countries there is emphasis on planned development of cities which is sought to be achieved by zoning, planning and regulating building construction activity. Such planning, though highly complex, is a matter based on scientific research, study and experience leading to rationalisation of laws by way of legislative enactments and rules and regulations framed thereunder. Zoning and planning do result in hardship to individual property owners as their freedom to use their property in the way they like, is subjected to regulation and control. The private owners are to some extent prevented from making the most profitable use of their property. But for this reason alone the controlling regulations cannot be termed as arbitrary or unreasonable. The private interest stands subordinated to the public good. It can be stated in a way that power to plan development of city and to regulate the building activity therein flows from the police power of the State. The exercise of such governmental power is justified on account of it being reasonably necessary for the public health, safety, morals or general welfare and ecological considerations; though an unnecessary or unreasonable intermeddling with the private ownership of the property may not be justified.

The municipal laws regulating the building construction activity may provide for regulations as to floor area, the number of floors, the extent of height rise and the nature of use to which a built-up property may be subjected in any particular area. The individuals as property owners have to pay some price for securing peace, good order, dignity, protection and comfort and safety of the community. Not only filth, stench and unhealthy places have to be eliminated, but the layout helps in achieving family values,

youth values, seclusion and clean air to make the locality a better place to live. Building regulations also help in reduction or elimination of fire hazards, the avoidance of traffic dangers and the lessening of prevention of traffic congestion in the streets and roads. Zoning and building regulations are also legitimised from the point of view of the control of community development, the prevention of overcrowding of land, the furnishing of recreational facilities like parks and playgrounds and the availability of adequate water, sewerage and other governmental or utility services.

Structural and lot area regulations authorise the municipal authorities to regulate and restrict the height, number of storeys and other structures; the percentage of a plot that may be occupied; the size of yards, courts and open spaces; the density of population; and the location and use of buildings and structures. All these have in our view and do achieve the larger purpose of the public health, safety or general welfare. So are front setback provisions, average alignments and structural alterations. Any violation of zoning and regulation laws takes the toll in terms of public welfare and convenience being sacrificed apart from the risk, inconvenience and hardship which is posed to the occupants of the building.

Though the municipal laws permit deviations from sanctioned constructions being regularised by compounding but that is by way of exception. Unfortunately, the exception, with the lapse of time and frequent exercise of the discretionary power conferred by such exception, has become the rule. Only such deviations deserve to be condoned as are *bona fide* or are attributable to some misunderstanding or are such deviations as where the benefit gained by demolition would be far less than the disadvantage suffered. Other than these, deliberate deviations do not deserve to be condoned and

compounded. Compounding of deviations ought to be kept at a bare minimum. The cases of professional builders stand on a different footing from an individual constructing his own building. A professional builder is supposed to understand the laws better and deviations by such builders can safely be assumed to be deliberate and done with the intention of earning profits and hence deserve to be dealt with sternly so as to act as a deterrent for future. It is common knowledge that the builders enter into underhand dealings. Be that as it may, the State Governments should think of levying heavy penalties on such builders and therefrom develop a welfare fund which can be utilised for compensating and rehabilitating such innocent or unwary buyers who are displaced on account of demolition of illegal constructions."

(emphasis supplied)

In *Royal Paradise Hotel (P) Ltd. v. State of Haryana and Ors.* (2006) 7 SCC 597, this Court noted that the construction had been made in the teeth of notices issued for stopping the unauthorized construction and held that no authority administering municipal laws can regularize the constructions made in violation of the Act. Some of the observations made in that judgment are extracted below:

"Whatever it be, the fact remains that the construction was made in the teeth of the notices and the directions to stop the unauthorized construction. Thus, the predecessor of the appellant put up the offending construction in a controlled area in defiance of the provisions of law preventing such a construction and in spite of notices and orders to stop the construction activity. The constructions put up are thus illegal and unauthorized and put up in defiance of law. The appellant is only an assignee from the person who put up such a construction and his present attempt is to defeat the statute and the statutory scheme of protecting the sides of highways in the interest of general public and moving

traffic on such highways. Therefore, this is a fit case for refusal of interference by this Court against the decision declining the regularization sought for by the appellant. Such violations cannot be compounded and the prayer of the appellant was rightly rejected by the authorities and the High Court was correct in dismissing the Writ Petition filed by the appellant. It is time that the message goes aboard that those who defy the law would not be permitted to reap the benefit of their defiance of law and it is the duty of High Courts to ensure that such definers of law are not rewarded. The High Court was therefore fully justified in refusing to interfere in the matter. The High Court was rightly conscious of its duty to ensure that violators of law do not get away with it.

We also find no merit in the argument that regularization of the acts of violation of the provisions of the Act ought to have been permitted. No authority administering municipal laws and other laws like the Act involved here, can encourage such violations. Even otherwise, compounding is not to be done when the violations are deliberate, designed, reckless or motivated. Marginal or insignificant accidental violations unconsciously made after trying to comply with all the requirements of the law can alone qualify for regularization which is not the rule, but a rare exception. The authorities and the High Court were hence right in refusing the request of the appellant."

The aforesaid observations found their echo in *Shanti Sports Club v. Union of India* (2009) 15 SCC 705 in the following words:

"In the last four decades, almost all cities, big or small, have seen unplanned growth. In the 21st century, the menace of illegal and unauthorised constructions and encroachments has acquired monstrous proportions and everyone has been paying heavy price for the same. Economically affluent people and those having support of

the political and executive apparatus of the State have constructed buildings, commercial complexes, multiplexes, malls, etc. in blatant violation of the municipal and town planning laws, master plans, zonal development plans and even the sanctioned building plans. In most of the cases of illegal or unauthorised constructions, the officers of the municipal and other regulatory bodies turn blind eye either due to the influence of higher functionaries of the State or other extraneous reasons. Those who construct buildings in violation of the relevant statutory provisions, master plan, etc. and those who directly or indirectly abet such violations are totally unmindful of the grave consequences of their actions and/or omissions on the present as well as future generations of the country which will be forced to live in unplanned cities and urban areas. The people belonging to this class do not realise that the constructions made in violation of the relevant laws, master plan or zonal development plan or sanctioned building plan or the building is used for a purpose other than the one specified in the relevant statute or the master plan, etc., such constructions put unbearable burden on the public facilities/ amenities like water, electricity, sewerage, etc. apart from creating chaos on the roads. The pollution caused due to traffic congestion affects the health of the road users. The pedestrians and people belonging to weaker sections of the society, who cannot afford the luxury of air-conditioned cars, are the worst victims of pollution. They suffer from skin diseases of different types, asthma, allergies and even more dreaded diseases like cancer. It can only be a matter of imagination how much the Government has to spend on the treatment of such persons and also for controlling pollution and adverse impact on the environment due to traffic congestion on the roads and chaotic conditions created due to illegal and unauthorised constructions. This Court has, from time to time, taken cognizance of buildings constructed in violation of municipal and other laws and emphasised that no compromise

should be made with the town planning scheme and no relief should be given to the violator of the town planning scheme, etc. on the ground that he has spent substantial amount on construction of the buildings, etc.

Unfortunately, despite repeated judgments by this Court and the High Courts, the builders and other affluent people engaged in the construction activities, who have, over the years shown scant respect for regulatory mechanism envisaged in the municipal and other similar laws, as also the master plans, zonal development plans, sanctioned plans, etc., have received encouragement and support from the State apparatus. As and when the Courts have passed orders or the officers of local and other bodies have taken action for ensuring rigorous compliance with laws relating to planned development of the cities and urban areas and issued directions for demolition of the illegal/unauthorised constructions, those in power have come forward to protect the wrongdoers either by issuing administrative orders or enacting laws for regularisation of illegal and unauthorised constructions in the name of compassion and hardship. Such actions have done irreparable harm to the concept of planned development of the cities and urban areas. It is high time that the executive and political apparatus of the State take serious view of the menace of illegal and unauthorised constructions and stop their support to the lobbies of affluent class of builders and others, else even the rural areas of the country will soon witness similar chaotic conditions."

In *Priyanka Estates International Pvt. Ltd. v. State of Assam* (2010) 2 SCC 27, this Court declined the appellant's prayer for directing the respondents to regularize the illegal construction and observed:

"It is a matter of common knowledge that illegal and unauthorised constructions beyond the sanctioned plans

are on rise, may be due to paucity of land in big cities. Such activities are required to be dealt with by firm hands otherwise builders/colonisers would continue to build or construct beyond the sanctioned and approved plans and would still go scot-free. Ultimately, it is the flat owners who fall prey to such activities as the ultimate desire of a common man is to have a shelter of his own. Such unlawful constructions are definitely against the public interest and hazardous to the safety of occupiers and residents of multistoreyed buildings. To some extent both parties can be said to be equally responsible for this. Still the greater loss would be of those flat owners whose flats are to be demolished as compared to the builder."

A somewhat similar question was recently considered in *Dipak Kumar Mukherjee v. Kolkata Municipal Corporation and others* (2012) 10 SCALE 29. While setting aside the order of the Division Bench of the Calcutta High Court, this Court referred to the provisions of the Kolkata Municipal Corporation Act, 1980 in the context of construction of additional floors in a residential building in violation of the sanctioned plan and observed:

"What needs to be emphasised is that illegal and unauthorised constructions of buildings and other structure not only violate the municipal laws and the concept of planned development of the particular area but also affect various fundamental and constitutional rights of other persons. The common man feels cheated when he finds that those making illegal and unauthorised constructions are supported by the people entrusted with the duty of preparing and executing master plan/development plan/ zonal plan. The reports of demolition of hutments and jhuggi jhopris belonging to poor and disadvantaged section of the society frequently appear in the print media but one seldom gets to read about demolition of illegally/unauthorisedly constructed multi-storied structure raised by economically

affluent people. The failure of the State apparatus to take prompt action to demolish such illegal constructions has convinced the citizens that planning laws are enforced only against poor and all compromises are made by the State machinery when it is required to deal with those who have money power or unholy nexus with the power corridors."

2. We have prefaced disposal of these matters by taking cognizance of the observations made in the aforementioned judgments because the main question which arises for our consideration is whether the orders passed by Deputy Chief Engineer, Building Proposals (City) of the Mumbai Municipal Corporation (hereinafter referred to as 'the Deputy Chief Engineer') and the Appellate Authority refusing to regularize the illegal constructions made on Plot No.9, Scheme 58, Worli, Mumbai are legally sustainable.

3. At the outset, we would like to observe that by rejecting the prayer for regularization of the floors constructed in wanton violation of the sanctioned plan, the Deputy Chief Engineer and the Appellate Authority have demonstrated their determination to ensure planned development of the commercial capital of the country and the orders passed by them have given a hope to the law abiding citizens that someone in the hierarchy of administration will not allow unscrupulous developers/builders to take law into their hands and get away with it.

4. The Municipal Corporation of Mumbai (for short, 'the Corporation') leased out the plot in question, of which land use was shown in the development plan as 'General Industrial' to M/s. Pure Drinks (hereinafter referred to as, 'the lessee') in January, 1962. The lessee constructed a factory and started manufacturing cold drinks under the brand name 'Campa Cola'. After about 16 years, the lessee engaged an architect for utilizing the land for construction of residential buildings. The architect made an application under Section 337 of the Mumbai Municipal Corporation Act, 1888 (for short, 'the 1888 Act') for sanction of plans of the proposed residential buildings. The

same was rejected by the Planning Authority vide order dated 31.7.1980 on the ground that the required NOCs had not been obtained and the Competent Authority had not given exemption under the Urban Land (Ceiling and Regulation) Act, 1976. Another application made by the architect was rejected by the Planning Authority on similar grounds.

5. In view of the above development, the lessee made an application to the Corporation for change of land use from 'General Industrial' to 'Residential'. The latter forwarded the same to the State Government along with a proposal for modification of the development plan of the area. The State Government accepted the proposal of the Corporation and passed an order dated 31.12.1980 under Section 37(2) of the Maharashtra Regional and Town Planning Act, 1966 (for short, 'the 1966 Act') in respect of 13049 sq. meters leaving the balance 4856 sq. meters for industrial use. This was subject to the condition that development shall be as per the Development Control Rules for Greater Mumbai, 1967 (for short, 'the D.C. Rules') and other relevant statutory provisions. Thereafter, the architect engaged by the lessee submitted revised plans for construction of residential buildings. The Planning Authority granted approval on 8.6.1981 for construction of 6 buildings comprising basement, ground and 5 upper floors. The commencement certificate was issued on 10.6.1981. On 27.6.1981, the Additional Collector and Competent Authority granted permission under Section 22 of the Urban Land (Ceiling and Regulation) Act for demolition of the structure and redevelopment in accordance with the provisions of the D.C. Rules.

6. On 12.8.1981, the lessee executed an Assignment Agreement in favour of P.S.B. Construction Company Limited. Paragraphs 10 and 11 of that agreement read as under:

> "10. The Developer shall construct the said buildings on the said sub-plot in accordance with the approved plan of the said buildings as sanctioned by the Corporation and/

> or in accordance with modifications and/or amendments thereto as may be sanctioned by the Corporation on the application in that behalf being made by the Owner at the instance of the Developer.
>
> 11. The Developer shall also construct the said building on the said sub-plot in accordance with and subject to the conditions stipulated in the letter of Intent dated 27th May 1981 made by the Additional Collector and Competent Authority under the ULC Act or such modifications and/or amendments thereto as may be sanctioned by the Additional Collector and Competent Authority on the application in that behalf being made by the Owner at the instance of the Developer and the sanction under Section 22 under the ULC Act, to be obtained by the Owner after compliance with the conditions in the said Letter of Intent or any modifications and/or amendments thereto as aforesaid and the development control rules of the Corporation and such other rules and regulations as are applicable".

Simultaneously, an irrevocable Power of Attorney was executed by the lessee in favour of the developer, i.e., P.S.B. Construction Company Limited.

7. Similar agreements were executed by the lessee on 20.8.1981 in favour of Mohamed Yusuf Patel son of Abdulla Patel and Mohinuddin son of Tayab Soni. On 16.6.1982, P.S.B. Construction Company Limited entered into an agreement with S/Shri B.K. Gupta, Manmohansingh Bhasin and Mohamed Yusuf Abdullah Patel appointing the latter as promoters of the builders and authorised them to develop one portion of the plot by demolishing the existing structures and constructing building Nos. 1, 3 and 8 in accordance with the sanctioned plan.

8. The architect, who was initially engaged by the lessee, continued to work on behalf of the developers/builders and promoters. The amended plans submitted by him for

construction of 9 buildings with ground and 5 upper floors were also approved vide order dated 2.2.1983.

9. In 1983, the lessee secured permission from the Chief Minister of the State to raise the height of the buildings up to 60 feet. However, the revised plans submitted for construction of separate buildings comprising stilt and 24 upper floors; stilt and 16 upper floors with additional 6th and 7th floor on building No.2 and additional 6th floor on building No.3 were rejected by the Planning Authority vide order dated 6.9.1984.

10. Notwithstanding rejection of the revised building plans, the developers/builders continued to construct the buildings. Therefore, Executive Engineer, A.E. Division of the Corporation issued 'stop work notice' dated 12.11.1984 under Section 354A of the 1888 Act mentioning therein that if the needful is not done, the construction will be forcibly removed. It is a different story that after issuing 'stop work notice', the authorities of the Corporation buckled under pressure from the developers/ builders and turned blind eye to the illegal constructions made between 1984 and 1989. For the sake of reference, notice dated 12.11.1984 is reproduced below:

"MUNICIPAL CORPORATION OF
GREATER BOMBAY
Notice under section 354A of the
Bombay Municipal
Corporation Act 12.11.1984
No.EB/3347/A of 1981

To

Shri Madanjit Singh C.A. Shri Charanjit Singh, Pure Drinks Pvt. Ltd., Plot. No.9 Worli Scheme No.58 B.G. Kher Marg, Worli Bombay-18.

Whereas the erection of a building work as described in section 342 of the above mentioned act is being unlawfully

carried on you at premises NO.C.S.No.868 and 1/868 of Worli situated at plot No.9 Worli Scheme 58 B.G. Kher Marg Worli.

And whereas under section 68 of the said Act the Municipal Commissioner for greater Bombay has duly empowered me to exercise the powers conferred upon him by section 354 A of the said Act. Now I do hereby give you notice that if, after the expiration 24 hours from the service hereof upon you, it is found that the construction of said building work is still being carried on by you, I shall, pursuant to section 354A of the said Act and in exercise of the powers conferred on me as aforesaid, direct that you be removed from the said-premises by police officer.

Work being carried out beyond approved plan in as much as the foundation work of sky scrapper is being lane site incharge plot no.9.

B.G. Kher Marg Worli.
A.E. Division
Executive Engineer
B.P. (City)
Bombay Municipal Corporation"

11. In the interregnum, the lessee and the developers/ builders engaged a new architect, namely, Shri Jayant Tipnis. He submitted another set of plans on 3.6.1985 proposing 7 new buildings and requested for withdrawal of stop work notice. The Planning Authority rejected the new plans on the ground that the construction had been raised in gross violation of the sanctioned plan. Thereupon, Shri Jayant Tipnis sent notice dated 9.8.1985 to the lessee that no work should continue till the amended plans are sanctioned. The Executive Engineer of the Corporation sent letter dated 28.9.1988 to Shri Jayant Tipnis with a copy to the lessee and asked them to inform the developers/builders not to proceed with the work till the stop work notice was withdrawn. In turn, Shri Jayant Tipnis wrote to

the developers/builders that they should not continue the construction. He also informed the Corporation about the intimation sent to the developers/builders and stated that despite intimation they had illegally and unauthorisedly carried out the construction work by utilizing excess Floor Space Index (FSI).

12. In 1994, Shri Jayant Tipnis submitted further amended plans prepared by M/s. Designs Consortium. The Deputy Chief Engineer rejected the new plans by recording the following reasons:

"(1) Advantage of lift, staircase lobby area claimed which is not admissible as per the prevailing rules, regulations and policy.

(2) Flower-beds are not counted in F.S.I. As per then M.C.'s order the same are to be counted in F.S.I. since they are at the same floor level beyond balcony.

(3) Inadequate parking provisions.

(4) Height of towers contravene D.C. Rule (9) provisions.

(5) R.G. is not as per D.C. Rule.

(6) Plot area for the permissible F.S.I. shall be in accordance with the change of user permitted by U.D. Deptt.'s order."

13. On receipt of the letter of rejection, Shri Jayant Tipnis informed the lessee and the developers/builders that in view of the stop work notice, the construction could not have been made in violation of the sanctioned plan and the D.C. Rules. This was incorporated by him in letter No.BC 1414 (C)-91 dated 22.2.2002 sent to the Executive Engineer, Building Proposals (City-I), the relevant portions of which are extracted below:

"Ref.No.BC 1414 (C)-91 22nd February, 2002

The Executive Engineer,
Building Proposals (City-I),
Municipal Corporation of Greater Mumbai,
Byculla,
Mumbai – 400 008.

Sub : Violation of F.S.I. at Campa-cola compound, plot No.9, Worli Scheme No.58, B. G. Kher Marg, Worli, Mumbai – 400 018.

Dear Sir,

We thank for your letter No.EB/3342/GS/A dated 'nil' personally handed over to us 21.2.2002.

Gist of how file/project moved till date is enclosed. There was no correspondence since the last several years. However, there used to be some notice or letter we used to receive from a few members and correspondence of B.Y.Builders Pvt. Ltd. We have time and again informed you that we have informed all the developers/society members, managing bodies upto what level the plans have been sanctioned, what was the stage of construction they have carried out and to the developers of the project. After site visit the summary report was worked out by the Corporation and it was informed to owners M/s. Pure Drinks Pvt. Ltd., copy of which was sent to us. However, how this file moved, summary of which is enclosed which probably would be useful while going through the matter and would also be clear about the stand we have taken.

On a number of occasions we have informed you that all the developers have been informed to stop the work in view of the stop work notice and such copies have been already on record. The developers have almost vanished from the scene and nobody is coming forward to take on the responsibility of the work done by them inspite of our instructions nor the owners have any query. To sum up it

is only interested parties/flat purchasers keep on running here and there for their daily necessities and the matter is reopened after a lapse of few years. We strongly feel that this is a gross violation of Development Control Rules and since the year 1984 the stop work notice is on record. Action under MRTP Act was initiated by you against the developers and the owners but we do not know exactly what happened thereafter.

Sub: Proposed Development at Campa Cola Compound, Plot No.9, Worli Scheme, B.G. Kher Marg, Worli, Mumbai-400018.

1) to 5) xxx xxx xxx

6) By our letter BC 1414 (B)-56 dated 05.01.1990 we addressed to all the Developers stating that the STOP WORK notice issued by the Brihanmumbai Mahanagarpalika against the subject work was not yet withdrawn by them but it was observed they continue to carry out the work of one way or other nature of the proposed structure which was in violation of the directives issued by EEBP (City) to them, for which responsibility solely rested with them. We, therefore, instructed them to stop the work being carried out by them on all fronts forthwith and if however, they continued any work at site henceforth it would be entirely at their risk and consequences and requested them to confirm to us in writing that the work was stopped by them completely immediately on receipt of the said letter. Copy of the said letter was endorsed to EEBP (City) to note the above instructions issued to the Developers.

7) xxx xxx xxx

8) In reply to letter dated 30.03.1992 addressed to the 4 Developers and copy endorsed to us by Campa cola Compound Residents Association, we clarified to them

vide our letter No.BC 1414 (B) 6 dated 10.04.1992 bringing to their notice following facts.

8 b) To the best of our knowledge there was no occupation permission granted by Brihanmumbai Mahanagarpalika for any part of the building except building No. 7A and B in any of the units covered by the said proposal and therefore it was informed that they could not occupy the flats without OCC from the Corporation and requested them to vacate the flats occupied by them without delay and to inform us accordingly.

9) Esha Ekta Apartment Co-operative Housing Society Limited addressed a letter dated 04.08.1994 to EEBP (City) and copy endorsed to us and the Director, Engineering Services and Projects and the Municipal Commissioner, stating that they were members occupying building No. 2 and requiring action against Developers.

10a) The Developers concerned with the said Development were kept fully informed by us about the STOP WORK notice issued on the proposal on 24.11.1986 that no work could be carried out at site. On the very same day of receipt of STOP WORK notice on 24.11.1986 we instructed all the Developers concerned to pay the penalty to BMC and also to stop the work of the project forthwith otherwise the plans would not be processed further with the said authority. On receipt of the EEBP letter dated 02.06.1990, we have issued final instructions to the Developers / Lessee to stop the work on the project forthwith and that the responsibility for such work carried out but not cleared by the said authority would be on them We further stated that we were not aware of any occupation already obtained by Esha Ekta Apartment Cooperative Housing Society and therefore we did not undertake any responsibility for anything contrary to the plans submitted by us to EEBP (City) Office, if found, carried out by the said Society through their Developers.

We clarified that we had not been involved at all by the said Developers and, therefore, did not agree with any of their statement mentioned in the said letter.

12) We have informed all the 3 Developers vide our letter No. BC 1414(B)-77 dated 25.11.1994 intimating that amended plans were not approvable and requesting them to coordinate with us for arranging a joint inventory of the premises and copy of the said letter was endorsed to Dy.C.E. B.P. (City)."

14. It is borne out from the record that even before commencement of the construction, some of the developers/ builders executed agreements with the prospective buyers. A copy of such an agreement signed on 18.7.1985 between P.S.B. Construction Company Limited and Mrs. Manjula Devi, W/o Amar Chand and Amar Chand was placed before the Court on 5.1.2012 by Shri Harish Salve, who had earlier appeared on behalf of respondent No.4, to show that the buyers of the flat were aware that the revised plans submitted by the architect had not been approved by the Planning Authority till the signing of agreement. This is evinced from paragraphs (v), (w), (x) and (a-1) of the agreement, which are extracted below:

"(v) The Builders plan to demolish the present structures standing on the said Plot X and to put up a new multi-storeyed buildings on the said Plot in accordance with the terms of the said Letter of intent dated 27th May 1981 of the Additional Collector and Competent Authority or any modification thereof may be made by him and the permission under Section 22 of the U.L.C. Act that may be granted by him in pursuance thereof.

(w) Building plans got prepared by the Builders for revising the said plans sanctioned by the said corporation for putting up such new multi-storeyed buildings on the said Plot X have been submitted to the said Corporation for approval and sanction.

(x) The Purchaser has taken inspection of the documents of title relating to the said property, the said Notification dated 25th December 1980, the said Letter of intent dated 27th. May 1981, the said Agreements respectively dated 12th August 1981, 20th August 1981, 1st September 1981 and 10th September 1981 and the said Power of Attorney dated 10th September 1981, and the said plans sanctioned by the said Corporation and the revised plans, designs and specifications prepared by the Builders' Architects Messrs. B. K. Gupta and of such other documents as are specified under the Maharashtra Ownership Flats (Regulation of Construction, Management and Transfer) Act, 1963 (which the Purchaser doth hereby confirm)**.**

(a-1) The Purchaser has agreed to acquire from the Builders Flat/Shop No**.**Two on the fifth floor of the Building No.Two and/or covered/open car parking space garage No. NIL in the compound (hereinafter referred to as 'the said Premises') with full notice of the terms and conditions and provisions contained in the documents referred to hereinabove and subject to the terms and conditions hereinafter contained."

15. Similar agreements were executed between the purchasers and the developers/builders. In each of the agreements it was mentioned that the developers/builders had submitted a revised plan for sanction and the purchaser has taken inspection of the documents of title, etc.

16. After executing agreements with the developers/ builders, the prospective buyers formed Cooperative Housing Societies, namely, Esha Ekta Apartments Cooperative Housing Society Limited, Patel Apartments Cooperative Housing Society Limited, Orchid Cooperative Housing Society Limited, B.Y. Apartments Cooperative Housing Society Limited, Midtown Apartments Cooperative Housing Society Limited and Shubh Apartment Cooperative Housing Society Limited

(hereinafter referred to as 'the housing societies').

17. Although the members of the housing societies knew that the construction had been raised in violation of the sanctioned plan and permission for occupation of the buildings had not been issued by the Competent Authority, a large number of them occupied the illegally constructed buildings. After this, the housing societies started litigation in one form or the other. Midtown Apartments Cooperative Housing Society Limited filed Writ Petition No.1141 of 1999 in the Bombay High Court for issue of a direction to the Corporation and its functionaries to supply water to the building occupied by its members. That petition was decided by the Division Bench of the High Court vide order dated 12.7.1999, which reads as under:

"1. The burning issue of non supply of water to the tenements is now satisfactory resolved. We are not in a position to go into the dispute between the Bombay Municipal Corporation and the builder on the issues of FSI violation and the consequent non-granting of Occupation certificate. This is a matter where there is a triangular dispute between the Petitioner-Society the Ist Respondent-Bombay Municipal Corporation and the 4th Respondent-builder.

2. We give liberty to the parties to agitate their rights in an appropriate Court of law and obtain such reliefs as they are entitled to in law. This is not an issue which can be satisfactorily resolved in a writ petition since there appear to be several disputed facts.

3. The 1st Respondent BMC shall non dis-continue the water supply of the Petitioner-Society on the ground that there are outstanding arrears or disputes with the 4th Respondent-builder.

4. The 1st Respondent-BMC shall submit a copy of the bill

for water charges to the petitioner and shall accept payment from it, if offered.

5. The 1st Respondent-BMC is at liberty in take such action as is permissible in as against the Petitioner-Society and the 4th Respondent-builder for recovery of arrears of all other charges which are alleged to be due.

6. The petitioner and/or the 4th Respondent to comply with the requisitions made by the 1st Respondent-BMC, as specified in the Permission Form date 22.06.1990.

7. In view of the above directions, nothing further needs to be done in the matter which is allowed to be withdrawn and dismissed as such with liberty aforesaid."

(Reproduced from the paper book)

18. Thereafter, other housing societies filed Writ Petition Nos. 2402, 2403, 2904, 2949 of 1999 and 1808 of 2000 for grant of similar relief.

19. During the pendency of the writ petitions, Shri Jayant Tipnis submitted application dated 22.2.2002 for regularization of the unauthorized construction by stating that 9292.95 sq. fts. had been consumed over and above the FSI granted for the project and this was done without his knowledge. His proposal was rejected by the Deputy Chief Engineer vide order dated 7.7.2003, which reads as under:

"Dy. Ch. E.B.P. (C)/1627/ Gen Ben
7.7.03
MUNICIPAL CORPORATION OF GREATER MUMBAI
No. EB/3342/GS/A
Shri Jayant C. Tipnis,
Architect,
Sadguru Darshan, 1050,
New Prabhadevi Road,
Mumbai-400 025.

Sub: Proposed development of Plot No.9, Worli Scheme No. 53, CTS No.868, 1/868, Worli Division, B.G. Kher Marg, Mumbai 400 018 Popularly known as Campa Cola compound.

Ref: Your letter addressed to M.C. bearing No.BC-1414 (:'C)-117 dated 02.06.2003

Sir,

By directions, this is to inform you that your request to exempt the area of staircase, lift and lift lobby from F.S.I, computation cannot be acceded to, since the same is not in conformity with the provisions of D.C. Regn. 35 (2)(c). Further, proposal under reference was decided by the Corporation prior to coming into force of D.C. Regn. 1991 and C.C. for the entire work was issued on 08.09.82. The permissible F.S.I, has already been exhausted.

Yours faithfully,
Sd/-
Dy. Chief Engineer,
Building Proposals (City)"

20. Shri Jayant Tipnis challenged the aforesaid order by filing an appeal under Section 47(1) of the 1966 Act and prayed that the Corporation be directed to reconsider the proposal under Development Control Regulations for Greater Mumbai, 1991 (for short, 'the 1991 Regulations') and regularize the FSI consumed in constructing the buildings by charging premium. The Chief Minister of the State, who was also in-charge of the Department of Urban Development, dismissed the appeal vide order dated 4.6.2010, the relevant portions of which are extracted below:

"The statement of residential buildings approved by MCGM on the above plot under reference along with the progress of the work of the buildings constructed is as under :-

Building No.	Approval details as plans dated 2.2.83	Present position
Building No. 1	Basement + stilt + 5 upper floors	No work carried out
Building No.2	Basement + Ground Floor (pt.) + Stilt (pt.) + 5 upper floor	Basement + Stilt + 7 upper floors + 8th upper floor (pt.)
Building No.3	Basement + Stilt (pt.) + Ground Floor (pt.) + 5 upper floors	Basement + Stilt (pt.) + Ground Floor (pt.) + 5 upper floors + 6 upper floor (pt.)
Building No.4	Basement + Stilt (pt.) + Ground Floor (pt.) + 5 upper floors	Basement + Ground Floor (pt.) + 6 upper floors + 7 upper floor (pt.)
Building No.5	Stilt (pt) + Ground Floor (pt.) + 5 upper floors	Stilt + 19 Upper floor + 20th upper floor (pt)
Building No.6	Stilt (pt) + Ground Floor (pt) + 5 upper floors	Ground Floor + 17 upper floors
Building No.7A	Stilt + 5 upper floors	Stilt + 5 upper floors + 6 upper floor (pt.)
Building No.7B	Stilt + 5 upper floors	Stilt + 6 upper floor
Building No. 8	Stilt + 5 upper floors	Work not carried out

Accordingly, MCGM has initiated necessary action as per the provisions of ... M.C. Act. 1888 / MRTP Act, against the Builder / Developer and the same are ... vigorously followed and occupation permission has not been granted to any of the building in the Campa Cola Compound till date.

Architect Shri Jayant Tipnis vide his letter dated 7.6.2002 No. BC / C-92 addressed to the Ex. Eng. (B.P.) City has stated that roughly 9292.95 sq.ft. of area has been consumer over and above the FSI granted to the said project and almost the area of 14148.22 sq.ft. has been consumed in the staircase lift and lift lobby which if made available to the complex on payment of premium, it is possible that the whole complex as is and as built up could be regularized on the payment of concessional penalty, as the builders who have developed this property are not in developers and he can not be blamed and / or held responsible for the same. Balance FSI from their remaining part shall not be utilized to regularize this unauthorized constructions. The unauthorized construction carried out by the Developer is not as per the provisions of the Development Control Regulations-1967. The MCGM has given the permission prior to 1991. Therefore, Development Control Regulations, 1991 will not be applicable and accordingly, the unauthorized construction cannot be regularized. Hence, appeal may be rejected.

In this matter, Hon'ble High Court passed an order dated 17.03.2010. In this order, Hon'ble High Court gave directives to the Minister (UDD) to hear and dispose off the appeal under Section 47 filed by the applicant within 12 weeks from the date of the Order.

It is pertinent to note here that Appellant Architect Shri Jayant Tipnis submitted the amended plans BC / 1414 C-95 dated 3.7.2002 by claiming the area of staircase, lift and lift lobby area free of FSI as per the Clause 35 (2) of Development Control Regulations 1991 to MCGM. However the said plan was rejected by MCGM vide letter No. Dy. Ch. Engineer (B.P.) City / 2186 / Gen. dated 6.8.2002 stating therein that the amended plans submitted cannot be considered for approval as the area of staircase lift, lift lobby can not be exempted on FSI computation.

Since the proposal under reference was approved and CCI was also issued prior to DCR (1991) coming into force i.e. 25.3.1991 and the same was already intimated to the applicant vide MCGM's letter dated 19.11.1994.

Considering the Hon'ble High Court's order dated 17.03.2010 and the representation made by appellant, MCGM & M/s Pure Drinks P. Ltd. and considering the plot under reference is situated in CRZ area, exemption under Section 35 (2)(c) of the Development Control Regulations, 1991 for the area of staircase, lift, lift lobby from floor space index computation cannot be granted. Appeal is not maintainable. Since the land belongs to MCGM, for the issues other than FSI appellant may approach MCGM separately."

21. When the writ petitions filed by the housing societies and their members for issue of direction to the Corporation to supply water to their buildings were taken up for hearing, the Division Bench of the High Court noted that even though the buildings were constructed in violation of the sanctioned plan, the Corporation had not taken action against those responsible for such construction and passed order dated 11.10.2005 for appearance of Additional Commissioner of the Corporation. The relevant portions of that order are extracted below:

"In the course of the argument, it was revealed by the Advocate for the Corporation on taking instructions that original licence for construction was granted in favour of four persons viz. Shri Manjit Singh Madanjit Singh, Power of Attorney Holder of S. Karanjit Singh, Chief Executive Officer of Pure Drink Pvt.Ltd., Shri Ishwarsingh Chawla of PSD Construction Pvt.Ltd., Shri D.K.Gupta of D.Y. Builders Pvt.Ltd. and Abdula Yusuf Patel. Pursuant to the illegality in construction having been found, notices were issued under Section 53-1 of the M.R.T.P. Act on 20th February, 2002 to all the four persons mentioned above. Thereafter, sanction was granted for prosecution of all the four persons

and decision in that regard was taken on 19th May, 2003 by the Executive Engineer (Building Proposal), CT/1 of the Corporation. Meanwhile, the panchanama of the illegal construction was carried out on 13th November, 2002. Besides, the prosecution was launched against builder, developer and all the occupants of the building and they were convicted on admission of guilt and sentenced by way of imposition of fine from Rs.600/- to Rs.2000/- imposed by the Magistrate. Apart from the above actions, no other action has been taken by the Corporation in relation to the illegal construction. The affidavit-in-reply filed on behalf of the Corporation before issuance of rule in the petition by Shri Kurmi Deonath Sitaram, Executive Engineer, DP(City)(I) discloses that initial approval was granted for six wings consisting of ground plus five upper floors and it was issued on 9th June, 1981 and Commencement Certificate was granted on 10th June, 1981. The amendment plans were approved for nine wings of ground plus five upper floors on 2nd February, 1983. Thereafter, amendment plans proposing stilt plus twenty-four floors and stilt plus sixteen floors with additional sixth and seventh floor to building nos.2 and 4 and additional sixth floor for the part of building no.3 were submitted but they were refused on 6th September, 1984. Inspite of that, the constructive activities continued and the work beyond the approved plans was carried out, and therefore Stop Work notice was issued under Section 353-A of the MMC Act on 12th November, 1984. However, the work continued. Again new architect submitted further plan with a fresh notice under Section 337. The same was rejected by the Corporation.

The affidavit also discloses the various illegalities committed in the course of construction of the buildings which include construction of additional floors without approval, increase in the height of the building and carrying of construction beyond the permissible limits of FSI, apart

from other illegalities. The affidavit, however, does not disclose as to what action, if any, for prohibiting the developer and the owner from proceeding with the construction, was taken as wall as what action was taken after illegal construction having been carried out, apart from launching prosecution and issuance of notices. Even in the course of the argument, learned Advocate appearing for the Corporation could not satisfy us about any concrete action having been taken by the Corporation for stoppage of illegal construction or demolition of illegal construction. In fact, the arguments in the matter were heard partly on 27th September and again yesterday and as well as today. On the very first day of the argument, it was orally informed by the learned Advocate for the Corporation that he would ensure the presence of the officer of the Corporation to assist him in order to enable him to give correct detail information in the matter. Inspite the officer being present, we are not able to get the detail information regarding the action taken by the Corporation as also the detail description of the illegalities committed by the builder and any other persons on his behalf in the matter. It is to be noted that undisputedly the records disclose some illegalities in the matter of construction carried out since the year 1984 onwards. Inspite of affidavit having been filed in the year 2000, the Corporation has not explained the reason for failure on its part to take appropriate action against the illegal construction and even today. Apart from being assisted by the officer of the Corporation, the Advocate appearing for the Corporation is unable to disclose the reason for the same. We find it necessary to issue notice to the Additional Commissioner to appear in person before us on Friday i.e. 14th October, 2005 at 11.00 a.m. to explain the same alongwith all records in the matter, as it is informed by the Advocate for the Corporation that Commissioner is out of India."

22. On the next date of hearing, the Commissioner of the

Corporation appeared before the High Court and gave an assurance that necessary steps will be taken in accordance with law within a period of two months. Thereafter, the Corporation issued notices dated 11.11.2005, 19.11.2005 and 5.12.2005 under Section 351 of the 1888 Act giving details of the illegal structures proposed to be demolished. The housing societies submitted their respective replies which were rejected by the Corporation vide order dated 3/8.12.2005.

23. Faced with the threat of demolition of the buildings, the housing societies and some of their members filed Long Cause Suits for quashing the notices issued under Section 351 of the 1888 Act and order dated 3/8.12.2005. They pleaded that the buyers of the flats were not aware that the buildings had been constructed in violation of the sanctioned plan. They also filed applications for restraining the Corporation from demolishing the illegal portions of the buildings. Initially, the trial Court stayed the demolition of the illegal construction but, after hearing the parties, the applications for temporary injunction were dismissed on the premise that the developers/builders had constructed a number of floors without obtaining permission from the Planning Authority, that too, despite the stop work notice issued under the 1888 Act and that the application made for regularization of the illegal construction had been rejected by the Corporation. The trial Court rejected the contention of the members of the housing societies that they had purchased the flats without knowing that the same were illegally constructed by the developers/builders. The trial Court noted that the architect had repeatedly told the developers/builders that construction of buildings beyond the sanctioned plan was illegal and the members of the housing societies were very much aware of this fact.

24. The appeals filed by the housing societies and their members were dismissed by the learned Single Judge of the Bombay High Court, who agreed with the trial Court that members of the housing societies were in know of the fact that

the flats occupied by them had been constructed in violation of the sanctioned plan.

25. The housing societies and their members challenged the order of the High Court in Special Leave Petition (C) Nos. 33471, 33601, 33940, 35402 and 35324 of 2011. After hearing the counsel for the parties at length, this Court expressed the view that the special leave petitions are liable to be dismissed. However, keeping in view the submission of the learned counsel that demolition of the illegal and unauthorized construction would adversely affect the flat buyers and their families and the writ petition filed by them for regularization of the disputed construction was pending before the High Court, it was considered appropriate to transfer the writ petition to this Court. Accordingly, order dated 29.2.2012 was passed, paragraphs 16 to 19 of which are reproduced below:

> "16. In these cases, the trial Court and the High Court have, after threadbare analysis of the pleadings of the parties and the documents filed by them concurrently held that the buildings in question were constructed in violation of the sanctioned plans and that the flat buyers do not have the *locus* to complain against the action taken by the Corporation under Section 351 of 1888 Act. Both, the trial Court and the High Court have assigned detailed reasons for declining the petitioners' prayer for temporary injunction and we do not find any valid ground or justification to take a different view in the matter.
>
> 17. The submission of Dr. Abhishek Manu Singhvi that the constructed area should be measured with reference to the total area of the plot cannot be accepted for the simple reason that the State Government had sanctioned change of land use only in respect of 13049.45 sq. meters.
>
> 18. In view of the above, we may have dismissed the special leave petitions and allowed the Corporation to take action in furtherance of notices dated 19.11.2005 and

orders dated 3/8.12.2005, but keeping in view the fact that the flat buyers and their families are residing in the buildings in question for the last more than one decade, we feel that it will be in the interest of justice that the issue relating to the petitioners' plea for regularization should be considered by this Court at the earliest so that they may finally know their fate.

19. We, therefore, direct the petitioners to furnish the particulars of the writ petitions filed for regularization of the construction which are pending before the High Court. The needful be done within a period of two weeks from today. Within this period of two weeks, the petitioners shall also furnish the particulars and details of the developers from whom the members of the societies had purchased the flats. List the cases on 16th March, 2012 (Friday)."

26. In compliance of the direction issued by this Court, learned counsel for the petitioners informed that Writ Petition Nos.6550/2010 filed for regularization of the disputed construction is pending before the High Court. They also furnished the particulars of the developers/builders from whom members of the housing societies are said to have purchased the flats. Thereafter, this Court *suo motu* ordered transfer of the writ petition pending before the Bombay High Court and impleadment of the developers/builders with a direction that notice be issued to them.

27. The record received from the Bombay High Court revealed that Writ Petition No.6550/2010 was filed by Campa Cola Residents Association, which is said to have been registered on 3.2.1992 and of which the residents of the six housing societies are members, and its Secretary - Shri Rohit Malhotra for quashing orders dated 7.7.2003 passed by the Deputy Chief Engineer and 4.6.2010 passed by the Appellate Authority as also the notices issued under Section 351 of the 1888 Act with a further prayer for issue of a mandamus to the Corporation to regularize the disputed constructions.

28. The writ petitioners have pleaded that the flat buyers should not be penalized for the illegalities committed by the lessee and developers/builders in connivance with the officers of the Corporation. According to the petitioners, the purchasers of the flat were not aware of the fact that even though the Planning Authority had not sanctioned the revised plans, the developers/builders constructed additional floors and utilized the FSI far in excess of what is permitted by the 1888 Act and the D.C. Rules.

29. The lessee and respondent No.4 have filed separate counter affidavit. Their stand is that the purchasers of the flat cannot plead innocent ignorance because they were very much aware of the fact that the revised plans submitted by the developers/builders had not been sanctioned by the Planning Authority and also that construction had been made despite the stop work notice issued by the Corporation. It is also the case of the lessee that while executing Assignment Agreement, it had made it clear to the developers/builders that they must raise construction strictly in consonance with the sanctioned plan. On its part, respondent No.4 has pleaded that it had purchased the remaining portion of the plot in question by paying a huge amount of Rs.30 crores and the petitioners have nothing to do with that portion of the plot.

30. Shri Ravi Shankar Prasad, learned senior counsel appearing for the petitioners in the transferred case argued that the order passed by the Deputy Chief Engineer and the Appellant Authority are liable to be quashed because neither of them applied mind on the petitioners' prayer for regularization. Learned senior counsel laid considerable emphasis on the fact that the members of the housing societies were not aware of the illegal nature of construction made by the developers/builders and argued that the innocent buyers should not be penalized for the misadventure of the lessee and the developers/builders. Shri Prasad read out portions of agreement dated 10.6.1981 executed between the lessee and the developers/builders and sample of the agreement entered

into between the developers/builders and the flat buyers to show that the latter were not apprised of the fact that some floors of the buildings were constructed in violation of the sanctioned plan and submitted that the Corporation cannot take advantage of its own wrong of not taking any action against the lessee and the developers/builders, who are solely responsible for constructing the buildings in violation of the sanctioned plans. He then relied upon the 1991 Regulations and argued that the Corporation should be directed to regularize the additional FSI by charging appropriate penalty. Shri Prasad also referred to Circular No.CHE/2005/DP/GEN dated 4.2.2011 issued by the Corporation for regularization of the illegal construction by charging penalty and submitted that this Court may exercise power under Article 142 of the Constitution for directing regularization of the disputed construction else the flat buyers will be deprived of the only shelter available to them.

31. Dr. A. M. Singhvi, learned senior counsel appearing for some of the housing societies and their members emphasized that the flat buyers should not be made victim of the illegalities committed by the lessee in collusion and connivance with the developers/builders. He argued that the Corporation cannot take advantage of its own wrong, i.e., failure to take prompt steps to stop the illegal construction. Learned senior counsel then referred to the provisions of the Maharashtra Ownership Flats (Regulation of the Promotion of Construction, Sale, Management and Transfer) Act, 1963 (for short, 'the 1963 Act') and argued that the developers/builders and promoters should be held liable for acting in violation of the sanctioned plans but the disputed construction should be regularized by invoking the provisions of the 1991 Regulations.

32. Learned Attorney General referred to Sections 44, 45, 47, 52 and 53 of the 1966 Act and argued that the extra floors constructed by the developers/builders cannot be regularized because that would tantamount to violation of the D.C. Rules. He further argued that the Deputy Chief Engineer and the

Appellate Authority did not commit any error by refusing to entertain the prayer made by the architect of the lessee for regularization of the buildings because the same fall within the CRZ area. He relied upon the judgment in Suresh Estates Private Limited v. Municipal Corporation of Greater Mumbai (2007) 14 SCC 439 and argued that the petitioners cannot rely upon the 1991 Regulations for seeking regularization of the illegally constructed floors.

33. Shri C.U. Singh, learned senior counsel appearing for the lessee and Shri Dave, learned senior counsel for respondent No.4 relied upon the sanction accorded by the State Government vide order dated 31.12.1980 for change of land use subject to the condition of compliance with relevant statutory provisions including the D.C. Rules and argued that the appellants do not have the locus to challenge the action taken by the Corporation for demolition of the illegal and unauthorized construction or seek regularization thereof, more so, because even before commencement of the construction, the flat buyers knew that the Planning Authority had not sanctioned the revised plans submitted by the developers/builders through their architect.

34. We have considered the respective arguments/submissions. The first question which arises for consideration in the transferred case is whether the writ petitioners are entitled to seek regularization of the illegal and unauthorized construction made by the developers/builders. At the cost of repetition, it will be apposite to note that the Deputy Chief Engineer had rejected the request made by the architect for exemption of the area of staircase, lift and lift lobby from FSI by observing that the same is not in conformity with Clause 35(2)(c) of the 1991 Regulations because the Corporation had decided the proposal prior to coming into force of those regulations and the permissible FSI had already been exhausted. The Appellate Authority agreed with the Deputy Chief Engineer that the 1991 Regulations cannot be invoked

for regularization of the disputed construction because the same were enforced much after rejection of the amended plans and the plot in question is situated in CRZ area.

35. In our view, the reasons assigned by the Deputy Chief Engineer and the Appellate Authority are in consonance with the law laid down by this Court in Suresh Estates Private Limited v. Municipal Corporation of Greater Mumbai (supra). The facts of that case were that after purchasing a plot measuring 8983 sq. mtrs. situated at Dr.Babasaheb Jaykar Marg, appellant Nos. 1 and 2 submitted plans to develop the same by constructing a luxury hotel in terms of the D.C. Rules. In the application, the appellants mentioned that they are entitled to additional FSI as per Rule 10(2) of the D.C Rules. The Corporation made a recommendation to the State Government that in view of the CRZ notification and the D.C. Rules, additional FSI be granted to the appellants. The Ministry of Environment and Forest sent communication dated 18.8.2006 to the Principal Secretary, Urban Development Department, Government of Maharashtra clarifying that the D.C. Rules, which existed on 19.2.1991 would apply to the areas falling within the CRZ notification and the word 'existing' means the rules which prevailed on 19.2.1991. It was also mentioned that the draft regulations of 1989, which came into force on 20.2.1991 would not apply. At that stage, the appellants filed a writ petition before the High Court with the complaint that the Corporation had not communicated its decision within 60 days. The same was disposed of by the High Court with a direction to the State Government to decide the application of the appellants within six weeks. Before this Court, it was argued on behalf of the Corporation that the D.C. Rules would not apply to the development permission sought by the appellants and the 1991 Regulations are applicable in the matter. According to the Corporation, the 1991 Regulations do not provide for additional FSI for the proposed hotel project. It was further argued that the restrictions contained in the CRZ notification will be attracted because the plot is situated in CRZ area. This Court noted that

the 1991 Regulations were notified on 20.2.1991 and came into force on 25.3.1991 whereas CRZ notification was issued on 2.2.1991 and observed:

> "The word "existing" as employed in the CRZ notification means the town and country planning regulations in force as on 19-2-1991. If it had been the intention that the town and country planning regulations as in force on the date of the grant of permission for building would apply to the building activity, it would have been so specified. It is well to remember that CRZ notification refers also to structures which were in existence on the date of the notification. What is stressed by the notification is that irrespective of what local town and country planning regulations may provide in future the building activity permitted under the notification shall be frozen to the laws and norms existing on the date of the notification.
>
> On 2-2-1991 when the CRZ notification was issued, the only building regulations that were existing in city of Mumbai, were the DC Rules, 1967. In view of the contents of CRZ II notification issued under the provisions of the Environment (Protection) Act which has the effect of prevailing over the provisions of other Acts, the application submitted by the appellants to develop the plot belonging to them would be governed by the provisions of the DC Rules, 1967 and not by the draft development regulations of 1989 which came into force on 20-2-1991 in the form of the Development Control Regulations for Greater Bombay, 1991.
>
> The argument that in view of the provisions of Section 46 of the Town Planning Act, 1966, the Planning Authority has to take into consideration the draft regulations of 1989 and, therefore, the appellants would not be entitled to additional FSI is devoid of merits.
>
> Section 3 of the Environment (Protection) Act, 1986 inter

alia provides that the provisions of the Act and any order or notification issued under the said Act will prevail over the provisions of any other law.

The phrase "any other law" will also include the MRTP Act, 1966. As noticed earlier the Notification dated 19-2-1991 issued under the provisions of the Environment (Protection) Act, 1986 freezes the building activity in an area falling within CRZ II to the law which was prevalent and in force as on 19-2-1991. The draft regulations of 1989 would therefore not apply as they were not existing law in force and prevalent as on 19-2-1991.

In view of the peculiar circumstances obtaining in the instant case, the Court is of the opinion that Section 46 of the MRTP Act, 1966 would not apply to the facts of the instant case. Further, when the sanctioned DC Regulations for Greater Bombay, 1991 do not apply to areas covered within CRZ II, since those Regulations came into force with effect from 25-3-1991, its previous draft also cannot apply. The draft published is to be taken into consideration so that the development plan is advanced and not thwarted. The draft development plan was capable of being sanctioned, but when the final development plan is not applicable, its draft would equally not apply as there is no question of that plan being thwarted at all. As far as development in the area covered by CRZ II is concerned, one will have to proceed on the footing that the draft plan after CRZ notification never existed. Even otherwise what is envisaged under Section 46 of the MRTP Act is due regard to draft plan only if there is no final plan. The DC Rules of 1967 were in existence as on 19-2-1991 and therefore the plan prepared thereunder would govern the case.

The draft regulations of 1989 were not in force as on 19-2-1991 and, therefore, would not apply to the plot in question. What is emphasised in Section 46 of the MRTP

Act, 1966 is that the Planning Authority should have due regard to the draft rules (*sic* regulations). The legislature has not used the phrase "must have regard" or "shall have regard". Municipal Corporation of Greater Mumbai which is the Planning Authority had given due regard to the draft DC Regulations of 1989 in the light of CRZ notification and recommended to the Government to grant additional FSI of 3.73 times permissible as per the Development Control Rules, 1967 over and above 1.33 permissible, to the appellants. Having regard to the facts of the case this Court is of the opinion that the contention that the Planning Authority has to take into consideration the draft regulations of 1989 and, therefore, the appellants would not be entitled to additional FSI, cannot be accepted and is hereby rejected."

(Emphasis supplied)

36. In view of the aforesaid judgment of the three Judge Bench, it must be held that the Appellate Authority had rightly declined to invoke the 1991 Regulations for entertaining the prayer made by the architect Shri Jayant Tipnis for regularization of the constructions made in violation of the sanctioned plan.

37. The argument of Shri Prasad and Dr. Singhvi that the flat buyers should not be penalized for the illegality committed by the lessee and the developers/builders in raising construction in violation of the sanctioned plan sounds attractive in the first blush but on a closer scrutiny, we do not find any merit in the same. Admittedly, the flat buyers had entered into agreements with the developers/builders much before commencement of the construction. They were aware of the fact that the revised plans submitted by the architect had not been approved by the Planning Authority and the developers/builders had foretold them about the consequence of rejection of the revised plans. Therefore, there is no escape from the conclusion that the flat buyers had consciously occupied the flats illegally constructed by the developers/builders. In this

scenario, the only remedy available to them is to sue the lessee and the developer/builder for return of the money and/or for damages and they cannot seek a direction for regularization of the illegal and unauthorized construction made by the developers/builders.

38. We shall now notice the provisions of the 1966 Act. Section 44(1) of that Act postulates making of an application to the Planning Authority by any person intending to carry out any development on any land. Such an application is required to be made in the prescribed form incorporating therein the relevant particulars and must be accompanied by such documents, as may be prescribed. This requirement is not applicable if the Central or State Government or local authority intends to carry out any development on any land. Similarly, a person intending to execute a Special Township Project on any land is not required to make an application under Section 44(1). Instead, he has to make an application to the State Government. Section 45 postulates grant or refusal of permission. In terms of Section 45(1), the Planning Authority is empowered to grant permission without any condition or with such general or special conditions which may be imposed with the previous approval of the State Government. It is also open to the Planning Authority to refuse the permission. As per Section 45(2) the permission granted under sub-section (1), with or without conditions, shall be contained in a commencement certificate in the prescribed form. Section 45(3) mandates that the order passed by the Planning Authority granting or refusing permission shall state the grounds for its decision. Section 45(5) contains a deeming provision and lays down that if the Planning Authority does not communicate its decision within 60 days from the date of receipt of application, or within 60 days from the date of receipt of reply from the applicant in respect of any requisition made by the Planning Authority, then such permission shall be deemed to have been granted on the date immediately following the date of expiry of 60 days. However, the deemed permission is subject to the rider contained in the

first proviso to Section 45(5) that the development proposal is in conformity with the relevant Development Control Regulations framed under the 1966 Act or bye-laws or regulations framed in that behalf under any law for the time being in force and the same is not violative of the provisions of any draft or final plan or proposals published by means of notice, submitted for sanction under the Act. The second proviso to this sub-section lays down that any development carried out pursuant to such deemed permission, which is in contravention of the provisions of the first proviso, shall be deemed to be an unauthorized development for the purposes of Sections 52 to 57. Section 52 prescribes the penalty for unauthorized development or for use of land otherwise than in conformity with development plan. Any person who commences, undertakes or carries out development, or institutes or changes the use of any land without obtaining the required permission or acts in violation of the permission originally granted or duly modified is liable to be punished with imprisonment for a term of at least one month, which may extend to three years. He is also liable to pay fine of at least Rs.2,000/-, which may extend to Rs. 5,000/-. In case of continuing offence, an additional daily fine of Rs.200/- is payable. Any person who continues to use or allows the use of any land or building in contravention of the provisions of a development plan without being allowed to do so under Section 45 or 47, or where the continuance of such use has been allowed under that section, continues such use after expiry of the period for which the use has been allowed, or in violation of the terms and conditions under which the continuance of such use is allowed is liable to pay fine which may extend to Rs.5,000/-. In the case of a continuing offence, further fine of Rs.100/- per day can be imposed. Section 53 empowers the Planning Authority to require the wrongdoer to remove unauthorized development. Of course, this power can be exercised only after following the rules of natural justice, as engrafted in sub-sections (1) and (2) of Section 53. By virtue of Section 53(3), any person to whom notice under sub-section (2) has been given can apply for permission under Section 44

for retention of any building or works or for the continuance of any use of the land pending final determination or withdrawal of the application. If the permission applied for is granted, the notice issued under Section 53(2) stands automatically withdrawn. If, however, the permission is not granted, the notice becomes effective. If the person to whom notice under Section 53(2) is given or the application, if any, made by him is not entertained, then the Planning Authority can prosecute the owner for not complying with the notice. Likewise, if the notice requires the demolition or alteration of any building or works or carrying out of any building or other operation, then the Planning Authority is free to take steps for demolition, etc., and recover the expenses incurred in this behalf from the owner as arrears of land revenue. Section 54 empowers the Planning Authority to stop unauthorized development. Section 55 enables the Planning Authority to remove or discontinue unauthorized temporary development summarily. Section 56 empowers the Planning Authority to take various steps in the interest of proper planning of particular areas including the amenities contemplated by the development plan. These steps include discontinuance of any use of land or alteration or removal of any building or work.

39. An analysis of the above reproduced provisions makes it clear that any person who undertakes or carries out development or changes the use of land without permission of the Planning Authority is liable to be punished with imprisonment. At the same time, the Planning Authority is empowered to require the owner to restore the land to its original condition as it existed before the development work was undertaken. The scheme of these provisions do not mandate regularization of construction made without obtaining the required permission or in violation thereof.

40. Circular dated 4.2.2011, on which reliance was placed by Shri Prasad, cannot be invoked for entertaining the prayer for regularization. That circular only contains the procedure for

regularization of unauthorized works/structures. It neither deals with the issues relating to entitlement of the applicant to seek regularization nor lays down that the Planning Authority can regularize illegal construction even after dismissal of the appeal filed under Section 47 of the 1966 Act. Therefore, the procedure laid down in Circular dated 4.2.2011 is of no avail to the flat buyers.

41. Though the argument of Dr. Singhvi that the developers / builders / promoters are responsible for the illegal construction finds support from the provisions of the 1963 Act, but that does not help the housing societies and their members because there is no provision under that Act for condonation of illegal/ unauthorized construction by the developers/builders and promoters or regularization of such construction. Section 2(c) of that Act defines the term 'promoter' in the following words:

> "Section 2(c) "promoter" means a person and includes a partnership firm or a body or association of persons, whether registered or not who constructs or causes to be constructed a block or building of flats, or apartments for the purpose of selling some or all of them to other persons, or to a company, co-operative society or other association of persons, and includes his assignees; and where the person who builds and the person who sells are different persons, the term includes both;"

Section 3 specifies general liabilities of the promoter. Sub-section (1) thereof contains a non-obstante clause and declares that notwithstanding anything in any other law, a promoter who intends to construct or constructs a block or building of flats, all or some of which are to be taken or taken on ownership basis, shall in all transactions with persons intending to take or taking one or more of such flats, be liable to give or produce, or cause to be given or produced, the information and the documents mentioned in the section. Section 3(2) lays down that a promoter, who constructs or intends to construct such block or building of flats, shall –

"(a) make full and true disclosure of the nature of his title to the land on which the flats are constructed, or are to be constructed; such title to the land as aforesaid having been duly certified by an Attorney-at-law, or by an Advocate of not less than three years standing, and having entered in the Property card or extract of Village Forms V or VII and XII or any other relevant revenue record;

(b) make full and true disclosure of all encumbrances on such land, including any right, title, interest or claim of any party in or over such land;

(c) give inspection on seven days' notice or demand, of the plans and specifications of the building built or to be built on the land; such plans and specifications, having been approved by the local authority which he is required so to do under any law for the time being in force;

(d) disclose the nature of fixtures, fittings and amenities (including the provision for one or more lifts) provided or to be provided;

(e) disclose on reasonable notice or demand if the promoter is himself the builder, the prescribed particulars as respect the design and the materials to be used in the construction of the building, and if the promoter is not himself the builder disclose, on such notice or demand, all agreements (and where there is no written agreement, the details of all agreements) entered into by him with the architects and contractors regarding the design, materials and construction of the buildings;

(f) specify in writing the date by which possession of the flat is to be handed over (and he shall hand over such possession accordingly);

(g) prepare and maintain a list of flats with their numbers already taken or agreed to be taken, and the names and addresses of the parties and the price charged or agreed

to be charged therefor, and the terms and conditions if any on which the flats are taken or agreed to be taken;

(h) state in writing, the precise nature of the organisation of persons to be constituted and to which title is to be passed, and the terms and conditions governing such organisation of persons who have taken or are to take the flats;

(i) not allow persons to enter into possession until a completion certificate where such certificate is required to be given under any law, is duly given by the local authority (and no person shall take possession of a flat until such completion certificate has been duly given by the local authority);

(j) make a full and true disclosure of all outgoings (including ground rent, if any, municipal or other local taxes, taxes on income, water charges and electricity charges, revenue assessment, interest on any mortgage or other encumbrances, if any);

(k) make a full and true disclosure of such other information and document; in such a manner as may be prescribed; and give on demand true copies of such of the documents referred to in any of the clauses of this sub-section as may be prescribed at a reasonable charge therefor;

(l) display or keep all the documents, plans or specifications (or copies thereof) referred to in clauses (a), (b) and (c), at the site and permit inspection thereof to persons intending to take or taking one or more flats;

(m) when the flats are advertised for sale, disclose inter alia in the advertisement the following particulars, namely: -

(i) the extent of the carpet area of the flat including the area of the balconies which should be shown

separately;

(ii) the price of the flat including the proportionate price of the common areas and facilities which should be shown separately, to be paid by the purchaser of flat; and the intervals at which the installments thereof may be paid;

(iii) the nature, extent and description of the common areas and facilities; and

(iv) the nature, extent and description of limited common areas and facilities, if any.

(n) sell flat on basis of carpet area only:

Provided that, the promoter may separately charge for the common areas and facilities in proportion 'to the carpet area of the flat'.

Explanation – For the purposes of this clause, the carpet area of the flat shall include the area of the balcony of such flat."

Section 4(1) also contains a non-obstante clause and lays down that a promoter who intends to construct or constructs a block or building of flats shall, before accepting any money as advance payment or deposit, which shall not be more than 20 per cent of the sale price, enter into a written agreement for sale with the buyer. Section 4(1A) specifies the particulars to be included in such agreement and the documents which must form part of it. Section 4(2) casts a duty on the promoter to get the agreement registered in accordance with the provisions of the Registration Act, 1908. Section 7 contains a prohibition against alterations or additions in the plans and specification without the consent of the persons who have agreed to take the flats. The promoter is also required to rectify the defects noticed within three years. Section 7(2) casts a duty on the promoter to construct and complete the building in accordance

with the plans and specifications. Section 13 postulates punishment to any promoter who is found guilty of violating the provisions contained in Sections 3, 4, 5 (except sub-section (2)) and 10 and 11.

42. Rule 3 of the Maharashtra Ownership Flats (Regulations of the Promotion of Construction, etc.) Rules, 1964 lays down the manner of making disclosure by the promoter to the flat buyers. Rule 5 specifies the particulars to be incorporated in the agreement required to be entered into between the promoter and the flat purchaser. Form V appended to the rules contains the model form of agreement to be entered into between promoter and flat purchaser.

43. The above noted provisions were interpreted by this Court in *Jayantilal Investments v. Madhuvihar Cooperative Housing Society* (2007) 9 SCC 220. After noticing the relevant statutory provisions the two Judge Bench held:

"Reading the above provisions of MOFA, we are required to balance the rights of the promoter to make alterations or additions in the structure of the building in accordance with the layout plan on the one hand vis-à-vis his obligations to form the society and convey the right, title and interest in the property to that society. The obligation of the promoter under MOFA to make true and full disclosure to the flat takers remains unfettered even after the inclusion of Section 7-A in MOFA. That obligation remains unfettered even after the amendment made in Section 7(1)(ii) of MOFA. That obligation is strengthened by insertion of sub-section (1-A) in Section 4 of MOFA by Maharashtra Amendment Act 36 of 1986. Therefore, every agreement between the promoter and the flat taker shall comply with the prescribed Form V. It may be noted that, in that prescribed form, there is an explanatory note which inter alia states that clauses 3 and 4 shall be statutory and shall be retained. It shows the intention of the legislature. Note 1 clarifies that a model form of agreement has been

prescribed which could be modified and adapted in each case depending upon the facts and circumstances of each case but, in any event, certain clauses including clauses 3 and 4 shall be treated as statutory and mandatory and shall be retained in each and every individual agreements between the promoter and the flat taker. Clauses 3 and 4 of the Form V of the Maharashtra Ownership Flats (Regulation of the Promotion of Construction, etc.) Rules, 1964 are quoted hereinbelow:

> "3. The promoter hereby agrees to observe, perform and comply with all the terms, conditions, stipulations and restrictions, if any, which may have been imposed by the local authority concerned at the time of sanctioning the said plans or thereafter and shall, before handing over possession of the flat to the flat purchaser, obtain from the local authority concerned occupation and/or completion certificates in respect of the flat.
>
> 4. The promoter hereby declares that the floor space index available in respect of the said land is … square metres only and that no part of the said floor space index has been utilised by the promoter elsewhere for any purpose whatsoever. In case the said floor space index has been utilised by the promoter elsewhere, then the promoter shall furnish to the flat purchaser all the detailed particulars in respect of such utilisation of said floor space index by him. In case while developing the said land the promoter has utilised any floor space index of any other land or property by way of floating floor space index, then the particulars of such floor space index shall be disclosed by the promoter to the flat purchaser. The residual FAR (FSI) in the plot or the layout not consumed will be available to the promoter till the registration of the society. Whereas after the registration of the society the residual FAR (FSI), shall be available to the society."

The above clauses 3 and 4 are declared to be statutory and mandatory by the legislature because the promoter is not only obliged statutorily to give the particulars of the land, amenities, facilities, etc., he is also obliged to make full and true disclosure of the development potentiality of the plot which is the subject-matter of the agreement. The promoter is not only required to make disclosure concerning the inherent FSI, he is also required at the stage of layout plan to declare whether the plot in question in future is capable of being loaded with additional FSI/ floating FSI/TDR. In other words, at the time of execution of the agreement with the flat takers the promoter is obliged statutorily to place before the flat takers the entire project/scheme, be it a one-building scheme or multiple number of buildings scheme. Clause 4 shows the effect of the formation of the Society.

In our view, the above condition of true and full disclosure flows from the obligation of the promoter under MOFA vide Sections 3 and 4 and Form V which prescribes the form of agreement to the extent indicated above. This obligation remains unfettered because the concept of developability has to be harmoniously read with the concept of registration of society and conveyance of title. Once the entire project is placed before the flat takers at the time of the agreement, then the promoter is not required to obtain prior consent of the flat takers as long as the builder puts up additional construction in accordance with the layout plan, building rules and Development Control Regulations, etc."

44. It is thus evident that the 1963 Act obligates the promoter to obtain sanctions and approvals from the concerned authority and disclose the same to the flat buyers. The Act also provides for imposition of penalty on the promoters. However,

the provisions contained therein do not entitle the flat buyers to seek a mandamus for regularization of the unauthorized/ illegal construction.

45. In view of the above discussion, we hold that the petitioners in the transferred case have failed to make out a case for directing the respondents to regularize the construction made in violation of the sanctioned plan. Rather, the ratio of the above-noted judgments and, in particular, *Royal Paradise Hotel (P) Ltd. v. State of Haryana and Ors.* (supra) is clearly attracted in the present case. We would like to reiterate that no authority administering municipal laws and other similar laws can encourage violation of the sanctioned plan. The Courts are also expected to refrain from exercising equitable jurisdiction for regularization of illegal and unauthorized constructions else it would encourage violators of the planning laws and destroy the very idea and concept of planned development of urban as well as rural areas.

46. In the result, the appeals and the transferred case are dismissed and it is declared that there is no impediment in the implementation of notices issued by the Corporation under Section 351 of the 1888 Act and order dated 3/8.12.2005 passed by the competent authority. The Corporation is expected to take action in the matter at the earliest.

47. We also direct that the State Government and its functionaries/officers as also the officers/employees of the Corporation shall not put any hurdle or obstacle in the implementation of notices issued under Section 351 of the 1888 Act.

48. It is needless to say that the flat buyers shall be free to avail appropriate remedy against the developers/builders.

B.B.B. Appeals & Transferred Case dismissed.

STATE OF U.P. & ORS.

v.

MAHESH NARAIN ETC.

(Civil Appeal Nos. 2208-2209 of 2013)

MARCH 06, 2013

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

Service Law – Promotion – Eligibility – Held: Respondents were already holding the post of Scientific Officer and hence eligible to the promoted quota of 25% posts of Assistant Director after completion of five years of service as Scientific Officers in terms of the Rules of 1987 – Subsequent amendment of 1990 laying down to fill in all the posts of Assistant Director by direct recruitment could not be applied in case of the respondents – If five years of service is counted from the date of initial promotion (to the post of Scientific Officer) until publication of amended Rules of 1990, the respondents had already completed five years of service on the post of Scientific Officer making them eligible for further promotion of Assistant Director under the 25% promotion quota – Even if respondents had not completed five years of experience on the post of Scientific Officer for any reason, they had the statutory protection and benefit of the proviso to Rule 5 of the 1987 rules which provided that where permanent scientific officers were not available for absorption under the 25% quota, such temporary and officiating personnel were also to be considered for promotion to the said posts who were functioning on permanent basis on the next lower post – U.P. Forensic Science Laboratories Technical Officers Service Rules, 1987 – rr.5 and 16 – U.P. Forensic Science Laboratories Technical Officers' Service (First Amendment) Rules 1990.

Service Law – Service rules – Applicability – Effective date – Held: The rules cannot be made effective from the

date of its preparation but will attain legal sanctity and hence capable of enforcement only when the rules are made effective – The date on which the rules is to be made effective would be the date when the rules are published vide the gazette notification.

Writ petitions were filed by the appellant/State of U.P. against the judgment passed by the State Public Services Tribunal directing the State of U.P. to consider the case of the respondents for promotion on the post of Assistant Director and grant them all consequential benefits if found suitable.

The High Court, by the impugned judgment, dismissed the writ petitions after recording a finding that the Rules of U.P. Forensic Science Laboratories Technical Officers' Service (First Amendment) Rules 1990 dated 15.9.1990 which were published in the U.P. Government Gazette on 20.10.1990 will be deemed to be enforced from the date when they were duly published in the U.P. Government Gazette and not from the date when the rules were prepared and passed by the Government. As a consequence of this finding, it was held by the High Court that the Respondent/claimant-officials were duly eligible and qualified for consideration of their claim for promotion on the posts of Assistant Director Forensic Science as they had acquired the requisite years of experience for promotion by the time the rules were published in the gazette.

Dismissing the appeals, the Court

HELD: 1.1. The respondents were promoted as Scientific Officer on 16.9.1985 which they joined on 20.9.1985. No doubt this promotion order indicated that the promotion was to remain effective only for a period of one year or until the U.P. Forensic Science Laboratories Technical Officers Service Rules, 1987 were

published but thereafter when the Rules of 1987 were finally published, it provided that 25% post of the total posts of promotion were to be filled in from amongst the permanent Scientific Officers having experience of five years of service. Hence if the five years of service is counted from the date of initial promotion until publication of amended Rules of 1990, the respondents had already completed five years of service on the post of Scientific Officer making them eligible for further promotion of Assistant Director under the 25% promotion quota to be filled by the departmental candidates possessing the required experience of five years. The rules cannot be held to be made effective from the date of its preparation but will attain legal sanctity and hence capable of enforcement only when the rules are made effective and the date on which it is to be made effective would obviously be the date when the rules are published vide the gazette notification. [Paras 9, 10] [542-D-G; 543-A-B]

1.2. The Rules of 1987 were amended in the year 1990 which was published in the U.P. Government Gazette dated 20.10.1990 laying down that the subsequent promotion would be made only by direct recruitment. The subsequent amendment of 1990 laying down to fill in all the posts of Assistant Director Forensic Science by direct recruitment could not have been applied in case of the respondents who were already holding the post of Scientific Officer and hence were eligible to the promoted quota of 25% posts of Assistant Director after completion of five years of service as Scientific Officers in terms of the Rules of 1987 and, therefore, their experience of five years on this post could not have been made to go waste on the ground that the amendment came into effect in 1990 making all the posts of Assistant Director to be filled in by direct recruitment. [Paras 11, 13] [544-A-B; 545-B-D]

1.3. Even if it were to be assumed that the respondents had not completed five years of experience on the post of Scientific Officer for any reason whatsoever making them ineligible for consideration of further promotion, they also had the statutory protection and benefit of the proviso to the said Rule 5 which laid down that where permanent scientific officers were not available for absorption under the 25% quota, such temporary and officiating personnel were also to be considered for promotion to the said posts who were functioning on permanent basis on the next lower post. The respondents had already been confirmed on the next lower post when they were promoted to the post of Scientific Officers and as they were entitled to the benefit of the proviso which laid down that even the temporary scientific officers who are permanent on next below post may also be considered for the purpose of promotion, the Respondents had a right to be considered for promotion since they were continuing on the post of Scientific Officer and had completed five years even before the Amended Rules came into effect on 20.10.1990 which laid down that all post of Assistant Directors would be filled by direct recruitment. [Para 15] [545-H; 546-A-E]

Nirmal Chandra Bhattachrjee & Ors. *vs. Union of India & Ors*. **1991 Supp. 2 SCC 363 and** *B.L. Gupta & Anr*. *vs. M.C.D.* **(1998) 9 SCC 223 – relied on.**

Case Law Reference:

1991 Supp. 2 SCC 363	**relied on**	**Para 12**
(1998) 9 SCC 223	**relied on**	**Para 13**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2208-2209 of 2013.

From the Judgment & Order dated 05.09.2007 of the High Court of Judicature at Allahabad Lucknow Bench, Lucknow in

Writ Petition No. 1049 (S/B) of 2007 and Writ Petition No. 1050 (S/B) of 2007.

P.N. Misra, Sanjay Visen, Manoj Kr. Dwivedi, Aviral Shukla, S. Misra, Gunnam Venkateswara Rao for the Appellants.

Mahesh Srivastava (for I.M. Nanavati Associates) for the Respondent.

The Judgment of the Court was delivered by

GYAN SUDHA MISRA, J. 1. Leave granted.

2. The appellant-State of Uttar Pradesh has preferred these appeals against the common judgment and order dated 5.9.2007 passed in two writ petitions bearing Nos. 1049(S/B)/2007 and 1040(S/B)/2007 whereby the Division Bench of the High Court of Allahabad, Lucknow Bench, Lucknow was pleased to dismiss both the writ petitions filed by the appellant/State of U.P. herein.

3. The aforesaid two writ petitions were filed by the appellant/State of U.P. represented by the Department of Forensic Science and the Department of Home assailing the judgment and order of the State Public Services Tribunal, Lucknow (for short 'the Tribunal') and seeking a writ in the nature of certiorari for quashing the judgment and order dated 10.4.2007 passed by the Tribunal whereby the Tribunal was pleased to direct the State of U.P. to consider the case of the respondents for promotion on the post of Assistant Director and grant them all consequential benefits if found suitable. The High Court vide its impugned judgment and order dated 5.9.2007 was pleased to dismiss both the writ petitions preferred by the State of U.P. after recording a finding that the Rules of U.P. Forensic Science Laboratories Technical Officers' Service (First Amendment) Rules 1990 dated 15.9.1990 which were published in the U.P. Government Gazette on 20.10.1990 will

be deemed to be enforced from the date when they were duly published in the U.P. Government Gazette and not from the date when the rules were prepared and passed by the Government. As a consequence of this finding, it was held by the High Court as also the Tribunal that the Respondent/ claimant-officials were duly eligible and qualified for consideration of their claim for promotion on the posts of Assistant Director Forensic Science as they had acquired the requisite years of experience for promotion by the time the rules were published in the gazette.

4. The facts of the case insofar as it is relevant for determining the controversy between the contesting parties indicate that the respondent No. 1 was initially appointed as Junior Chemical Assistant in the Forensic Science Laboratory in the year 1968. The nomenclature of the said post of Junior Chemical Assistant was subsequently changed to Scientific Assistant. The respondent No.1 was promoted to the post of Senior Chemical Assistant in the year 1973 and was further promoted as Scientific Officer on 16.9.1985 and in compliance of the promotion order he joined on the said post on 20.9.1985. The said promotion order was issued with a condition that the order of promotion would be effective for a period of one year or until the service rules were published. The State Government thereafter published the U.P. Forensic Science Laboratories Technical Officers Service Rules 1987 (Shortly referred to as the Rules). Rule 5 of the said rules laid down that 75% posts would be filled through direct recruitment and the remaining 25% posts would be filled by promotion from amongst the permanent scientific officers having 5 years of experience. Besides this, the proviso to the said rule 5 laid down that where permanent scientific officers are not available, such temporary and officiating personnel may also be considered for promotion to the said post as may be permanent on the next lower post. There were 15 posts of Assistant Directors in the Department which were sanctioned by the State when the Rules of 1987 came into force. Rules of 1987 were subsequently amended

by U.P. Forensic Science Laboratories Technical Officers Service (First Amendment) Rules 1990 which was published in the U.P. Government Gazette dated 20.10.1990. In the meantime, the Respondents had already acquired 5 years of experience on the next lower post due to which they had become eligible for promotion to the post of Assistant Director Forensic Science.

5. But in pursuance to the Rules of 1990, the State Government notified 11 vacancies for direct recruitment through a notification published in the Employment News dated 5.1.1995. Since the promotion was not granted to the respondents on the post of Assistant Director even after five years of service against four vacancies which were available to be filled under promotion quota, the respondents filed claim petitions under the U.P. Public Service Tribunal Act (1976). The tribunal allowed the claim petition and directed the authorities to consider the case of the respondents for promotion against the said quota on the post of Assistant Director and to promote them with all consequential benefits including pay and allowances if found suitable.

6. The department Forensic Science of U.P. felt aggrieved by the order of the tribunal and hence filed two writ petitions which were dismissed by the High Court vide the impugned judgment and order dated 5.9.2007 recording a finding that the U.P. Forensic Science Laboratories Technical Officers Service (First Amendment) Rules 1990 dated 15.9.1990 were published in the U.P. Government Gazette on 20.10.1990 and they will be deemed to be enforced from the date when they were duly published in the U.P. Government Gazette and not from the date when the rules were prepared by the State Government as a result of which the Respondents were eligible to be considered for promotion as they had the requisite experience.

7. The appellant/State of U.P. felt aggrieved with the judgment and order passed by the High Court as also the

tribunal and hence has filed these two special leave petitions which arises out of the common judgment and order of the High Court under challenge wherein the principal ground of challenge is that the respondents were not eligible for promotion to the post of Assistant Director under Rules 5 and 16 of the 1987 Rules as they were not possessing five years of experience nor were functioning on permanent post of Scientific Officers. Thus, they were not eligible in terms of Rule 5 and 16 of the 1987 Rules which provided for recruitment to 25% of vacancies to the post of Assistant Director found amongst the permanent scientific officers with five years experience. It was stated that the respondents were promoted to the post of Scientific Officer purely on ad hoc basis on 16.9.1985 and were thereafter promoted on the said post on permanent basis only on 20.3.1989 but the Rules of 1987 were amended on 15.9.1990, whereby all the posts of Assistant Director were to be filled by direct recruitment. In these circumstances, it was submitted that the respondents could not be deemed to have had five years experience to their credit on the permanent post of Scientific Officer as required by Rule 5 of the 1987 Rules so as to be eligible for consideration of promotion on the post of Assistant Director.

8. In response to a show cause notice which was issued to the respondents by this Court, it was contended in sum and substance that the respondents were duly qualified to be promoted as they had already put in five years of service on the next lower post of Scientific Officer to which they were promoted and were, therefore, rightly held eligible to be considered for promotion to the post of Assistant Director. Arguments were also advanced to the effect that the respondents had already completed five years of service in terms of Rule 5 of the 1987 Rules itself which were applicable on the Respondents. It was further elaborated that in view of Rule 5 of the 1987 Rules, the respondents were entitled for consideration for promotion to the posts of Assistant Directors against the quota of 25% of the vacancies reserved for

departmental candidates which were to be filled in by the candidates who were already discharging duties in the department since the amendment of 1990 laying down to fill all the post of Assistant Directors by direct recruitment came into effect on 20.10.1990 by which time the promotion of the Respondent on the post of Scientific Officer already stood confirmed so as to be eligible for consideration of promotion for the post of Assistant Director under the unamended Rules of 1987 and thus would not be affected by the Amended Rules of 1990 laying down to fill all the posts by direct recruitment.

9. In order to ascertain the correctness of the orders passed by the High Court as also the Tribunal, we have carefully examined the contesting claims of the parties. In the process, we noticed that the respondents were initially promoted to the post of Senior Chemical Assistant in the year 1973 and were further promoted as Scientific Officer on 16.9.1985 which they joined on 20.9.1985. It is no doubt true that this promotion order indicated that the promotion was to remain effective only for a period of one year or until the rules of 1987 were published but thereafter when the Rules of 1987 were finally published, it provided that 25% post of the total posts of promotion were to be filled in from amongst the permanent Scientific Officers having experience of five years of service. Hence if the five years of service is counted from the date of initial promotion until publication of amended Rules of 1990, the respondents had already completed five years of service on the post of Scientific Officer making them eligible for further promotion of Assistant Director under the 25% promotion quota to be filled by the departmental candidates possessing the required experience of five years. However, the appellant/State of U.P. contested all through that the experience of the Respondents would be counted not from the date when the rules were published in the Gazette but would be from the date when the rules were under preparation in view of which they did not possess the requisite experience of five years on the post of Scientific Officer.

10. We however have no hesitation in holding that this contention is fit to be rejected outright as the rules cannot be held to be made effective from the date of its preparation but will attain legal sanctity and hence capable of enforcement only when the rules are made effective and the date on which it is to be made effective would obviously be the date when the rules are published vide the gazette notification. In that view of the matter, we find no infirmity in the Respondents plea that they possessed the requisite experience of five years on the post of Scientific Officer as they had already put in five years of service from the publication of the amended Rules of 1990 and, therefore, they were rightly held eligible for consideration of promotion to the next post of Assistant Director. We are thus pleased to approve and uphold the view taken by the High Court on this count.

11. But even if we were to hold that the reasons assigned by the High Court in the impugned judgment suffered from some aberration since the respondents had joined on the post of Scientific Officer in the year 1989 due to which in 1990, they did not acquire the requisite experience, it cannot be overlooked that the respondents had been promoted on the post of Scientific Officers on 16.9.1985 on ad hoc basis which had to remain effective for a period of one year only but it had also ordered that the incumbent would be entitled to continue on the promoted post till the service rules of 1987 were published. Thus the respondents had a right to continue on the promoted posts when the Rules of 1987 were finally published and made effective in 1987 which earmarked that 25% of total posts were to be filled by promotion from amongst the permanent Scientific Officers having experience of five years of service and further added a proviso which laid down that:

> "where permanent Scientific Officers are not available, such temporary and officiating personnel may also be considered for promotion to the said posts as may be permanent on the next lower post."

Rules of 1987 were amended thereafter in the year 1990 which was published in the U.P. Government Gazette dated 20.10.1990 laying down that the subsequent promotion would be made only by direct recruitment. But this amendment cannot be allowed to affect the respondents' claim for promotion as a rule cannot work to the prejudice of an employee who was holding the post of his eligibility prior to the enactment and enforcement of the Amended Rules of 1990. Since the respondents were eligible and entitled to the promotion for the post of Scientific Officer in terms of the Rules of 1987, their experience could not have been ignored on the said post so as to deny them the benefit of consideration for the subsequent post of Assistant Director on the basis of Rules of 1990 which could be made effective for the vacancies which arose after 1990.

12. Learned counsel for the respondents in support of this position has also cited the authority of this Court in the matter of *Nirmal Chandra Bhattachrjee & Ors. vs. Union of India & Ors*. reported 1991 Supp. 2 SCC 363 wherein this Court observed as under:-

> "No rule or order which is meant to benefit employees should normally be construed in such a manner as to work hardship and injustice specially when its operation is automatic and if any injustice arises then the primary duty of the courts is to resolve it in such a manner that it may avoid any loss to one without giving undue advantage to other".

The Court further observed that the mistake or delay on the part of the department should not be permitted to recoil on the appellants, more so since, the restructuring order in the said case itself provided that vacancies existing on July 31, 1983 should be filled according to procedure which was in vogue before August 1, 1983. This Court therefore, restored the promotion order of the employees to which they were entitled prior to the change of service rules as it was held that the

change of service rules cannot be made to the prejudice of an employee who was in service prior to the change. The Court further went on to hold that if the delay in promotion takes place at the instance of the employer, an employee cannot be made to suffer on account of intervening events.

13. The principle laid down in the aforesaid case aptly fits into the facts and circumstances of this case as the subsequent amendment of 1990 laying down to fill in all the posts of Assistant Director Forensic Science by direct recruitment could not have been applied in case of the respondents who were already holding the post of Scientific Officer and hence were eligible to the promoted quota of 25% posts of Assistant Director after completion of five years of service as Scientific Officers in terms of the Rules of 1987 and, therefore, their experience of five years on this post could not have been made to go waste on the ground that the amendment came into effect in 1990 making all the posts of Assistant Director to be filled in by direct recruitment. In support of this view, the counsel for the Respondents also relied on the decision of this Court in the matter of *B.L. Gupta & Anr. vs. M.C.D.* reported in (1998) 9 SCC 223 wherein this Court had held that any vacancy which arose after 1995 were to be filled up according to rules but the vacancies which arose prior to 1995 should have been filled up according to 1978 rules only.

14. As a consequence of the aforesaid analysis, we have no hesitation in holding that the High Court was right in taking the view that the respondents were eligible for promotion to the post of Assistant Director under the Rules of 1987 against 25 per cent quota to be filled in by promotion as they satisfied the conditions of five years of requisite experience on the post of Scientific Officer if the experience were to be counted from the date of publication of the Rules in the U.P. Government Gazette.

15. But besides the above, it cannot be overlooked that even if it were to be assumed that the respondents had not

completed five years of experience on the post of Scientific Officer for any reason whatsoever making them ineligible for consideration of further promotion, they also had the statutory protection and benefit of the proviso to the said Rule 5 which laid down that where permanent scientific officers were not available for absorption under the 25% quota, such temporary and officiating personnel were also to be considered for promotion to the said posts who were functioning on permanent basis on the next lower post. It is an admitted position that the respondents had already been confirmed on the next lower post when they were promoted to the post of Scientific Officers and as they were entitled to the benefit of the proviso which laid down that even the temporary scientific officers who are permanent on next below post may also be considered for the purpose of promotion, the Respondents had a right to be considered for promotion since they were continuing on the post of Scientific Officer and had completed five years even before the Amended Rules came into effect on 20.10.1990 which laid down that all post of Assistant Directors would be filled by direct recruitment. Thus, for this additional and sure shot reason as also for the reasons which have been assigned by the High Court, we find no infirmity in the orders of the High Court as also the Tribunal which had held in favour of the respondents directing the appellant/State of U.P. to consider their eligibility for promotion to the post of Assistant Director Forensic Science and grant them the consequential benefit if found eligible.

16. We thus, find no substance in these appeals filed by the appellant/State of U.P. and consequently dismiss them but in the circumstances without any order as to costs.

B.B.B. Appeals dismissed.

GOUDAPPA & ORS.
v.
STATE OF KARNATAKA
(Criminal Appeal No. 229 of 2007)

MARCH 11, 2013

[A.K. PATNAIK AND CHANDRAMAULI KR. PRASAD, JJ.]

Penal Code, 1860 – s.302 r/w s.34, 143 and 148 – Murder – Of husband, by the wife's father and uncles – Five accused – Conviction of accused nos. 3, 4 & 5 (appellants) u/s.302 r/w s.34 – Justification – Held: Justified – Deceased was done to death in furtherance of common intention – The fact that accused nos.3 and 4 held the deceased and facilitated accused no.5 to give the fatal blow and made no effort to prevent him from assaulting the deceased leads to the irresistible and inescapable conclusion that accused nos. 3 and 4 shared the common intention with accused no. 5 – Intention of accused no.5 clear from the nature of weapon used (jambia) and the severity of attack which was in the area of chest penetrating deep inside up to heart and liver which caused the death of the deceased.

Penal Code, 1860 – s.34 – Scope of – Common intention – Held: s.34 IPC lays down a principle of joint liability in the doing of a criminal act – The common intention is gathered from the manner in which the crime has been committed, the conduct of the accused soon before and after the occurrence, the determination and concern with which the crime was committed, the weapon carried by the accused and from the nature and injury caused by one or some of them – For arriving at a conclusion whether the accused had the common intention to commit an offence of which they could be convicted, the totality of circumstances must be taken into consideration.

The relations between the deceased-husband and his wife were strained. The prosecution case was that the wife's father (accused no.1) and uncles (four other accused) murdered the husband in furtherance of common intention. The five accused allegedly entered the house of the deceased, abused and threatened them of dire consequences; whereafter accused nos.3 and 4 caught hold of the deceased's hands while accused no. 5 gave *jambia* blow on his chest. Further allegation was that the accused no.1 pelted stone over the door of the house whereas accused no. 2 damaged its front door with an axe.

The trial court acquitted accused nos.1 and 2 but convicted the other three accused (i.e. the appellants). While accused nos.3 and 4 were convicted under Section 304, Part II read with Section 109 of the IPC, accused no.5 was convicted under Section 304, Part II of IPC. The High Court, however, held all the accused guilty under Section 143 and 148 of IPC, and further convicted the appellants under Section 302/34 of IPC as well, and therefore the instant appeal.

Dismissing the appeal, the Court

HELD: 1.1. The house in question is a small house and the distance between the place where PWs 1, 2and 3 were watching TV and the place of occurrence is about 20 ft. Further, there was an alarm raised by the deceased which attracted the witnesses (PWs1, 2 and 3) and, thus their claim of being eye-witnesses of the occurrence cannot be rejected. [Para 12] [556-G-H]

1.2. It is the consistent evidence of the prosecution witnesses that the deceased was chewing paan and came out of the house to spit when accused no.1 abused him alleging that he failed to keep his daughter

whereupon all the accused persons entered the house and the crime was committed. As the dead body was found 7 ft. inside the front door, there is no inconsistency in regard to the place of occurrence. [Para 13] [557-D-E]

2.1. Ordinarily, every man is responsible criminally for a criminal act done by him. No man can be held responsible for an independent act and wrong committed by another. The principle of criminal liability is that the person who commits an offence is responsible for that and he can only be held guilty. However, Section 34 of the Indian Penal Code makes an exception to this principle. It lays down a principle of joint liability in the doing of a criminal act. The essence of that liability is to be found in the existence of common intention, animating the accused leading to the doing of a criminal act in furtherance of such intention. It deals with the doing of separate acts, similar or adverse by several persons, if all are done in furtherance of common intention. In such situation, each person is liable for the result of that as if he had done that act himself. Section 34 of the Indian Penal Code thus lays down a principle of joint criminal liability which is only a rule of evidence but does not create a substantive offence. Therefore, if the act is the result of a common intention that every person who did the criminal act share, that common intention would make him liable for the offence committed irrespective of the role which he had in its perpetration. The common intention is gathered from the manner in which the crime has been committed, the conduct of the accused soon before and after the occurrence, the determination and concern with which the crime was committed, the weapon carried by the accused and from the nature and injury caused by one or some of them. Therefore, for arriving at a conclusion whether the accused had the common intention to commit an offence of which they

could be convicted, the totality of circumstances must be taken into consideration. [Para 16] [558-G-H; 559-A-E]

2.2. In the instant case, the deceased was done to death in furtherance of the common intention of the two appellants namely, accused no. 3 and accused no. 4. All the accused had assembled at one place and the moment deceased came out of the house to spit, one of the accused started abusing him. They were armed with axe and jambia and by catching and immobilizing the deceased these two accused facilitated the assault by accused no. 5. Accused no. 5 stabbed the deceased with jambia over the left side of the chest and the blow was so severe that it penetrated into the heart and liver. The fact that these appellants held the deceased and facilitated the other accused to give the fatal blow and made no effort to prevent him from assaulting the deceased leads to irresistible and inescapable conclusion that these two appellants shared the common intention with accused no. 5. The intention of accused no. 5 is clear from the nature of weapon used and the severity of attack which was in the area of chest penetrating deep inside up to heart and liver which caused the death of the deceased. [Para 17] [559-F-H; 560-A-B]

Ramesh Singh v. State of A.P. **(2004) 11 SCC 305 – relied on.**

Ramashish Yadav v. State of Bihar **(1999) 8 SCC 555: 1999 (2) Suppl. SCR 285 and** *Pandurang v. State of Hyderabad* **AIR 1955 SC 216: 1955 SCR 1083 – referred to.**

3. The High Court has not committed any error in setting aside the judgment of acquittal and holding all the accused guilty under Section 143 and 148 of the IPC and convicting the appellants under Section 302/34 of the IPC

and sentencing them to undergo imprisonment for life with default clause. [Para 20] [561-D-E]

Case Law Reference:

1999 (2) Suppl. SCR 285	**referred to**	**Para 14**
(2004) 11 SCC 305	**relied on**	**Para 15, 18**
1955 SCR 1083	**referred to**	**Para 19**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 229 of 2007.

From the Judgment & Order dated 28.07.2006 of the High Court of Karnataka at Bangalore in Criminal Appeal No. 59 of 2000 and Criminal Appeal No. 879 of 1999.

Basava Prabhu S. Patil, B. Subrahmanya Prasad, Anirudh Sanganeria, Venkatakrishna Kunduru, R.D. Upadhyay for the Appellants.

Anitha Shenoy for the Respondent.

The Judgment of the Court was delivered by

CHANDRAMAULI KR. PRASAD, J. 1. Appellant No. 1, Goudappa (Accused No.3), Appellant No.2, Chhannappa @ Ajjappa (Accused No.4) and Appellant No. 3, Mahadevappa (Accused No.5) aggrieved by their conviction and sentence, have preferred this appeal with the leave of the court.

2. Altogether five brothers namely, Basappa, Vipakshappa, Goudappa, Channappa @ Ajjappa and Mahadevappa were put on trial for offence under Section 143, 148, 452, 341, 302, 427, 504 and 506 read with Section 149 of the Indian Penal Code. The trial court acquitted accused no. 1, Basappa and accused no. 2 Vipakshappa of all the charges. Accused no. 3, Goudappa and accused no. 4, Channappa @ Ajjappa were, however, held guilty under Section 304, Part II

read with Section 109 of the Indian Penal Code and sentenced to undergo simple imprisonment for one year. Accused no. 5, Mahadevappa has been convicted under Section 304, Part II of the Indian Penal Code and sentenced to undergo rigorous imprisonment for five years. They have, however, been acquitted of all other charges.

3. State of Karnataka, aggrieved by the order of acquittal of the aforesaid two accused and conviction of other three only under Section 304, Part II, instead under Section 302 of the Indian Penal Code and those convicted and sentenced also preferred separate appeals before the High Court. Both the appeals were heard together and disposed of by a common judgment. The High Court by the impugned judgment and order has set aside the judgment of acquittal and held all the accused guilty under Section 143 and 148 of the Indian Penal Code and sentenced them to pay fine of Rs. 1,000/- on each count with a default clause. Those three found guilty under Section 304, Part II read with Section 109 or under Section 304, Part II of the Indian Penal Code simplicitor have, instead, been convicted under Section 302/34 of the Indian Penal Code and sentenced to undergo imprisonment for life with default clause.

4. Matrimonial discord between deceased Channappa and Kalavathi, daughter of accused no. 1, Basappa is the cause of the crime. All the accused are brothers and reside in Village Navalur within Dharwad District of the State of Karnataka. Kalavathi was married to deceased Channappa, who was also the resident of the same village, houses of both being situated within a distance of 100 ft. from each other. Marriage between them had taken place on 5th of May, 1996. The relationship between the couple was not cordial and, according to the prosecution, as usual the elders of the village convened a Panchayat in which the father of Kalavathi i.e. accused no. 1 Basappa wrote an undertaking (Exh. P-6) to counsel his daughter and not to blame anyone else, if any untoward incident happens. However, this did not bring peace and matrimonial

harmony and Kalavathi left the matrimonial house without informing anybody. This was not liked by her husband, Channappa and he stopped her entry in the matrimonial house. All the accused thus nurtured ill-will against him.

5. According to the prosecution, on 9th of January, 1998 at about 9.30 P.M. the deceased Channappa, his brother Manjunatha (PW-1), mother Siddawwa (PW-2) and grandson of PW-2, Manjunath (PW-3) were watching TV. The deceased Channappa at that time was chewing paan and came out of the house to spit. Accused Basappa started abusing him alleging that he failed to keep his daughter, whereupon all the accused entered the house and accused no. 3 Goudappa and accused No. 4 Channappa @ Ajjappa caught hold of the deceased and accused no. 5 Mahadevappa stabbed him with jambia over the left side of the chest. The blow was so severe that it penetrated into the heart and liver. Prosecution has further alleged that accused no. 1, Basappa pelted stone over the door of the house whereas accused no. 2 Vipakshappa damaged its front door with an axe. Manjunatha (PW-1), Siddawwa (PW-2) and Manjunath (PW-3) claimed to have seen the incident. Manunatha (PW-1) conveyed the message to the Police Control Room and called Dr. Shamsuddin Kasimsab Jamadar (PW-18) for treatment, but noticing profuse bleeding, he advised to shift the injured to the Government Hospital. While arrangement to shift the injured was being made, Shashidhar (PW-24), the police constable, Manappa Siddappa Arer (PW-27), the Sub-Inspector of Police of Vidhyagiri Police Station and other two police constables came to the spot and the injured was shifted to Civil Hospital, Dharwad. He was examined by the doctor and declared dead. Manjunatha (PW-1) gave report to Manappa Siddappa Arer which led to registration of Crime No. 14 of 1998 under Section 143, 147, 148, 323, 427, 452, 302, 504 and 506 read with Section 149 of the Indian Penal Code.

6. After usual investigation, police submitted the charge-sheet and all the five accused were ultimately committed to the

Court of Sessions to face the trial. The trial court framed charges under Section 143, 148, 452, 341, 302, 427, 504 and 506 read with Section 149 of the Indian Penal Code. Accused pleaded not guilty and claimed to be tried. In order to bring home the charge, the prosecution has altogether examined 28 witnesses and a large number of documents (Exibits P-1 to P-24) and material objects (M.Os. 1 to 14) were exhibited. Out of the aforesaid witnesses, Manjunatha (PW- 1), Siddawwa (PW-2) and Manjunath (PW-3) claimed to be the eye-witnesses of the occurrence. Dr. Rajashekara (PW-6) has conducted the post-mortem examination on the dead body of the deceased. The defence of the accused is of total denial and they have led no evidence. There is consistent evidence of Manjunatha (PW-1), Siddawwa (PW-2) and Manjunath (PW-3) that relation of Kalawathi, daughter of accused no. 1 Basappa and her husband, the deceased Channappa was strained and the accused have virtually accepted this part of the prosecution story. Manjunatha (PW-1), has stated in his evidence that while he along with the other two eye-witnesses, Siddawwa (PW- 2) and Manjunath (PW-3) and the deceased Channappa were watching TV, all the accused had assembled in the house of accused no. 3, Goudappa and were hurling abuses. According to this witness, the deceased Channappa was in the habit of chewing paan and, therefore, he had gone out of the house to spit. At that time accused no. 1 Basappa abused him alleging that he is not able to lead married life with his daughter. Immediately thereafter, all the accused entered into the house. At that time, accused no. 2, Vipakshappa was armed with an axe whereas accused no. 5, Mahadevappa was carrying a jambia. According to this witness, accused no. 3, Goudappa and accused no. 4 Channappa @ Ajjappa caught hold of the deceased Channappa whereupon accused no. 5, Mahadevappa assaulted the deceased with jambia on his chest. It has further been stated that accused no. 1, Basappa pelted stone over the door whereas accused no. 2, Vipakshappa damaged the front door with an axe. In the cross-examination, this witness has admitted that all of them including

the deceased Channappa, were inside the house and watching TV when the accused have come in front of their house and the occurrence had taken place inside the house. He has further admitted that in the first information report he had not mentioned about the availability of electric light in the house and in the street, at the time of the incident.

7. Siddawwa (PW-2), who happens to be the mother of the deceased, stated in her evidence that all the accused came to their house, abused and threatened them of dire consequences as the deceased was not accepting Kalavathi to lead a married life. She has further stated that accused no. 3, Goudappa and accused no. 4, Channappa @ Ajjappa caught hold of deceased's hands and accused no. 5, Mahadevappa gave jambia blow on his chest. Evidence of Manjunath (PW-3), the grandson of Siddawwa (PW-2), is the same as those of other two eye witnesses. In the cross-examination he had stated that the deceased Channappa was inside the house when the accused came to the spot.

8. Dr. Rajashekara (PW-6), who conducted the post-mortem examination on the dead body of the deceased Channappa, had found the following external injuries on his person:

> "1. Punctured wound over the left side of the chest over 2, 3 and 4th intercostal space 3" below the junction of medial 1/3rd and later 2/3rd of clavicle bone 3" lateral to midline."

9. He also found the following internal injuries on his person:

> "On opening of the skull brain was pale in colour. On examination of the chest, crack fracture of 2nd rib on the left side 3" from sterno costal junction. Plura opened at the site of the wound, which was described above. Containing blood with some clots and blood was about 1000 ml.
>
> Laryanx and treachea was intact and pale.

> Lungs were intact and pale. Plura was opened over the left atrium of the heart.
>
> Punctured wound over left atrium 1½" x 1" clot blood at the margins and reddish in colour."

10. Mr. Basava Prabhu S. Patil, Senior Advocate appears on behalf of the appellants, whereas the respondent-State of Karnataka is represented by Ms. Anitha Shenoy.

11. Mr. Patil submits that the claim of Manjunatha (PW-1), Siddawwa (PW-2) and Manjunath (PW-3) to be the eye-witnesses to the occurrence and having witnessed the incident is fit to be rejected as, according to their own evidence, they were watching the television inside the house (PADASALE) at the time of occurrence, whereas the occurrence has taken place near the front door inside the house. In this connection, he has drawn our attention to the sketch map and points out that from the place where these witnesses were watching the television, the place where the deceased was assaulted is not visible. Ms. Shenoy, however, submits that the house where the incident had taken place is a small house and the distance between the place of occurrence and the PADASALE where they were watching TV is hardly 20 ft. She further submits that after the accused persons entered into the house and saw the deceased Channappa, the latter had raised an alarm which attracted the attention of the witnesses and they came to the spot and, hence, witnessed the occurrence.

12. We have bestowed our consideration to the rival submissions and we find substance in the submission of Ms. Shenoy. The house in question is a small house and the distance between the place where they were watching TV and the place of occurrence is about 20 ft. Further, there was an alarm raised by the deceased Channappa which attracted the witnesses and, thus their claim of being eye-witnesses of the occurrence cannot be rejected on this ground.

13. Mr. Patil then submits that, according to the evidence of the prosecution witnesses, when the deceased came out of the house to spit, the occurrence has taken place, but the dead body was found inside the house and, therefore, prosecution has not been able to prove the place of occurrence beyond all reasonable doubt. According to him, the consistent case of the prosecution is that the deceased along with other eye-witnesses were watching TV in the PADASALE and the deceased was assaulted when he came out of the house to spit. In this connection, he has drawn our attention to the sketch map which gives the details of the house and the place of occurrence. This, according to Mr. Patil, clearly shows that the occurrence has taken place inside the house. We do not find any substance in the submission of Mr. Patil and the same is fit to be rejected. For appreciation of this submission one has to bear in mind that the house where the occurrence has taken place is a small house and the dead body was found 7 ft. inside the front door. It is the consistent evidence of the prosecution witnesses that the deceased Channappa was chewing paan and came out of the house to spit when accused no. 1 Basappa abused him alleging that he failed to keep his daughter whereupon all the accused persons entered the house and the crime was committed. As stated earlier, the dead body was found 7 ft. inside the front door, we do not find any inconsistency in regard to the place of occurrence.

14. Mr. Patil lastly submits that, according to the prosecution itself, role attributed to accused no. 3 Goudappa and accused no. 4 Channappa @ Ajjappa is that they had caught hold of the deceased Channappa and from that it cannot be inferred that the crime was committed in furtherance of common intention. According to him, these appellants had not intended to cause the death of the deceased and, hence, cannot be convicted for the offence under Section 302 with the aid of Section 34 of the Indian Penal Code. In support of the submission reliance has been placed on the judgment of this Court in the case of *Ramashish Yadav v. State of Bihar,* (1999) 8 SCC 555:

> "This being the requirement of law for applicability of Section 34 IPC, from the mere fact that accused Ram Pravesh Yadav and Ramanand Yadav came and caught hold of Tapeshwar, whereafter Samundar Yadav and Sheo Layak Yadav came with gandasa in their hands and gave blows by means of gandasa, it cannot be said that the accused Ram Pravesh Yadav and Ramanand Yadav shared the common intention with accused Samundar Yadav and Sheo Layak Yadav. Consequently, accused Ram Pravesh Yadav and Ramanand Yadav cannot be held guilty of the charge under Sections 302/34 IPC but accused Samundar Yadav and Sheo Layak Yadav did commit the offence under Sections 302/34, having assaulted deceased Tapeshwar on his head by means of gandasa on account of which Tapeshwar died. The accused Ram Pravesh Yadav and Ramanand Yadav are, therefore, acquitted of the charges levelled against them and they be set at liberty forthwith."

15. Ms. Shenoy, however, submits that from the manner in which the crime has been committed and the role played by the aforesaid two appellants clearly show that the criminal act was done by several persons in furtherance of the common intention of all and, hence, each of such person shall be liable for the criminal act in the same manner as if it was done by him alone. Reference, in this connection, has been made to a decision of this Court in the case of *Ramesh Singh v. State of A.P.,* (2004) 11 SCC 305.

16. We have bestowed our consideration to the rival submissions and the submission made by Ms. Shenoy commend us. Ordinarily, every man is responsible criminally for a criminal act done by him. No man can be held responsible for an independent act and wrong committed by another. The principle of criminal liability is that the person who commits an offence is responsible for that and he can only be held guilty. However, Section 34 of the Indian Penal Code makes an

exception to this principle. It lays down a principle of joint liability in the doing of a criminal act. The essence of that liability is to be found in the existence of common intention, animating the accused leading to the doing of a criminal act in furtherance of such intention. It deals with the doing of separate acts, similar or adverse by several persons, if all are done in furtherance of common intention. In such situation, each person is liable for the result of that as if he had done that act himself. Section 34 of the Indian Penal Code thus lays down a principle of joint criminal liability which is only a rule of evidence but does not create a substantive offence. Therefore, if the act is the result of a common intention that every person who did the criminal act share, that common intention would make him liable for the offence committed irrespective of the role which he had in its perpetration. Then how to gather common intention? The common intention is gathered from the manner in which the crime has been committed, the conduct of the accused soon before and after the occurrence, the determination and concern with which the crime was committed, the weapon carried by the accused and from the nature and injury caused by one or some of them. Therefore, for arriving at a conclusion whether the accused had the common intention to commit an offence of which they could be convicted, the totality of circumstances must be taken into consideration.

17. Bearing in mind the principle aforesaid, when we proceed to consider the case of these two appellants namely, accused no. 3 Goudappa and accused no. 4 Channappa @ Ajjappa, we have no hesitation in coming to the conclusion that the deceased Channappa was done to death in furtherance of their common intention. All the accused had assembled at one place and the moment deceased came out of the house to spit, one of the accused started abusing him. They were armed with axe and jambia and by catching and immobilizing the deceased these two accused facilitated the assault by accused no. 5. Accused no. 5 stabbed the deceased with jambia over the left side of the chest and the blow was so severe that it penetrated

into the heart and liver. The fact that these appellants held the deceased and facilitated the other accused to give the fatal blow and made no effort to prevent him from assaulting the deceased leads to irresistible and inescapable conclusion that these two appellants shared the common intention with accused no. 5. The intention of accused no. 5 is clear from the nature of weapon used and the severity of attack which was in the area of chest penetrating deep inside up to heart and liver which caused the death of the deceased.

18. The view which we have taken finds support from the judgment of this Court in the case of *Ramesh Singh* (supra) in which it has been observed as follows:

> "Once the prosecution evidence tendered through PWs 1 to 3 is accepted, then it is clear that when A-2 and A-3 held the hands of the deceased, they had some intention in disabling the deceased. This inference is possible to be drawn because the appellants in their statement recorded under Section 313 CrPC did not give any explanation why they held the hands of the deceased which indicates that the appellants had the knowledge that A-1 was to assault the deceased. The fact that the appellants continued to hold the deceased all along without making any effort to prevent A-1 from further attacking, in our opinion, leads to an irresistible and an inescapable conclusion that these accused persons also shared the common intention with A-1."

19. However, we hasten to add that each case rests on its own facts and mere similarity of the facts in one case cannot be used to determine a conclusion of fact in another. Whether the crime was committed in furtherance of common intention is determined on appreciation of evidence laid in that case and the similarity of facts in one case may not be decisive to come to a definite conclusion of fact in another. Hence, answer of such question has to be found in the facts of a given case. In this connection, it is apt to reproduce the following passage

from the case of *Pandurang v. State of Hyderabad,* AIR 1955 SC 216:

> "But to say this is no more than to reproduce the ordinary rule about circumstantial evidence, for there is no special rule of evidence for this class of case. At bottom, it is a question of fact in every case and however similar the circumstances, facts in one case cannot be used as a precedent to determine the conclusion on the facts in another. All that is necessary is either to have direct proof of prior concert, or proof of circumstances which necessarily lead to that inference, or, as we prefer to put it in the time- honoured way, 'the incriminating facts must be incompatible with the innocence of the accused and incapable of explanation on any other reasonable hypothesis'. (Sarkar's Evidence, 8th Edn., p. 30)"

20. From the discussion aforesaid, it is evident that the High Court has not committed any error in setting aside the judgment of acquittal and holding all the accused guilty under Section 143 and 148 of the Indian Penal Code and convicting the appellants under Section 302/34 of the Indian Penal Code and sentencing them to undergo imprisonment for life with default clause.

21. In the result, we do not find any merit in the appeal and it is dismissed accordingly.

B.B.B. Appeal dismissed.

THE CHIEF EXECUTIVE OFFICER, PONDICHERRY KHADI AND VILLAGE INDUSTRIES BOARD AND ANR.
v.
K. AROQUIA RADJA & ORS.
(Civil Appeal No. 2323 of 2013)

MARCH 12, 2013

[G.S. SINGHVI, H.L. GOKHALE AND RANJANA PRAKASH DESAI, JJ.]

Service Law – Co-terminus employees (respondents) – Entitlement of, to continue in service after cessation of engagement of the person with whose engagement their services were made co-terminus – Held: Respondents were engaged only because their names were sponsored by the Chairman of the Pondicherry Khadi and Village Industries Board, a statutory body corporate – They did not come into the service either through the Employment Exchange or through any procedure in which they were required to compete against other eligible candidates – Also, the respondents had been clearly told that their services were co-terminus, and they will have no right to be employed thereafter – It was not permissible for them to challenge their dis-engagement when the tenure of the Chairman was over – Pondicherry Khadi and Village Industries Board Act, 1980 – ss.3 and 15.

Service Law – Recruitment – Proper channel – Requirement of – Held: The requirement of being employed through proper channel could not be relaxed in an arbitrary and cavalier manner for the benefit of a few persons – This would be clearly violative of Articles 14 and 16 of the Constitution – Constitution of India, 1950 – Articles 14 and 16.

The Pondicherry Khadi and Village Industries Board

is a statutory body corporate constituted under Section 3 of the Pondicherry Khadi and Village Industries Board Act, 1980. The Chairman of the Board desired engagement of certain persons as his personal staff. There was no provision for any sanctioned post of personal staff in the Board, yet without obtaining the names sponsored by the Employment Exchange, the said Chairman engaged five persons as his personal staff including the four respondents. In view of the persuasion of the said Chairman, the Government of Puducherry issued general orders appointing the respondents on co-terminus basis and on a fixed scale of pay. Subsequently, the Chairman of the Board resigned from his chairmanship when his term expired, and thereafter, all the four respondents were relieved from their services.

The question which arose for consideration in the instant appeal is as to whether the respondents, who were appointed on a co-terminus basis had any right to continue in service after the cessation of the engagement of the Chairman of the Board with whose engagement their services were made co-terminus.

Allowing the appeals, the Court

HELD:1.1. The respondents were engaged only because their names were sponsored by the then Chairman of the Pondicherry Khadi and Village Industries Board. They did not come into the service either through the Employment Exchange or through any procedure in which they were required to compete against other eligible candidates. The proposal which was sent to the Governor for his approval was not sent through the normal routine of the concerned Administrative machinery, and through the Chief Secretary of Puducherry. Since the proposal was not routed through the normal channel of administration, the factual position with respect to the irregular employment of the

respondents could not be placed before the Governor. The relevant facts such as those relating to their initial engagement, availability of sanctioned posts in the same category in the Board, relevant rules for engagement of the employees etc. could also not be placed before the Governor. Even so the proposal itself recorded that the respondents had put in just 3½ years of service, and the proposal to regularize them had been once turned down by the Government. Section 15 of the Board Act clearly laid down that the Board was bound by the directions given by the Government in the performance of its function under the Act. The Governor was not supposed to act on his own, but with the aid and advice of the Council of Ministers. The question as to whether it will result into creation of additional posts and additional financial liability was required to be referred to the Government. Besides, the resolution only recorded the request of the Chairman in that behalf. It was not a resolution of the Board approving regularization or relaxing the existing norms, as a special case. [Para 15] [576-F-H; 577-A-D]

1.2. The respondents were clearly told that their services were co-terminus, and they will have no right to be employed thereafter. Condition No.4 and 6 of the referred terms and condition are very clear in this behalf. The respondents had taken the co-terminus appointment with full understanding. It was not permissible for them to challenge their dis-engagement when the tenure of the Chairman was over. [Para 17] [577-H; 578-A-B]

1.3. Absorption, regularization or permanent continuance of temporary, contractual, casual, daily-wage or adhoc employees appointed/recruited and continued for long in public employment dehors the constitutional scheme of public employment is impermissible and violative of Article 14 and 16 of the Constitution of India. [Para 18] [578-G]

1.4. In the present case, the M.L.A. concerned was to function as the Chairman during the course of his tenure as an M.L.A., and had resigned with the announcement of the election for the state assembly. A proposal for regularization of the co-terminus employees appointed by him was directly sent to the Governor without the same being routed through the State Government. Similar such proposals have come to be rejected. The requirement of being employed through proper channel could not be relaxed in an arbitrary and cavalier manner for the benefit of a few persons. This would be clearly violative of Articles 14 and 16 of the Constitution of India. [Para 20] [579-D-F]

*Secretary, State of Karnataka and Ors. Vs. Umadevi **(3) and Ors.*** **2006 (4) SCC 1: 2006 (3) SCR 953;** *State of Gujarat and Anr. Vs. P.J. Kampavat and Ors.* **1992 (3) SCC 226: 1992 (2) SCR 845 and** *Union of India Vs. Dharam Pal* **2009 (4) SCC 170: 2009 (2) SCR 193 – relied on.**

Excise Superintendent Malkapatnam, Krishna District, A.P. Vs. K.B.N. Visweshwara Rao and Ors. **1996 (6) SCC 216: 1996 (5) Suppl. SCR 73 – referred to.**

Case Law Reference:

1996 (5) Suppl. SCR 73	**referred to**	**Para 4**
2006 (3) SCR 953	**relied on**	**Para 17, 18**
1992 (2) SCR 845	**relied on**	**Para 19**
2009 (2) SCR 193	**relied on**	**Para 19**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2323 of 2013.

From the Judgment & Order dated 03.08.2011 of the High Court of Judicature at Madras in W.A. No. 1131 of 2011.

WITH

C.A. No. 2324 of 2013.

R. Venkatramani, V.G. Pragasam, S. Prabu Ramasubramanian, Supriya Garg, Neelam Singh, Shodhan Babu for the Appellants.

C. Raghonatha Reddy, C. Salila Reddy, V. Vasanta Kumar, A.V. Rangam, Richa Bharadwaj for the Respondents.

The Judgment of the Court was delivered by

H.L. GOKHALE J. 1. Leave Granted in both these appeals.

2. Both these appeals raise the question as to whether the employees who are appointed on a co-terminus basis have any right to continue in service after the cessation of the engagement of the person with whose engagement their services were made co-terminus.

Facts leading to these appeals are this wise:-

3. The Pondicherry Khadi and Village Industries Board (Board for short) is a statutory body corporate constituted under Section 3 of the Pondicherry Khadi and Village Industries Board Act, 1980 (Board Act for short). The board is running various Khadi spinning/weaving/silk centers which provide employment opportunities to a large number of persons, particularly women. It runs several Khadi Bhandars for the sale of Khadi and Village Industries goods produced by the board. The board has 219 sanctioned posts at various levels as approved by the Government of Puducherry. It has framed Recruitment Rules/Standing Orders with respect to each of these posts.

4. Government of India had issued Office Memorandum

dated 18.5.1998, wherein after referring to the principles laid down by this Court in *Excise Superintendent Malkapatnam, Krishna District, A.P. Vs. K.B.N. Visweshwara Rao and Ors.* reported in 1996 (6) SCC 216 (which recognises the recruitment through the employment exchanges as the principle mode of recruitment), it was directed that all vacancies arising under the Central Government Offices/establishments (including quasi-government institutions and statutory organizations) irrespective of the nature and duration (other than those filled through UPSC), are not only to be notified, but also to be filled through the Employment Exchange alone. Other permissible sources of recruitment were to be tapped only if the Employment Exchange concerned issued a Non-availability Certificate. There can be no departure from this recruitment procedure unless a different arrangement in this regard has been previously agreed to in consultation with the Department and the Ministry of Labour (Directorate General, employment & Training). Similar instructions are also in force requiring vacancies against posts carrying a basic salary of less than Rs. 500/- per month in Central Public Sector undertaking to be filled only through Employment Exchange.

5. It so transpired that one Shri P. Angalan, assumed the office of the Chairman of the Board on 12.7.2002, and he desired engagement of certain persons as his personal staff. There was no provision for any sanctioned post of personal staff in the board, yet without obtaining the names sponsored by the Employment Exchange, the said Chairman engaged five persons as his personal staff viz. the four respondents herein and one T. Kumar (since deceased).

6. In view of the persuasion of the said Chairman, the Government of Puducherry issued general orders dated 13.2.2003 appointing the respondents on co-terminus basis. They were appointed on fixed scale of pay. The appointment orders of these respondents clearly stated that their service

shall automatically stand terminated, as soon as the tenure of the Chairman is over. The government order approving the appointment of these five persons read as follows:-

"GOVERNMENT OF PONDICHERRY
DEPARTMENT OF INDUSTRIAL DEVELOPMENT
(INDUSTRIES AND COMMERCE)

No. J.12014/5/2002/Ind. & Com.B
Pondicherry, the 26 Mar 2003

To
The Chief Executive Officer,
Pondicherry Khadi and Village Industries Board,
Plot No. 1 & 2, Kamaraj Salai,
New Saram, Pondicherry

Sir,

Sub: DID (Ind & Com.) – Providing personal staff to the Chairman of the Boards/Corporations-Approval-Conveyed

Ref:1 I.D. No.A.52011/1/2002/DP&AR/SSI (2)

Dated 13.02.2003 of the Department of Personnel and Administrative Reforms (Personnel Wing), Pondicherry

2. Letter No. 1/516/2002/Estt-I dated 13.03.2003 from the Chief Executive Officer, Pondicherry Khadi and Village Industries Board, Pondicherry

I am directed to invite a kind reference to the I.D. Note cited under reference one above.

2. Approval of the Government is hereby conveyed for the engagement of the following personal staff by the Chairman of the Pondicherry Khadi and Village Industries Board on co-terminus basis as requested in

the reference second cited above:-

Sl. No	*Name and Address*	*Post*	*Scale of Pay*
1.	*K.Aroquia Radja, S/o Kulandai Raj, No. 24, II Cross, Balaji Nagar, Pondicherry-13*	*Stenographer*	*Rs. 4500-125-7000*
2.	*G. Ayappan, S/o Gangadharan, No. 29, II Cross, Mariamman Nagar, Karamanikuppan, Pondhicherry-4*	*Personal Clerk*	*Rs. 3050-75-3950-80-4590*
3.	*T. Kumar, S/o Thiagarajan, Thirupur Kumaran Street, Manjolai, Ariyankuppam, Pondicherry-7*	*Staff Car Driver*	*Rs. 3050-75-3950-80-4590*
4.	*P. Rajesekar, S/o Puroshothaman,No. 8, Main Road, C.N. Palayam, Arumapathpuram (P.O.) Villianur via, Pondicherry-10*	*Peon*	*Rs. 2550-55-2660-3200*
5.	*S. Ramachandran, S/o Subramani, 64, Gangai Amman Koil Street, Pillaichavadi, Pondicherry-14*	*Peon*	*Rs. 2550-55-2660-3200*

3. These official's services shall automatically stand terminated as soon as the Chairman ceases to hold his post.

4. Further, it is also requested to send proposals for incorporating the provision of personal staff to Chairman in the Act/Rules of corporation immediately.

Yours faithfully

(P.M.Emmanuel)
Under Secretary to Govt. (Ind. & Com.)"

7. Based on the above order of approval, a separate office

order dated 26.3.2003 was issued concerning the appointment of the five persons, containing the terms and conditions which were as follows:-

"…….

TERMS AND CONDITIONS FOR ENGAGEMENT OF PERSONAL STAFF ON CO-TERMINUS BASIS

1. The individual is engaged on co-terminus basis. It means that the services of the individual stands automatically terminated as soon as the present Chairman ceases to hold his post/ceases to be in the office of the Chairman.

2. The terms of this engagement will be co-terminus basis and coincide with the tenure of the Chairman of the Board or will be in force till the Chairman requires his service whichever is earlier. When the necessity for his services ceases, his services stands terminated from this office without any prior notice and he will not have any claim for regular appointment/absorption in Board's service whatever be the duration of services in the office.

3. No pay fixation will be done for his engagement. But the pay will be claimed on per with the same post and scale of pay exists in the government against which he is engaged and he will earn increment, as per Rules, every year in the time scale of pay in which he is engaged.

4. No Act/Service Rules/Regulations will be made applicable to the individual for claiming the regular appointment in the Board. Because of working in the Board on co-terminus basis, he does not have any right for claiming regular appointment in the Board.

5. The engagement is neither temporary/regular no

adhoc basis. It is only purely co-terminus basis for the purpose of assisting the Chairman till he hold his post.

6. Neither legal nor the Board Resolution to be passed shall bind over orders issued to the individual to make him as a regular employee in the Board in future.

7. Because of working as on Co-terminus basis, the Board will not give any preference for selection to any post if any recruitment is made in the future.

8. Whatever be the period the individual served in the Board it will not be accounted for any purpose.

9. The individual has no right to go to anywhere viz. Higher Authority/Legal Authority to claim the services put by him for regular appointment.

10. The benefits enjoyed by the regular employee will not be made applicable to the individual engaged on co-terminus basis. Procedure and rules followed for regular employees will not be followed in the case of Co-terminus basis engagement.

11. On humanitarian ground he will avail casual leave, as Board thinks fit.

12. The individual may claim T.A on humanitarian basis, if permitted to go on tour by the Chairman since he has to incur expenditures for undertaking tour. The services will confine only to the office of the Chairman and not to the Board.

13. The individual may claim O.T.A in connection with official duty performed by him in the office of the Chairman.

14. The individual is exempted from production of Medical Certificate and Character and Antecedents,

since it is not a regular/temporary/adhoc appointment selected by the Board as per Recruitment Rules/ Recruitment Committee.

15. During the tenure of his service, if he is found under any mis-conduct or involved in any type of criminal case, his services will be forthwith terminated without any notice.

16. No other service terms and conditions will be made applicable to the individual except the above said facilities O.T.A and O.T.A.

In the event of the candidate is accepting the above terms and conditions for the co-terminus engagement, he is directed to report for duty before the undersigned with his Bio-data/other testimonies not later than 10 days time of receipt of this office order.

……..”

8. The board, after obtaining the approval from the Government as above, issued the necessary appointment orders on 22.1.2004 to the five persons concerned, engaging them as personal staff retrospectively from 22.7.2002, although making clear once again, therein, that these appointments were on co-terminus basis. In spite of this position, the then Chairman moved a resolution and got it passed in the board on 31.8.2005, to send a proposal to the Government for absorption of five personal staff in lieu of vacant posts for the Governor’s approval. However, the Government declined to approve the said proposal. The Chairman, therefore, got another resolution passed in the Board for absorption of the five persons on 17.2.2006. The said Chairman thereafter forwarded a note containing 8 paragraphs to the Lt. Governor of Puducherry. Paragraphs 5 to 8 of this note read as follows:-

“5. Accordingly, a proposal was sent to Government for absorption of the above five personal staff taking in

account the continuous service of 3 ½ years and experience in the respective posts. Whereas the proposal has not been agreed to by the Government on the ground that the above appointments were made on co-terminus basis with the tenure of the Chairman.

6. Again the above subject matter was discussed in the 50th Board meeting held on 17.02.2006, where it has been resolved as follows:

> "*The Board was informed that the proposal sent earlier for absorption of personal staff of the Chairman has not been approved by the Government. However, Chairman has desired to send a separate note with necessary justification to government, in relaxation of the existing norms, for approval, as a special case. The Board has endorsed the same."*

7. Considering the fact that the above proposal involves no additional creation of posts involving additional financial liability, the power of the board to relax any of the provisions of recruitment Rules, wherever it is felt necessary, length of service put in by the above personal staff and in the light of deliberation of the Board, the Government is solicited to approve the above proposal of absorption of the 5 personal staff of the Chairman, in relaxation of existing norms, as a special case.

8. Bio-data of the personal staff are placed in the file for kind perusal."

Paragraph 7 of the above note was approved by the then Lt. Governor of Puducherry on 26.2.2006 in spite of the fact that this time the note was not routed through the concerned Administrative Secretariat, namely Department of Industrial Development (Industries & Commerce), and Office of the Chief

Secretary of the Government of Puducherry.

9. It is relevant to note that earlier the services of some other similarly situated temporary employees of the Legislative Assembly Department, Puducherry were not regularized and came to be terminated. On their termination they had approached the Central Administrative Tribunal, and their Original Applications were dismissed. Those orders were confirmed by the High Court and by this Court by its order 6.3.2006 in SLP (C) No. 7859-7877 of 2005 in the case of Ilango & Ors. Vs. Union of India & Ors. It is also material to note that a similar proposal for regularization of services concerning other co-terminus employees, engaged by the very Board, also came to be rejected by the Lt. Governor, subsequently, on 17.6.2008.

10. The above proposal for absorption of these five persons was kept in abeyance due to the declaration of elections of the State Assembly of Puducherry in March 2006. The then Chairman P. Angalan resigned from his chairmanship when his term expired on 16.4.2006, and thereafter, alongwith him all the four respondents and above referred T. Kumar were relieved from their services.

11. The respondents filed a Writ Petition nearly two years later bearing No. 3181 of 2008 seeking a direction to implement the resolution dated 17.2.2006 and the approval dated 26.2.2006. In their Writ Petition they accepted in para 3 that they were appointed on co-terminus basis. In para 6 thereof, they stated that they were already dis-engaged from their services after the resignation of the Chairman in April 2006. In spite of these averments in the petition, a Single Judge of the High Court of Madras relied upon the fact that an approval had been given to their absorption, and the issue was kept in abeyance only till the elections of the year 2006 were over, and two years had gone thereafter. Therefore, the learned Single Judge by the order dated 26.2.2008, directed that the petitioner herein (which was the respondent in that petition) shall act as

expeditiously, as possible, preferably within a period of 6 weeks from the date of receipt of a copy of the order in accordance with the note of approval. It is material to note that the petition was disposed of at the admission stage itself, and the present petitioner did not have any opportunity to file a reply to place the necessary facts on record such as the recruitment rules and the nature of respondents' engagement.

12. In view of passing of this order the appellants filed a Writ Appeal, bearing No. 1131 of 2011 before the Division Bench of Madras High Court, and placed the necessary material on record. Yet the Bench gave importance to the fact that board had sought an approval from the Lt. Governor of Pondicherry which had been granted. Therefore, according to the Division Bench, there was no error in the order of the Single Judge directing the implementation of the decision of the board to absorb the respondents herein. The appeal was consequently dismissed.

13. In the meanwhile, the respondents filed another Writ Petition bearing No. 13428 of 2010 since no order was being passed by the Board with respect to their absorption in spite of the order passed by the Single Judge in Writ Petition No.3181 of 2008. During the pendency of this second Writ Petition, the petitioner passed order dated 10.1.2011 rejecting the claim of the respondents. Therefore, the respondents amended the second Writ Petition and challenged this order dated 10.1.2011. This second Writ Petition reached for hearing after the dismissal of the Appeal Nos. 1131 of 2011 filed by the appellants herein. That being so, the learned Single Judge who heard Writ Petition No. 13428 of 2010 allowed the same, and quashed the order of 10.1.2011, after referring to the dismissal of the Writ Appeal filed by the appellants herein. Being aggrieved by the judgment and order in that Writ Petition the appellants have filed the second SLP (C) No.4688 of 2012 which has been heard alongwith SLP (C) No.4669 of 2012 which has been filed to challenge the order of the Division

Bench in Writ Appeal No.1131 of 2011. Both these appeal arising out of these two SLPs have been heard and are being disposed off together.

Consideration of the submissions of the rival parties:-

14. The principle contention of the appellants is that as seen from the above narration of facts, the engagement of the respondents was clearly on a co-terminus basis. There was no assurance to them that they will be continuing in service after the tenure of the Chairman of the Board was over. There are recruitment rules and a procedure by which the employees under the Board are to be engaged. It was submitted on behalf of the appellant that any departure therefrom would mean allowing a back door entry in Government Establishment / Quasi Government employment which would be violative of Articles 14 and 16 of the Constitution of India. As against this submission of the appellant, it was pointed out by the respondents that in their case there has been an approval by the Board and then by the Lt. Governor. That being so, there was no reason to interfere into the orders passed by the Division Bench as well as by the Single Judge in the two matters before us directing implementation .

15. We have noted the submissions of counsel for both the parties. It is very clear from the narration of facts as above that the respondents were engaged only because their names were sponsored by the then Chairman of the Board. They have not come into the service either through the Employment Exchange or through any procedure in which they were required to compete against other eligible candidates. It is also seen that the proposal which was sent to the Governor for his approval was not sent through the normal routine of the concerned Administrative machinery, and through the Chief Secretary of Puducherry. Since the proposal was not routed through the normal channel of administration, the factual position with respect to the irregular employment of the respondents could

not be placed before the Governor. The relevant facts such as those relating to their initial engagement, availability of sanctioned posts in the same category in the Board, relevant rules for engagement of the employees etc. could also not be placed before the Governor. Even so the proposal itself recorded that the respondents had put in just 3½ years of service, and the proposal to regularize them had been once turned down by the Government. Section 15 of the Board Act clearly laid down that the Board was bound by the directions given by the Government in the performance of its function under the Act. The Governor was not supposed to act on his own, but with the aid and advice of the Council of Ministers. The question as to whether it will result into creation of additional posts and additional financial liability was required to be referred to the Government. Besides, the resolution only recorded the request of the Chairman in that behalf. It was not a resolution of the Board approving regularization or relaxing the existing norms, as a special case.

16. The learned Single Judge allowed the Writ Petition No.3181 of 2008 at the admission stage itself without affording an opportunity to the appellants to place these relevant facts before the Court, which led to an erroneous decision. If the petition was to be allowed, the least that was expected was to permit the respondents to the petition to file their response, and then take the decision one way or the other. Again the Division Bench also did not look into the substantive issue before it although the relevant material was placed before the bench in the writ appeal. The learned Single Judge who heard the second writ petition merely followed the decision of the Division Bench in writ appeal.

17. The learned Single Judge who heard the Writ Petition No.3181 of 2008 and also the Division Bench which heard the writ appeal could not have ignored that the respondents were clearly told that their services were co-terminus, and they will have no right to be employed thereafter. Condition No.4 and 6

of the earlier referred terms and condition are very clear in this behalf. The respondents had taken the co-terminus appointment with full understanding. It was not permissible for them to challenge their dis-engagement when the tenure of the Chairman was over. What a Constitution Bench of this Court has observed in paragraph 45 of *Secretary, State of Karnataka and Ors. Vs. Umadevi (3) and Ors.* reported in 2006 (4) SCC 1, is quite apt. The said para reads as follows:-

> *"45. While directing that appointments, temporary or casual, be regularised or made permanent, the courts are swayed by the fact that the person concerned has worked for some time and in some cases for a considerable length of time. It is not as if the person who accepts an engagement either temporary or casual in nature, is not aware of the nature of his employment. He accepts the employment with open eyes. It may be true that he is not in a position to bargain—not at arm's length—since he might have been searching for some employment so as to eke out his livelihood and accepts whatever he gets. But on that ground alone, it would not be appropriate to jettison the constitutional scheme of appointment and to take the view that a person who has temporarily or casually got employed should be directed to be continued permanently. By doing so, it will be creating another mode of public appointment which is not permissible……"*

18. As stated by this Court in *Umadevi* (supra), absorption, regularization or permanent continuance of temporary, contractual, casual, daily-wage or adhoc employees appointed/ recruited and continued for long in public employment dehors the constitutional scheme of public employment is impermissible and violative of Article 14 and 16 of the Constitution of India. As recorded in paragraph 53 of the report in SCC, this Court has allowed as a one time measure, regularization of services of irregularly appointed persons, provided they have worked for

ten years or more in duly sanctioned posts. That is also not the case in the present matter.

19. In another judgment of this Court in *State of Gujarat and Anr. Vs. P.J. Kampavat and Ors.* reported in 1992 (3) SCC 226, this Court had occasion to look into a similar situation. That was a case where persons concerned were appointed directly in the office of the Chief Minister on purely temporary basis for a limited period up to the tenure of the Chief Minister. This Court held that such an appointment was purely a contractual one, and it was co-terminus with that of the Chief Minister's tenure, and such service came to an end simultaneously with the end of tenure of the Chief Minister. No separate order of termination or even a notice was necessary for putting an end to such a service.

20. We have to note that in the present case the M.L.A. concerned was to function as the Chairman during the course of his tenure as an M.L.A., and had resigned with the announcement of the election for the state assembly. A proposal for regularization of the co-terminus employees appointed by him was directly sent to the Governor without the same being routed through the State Government. Similar such proposals have come to be rejected. As observed by this Court in *Union of India Vs. Dharam Pal* reported in 2009 (4) SCC 170, the requirement of being employed through proper channel could not be relaxed in an arbitrary and cavalier manner for the benefit of a few persons. This would be clearly violative of Articles 14 and 16 of the Constitution of India.

21. This being the scenario, the learned Single Judge as well as the Division Bench, and the subsequent learned Single Judge have erred in passing the orders that they have. The High Court has erred in deciding Writ Petition No.3181 of 2008 by directing the board to implement the resolution/note issued by the Chairman and approved by the Governor. The Division Bench has also erred in leaving the order passed by the learned

Single Judge in that petition undisturbed. So has the learned Single Judge erred who heard the second Writ Petition.

22. For the reasons stated above both these appeals are allowed, and the impugned judgments and orders in Writ Appeal No. 1131 of 2011 as well as one in Writ Petition No. 3181 of 2008 and Writ Petition No. 13428 of 2010 are set-aside. Writ Petition No. 3181 of 2008 and 13428 of 2010 shall stand dismissed. Consequently the Interim Applications in both these appeals, and the Contempt Petition No.1841 of 2011 filed by the respondent in the Madras High Court will also stand disposed of. In the facts of the present case we do not pass any order as to the costs.

B.B.B. Appeals allowed.

SUBODH NATH AND ANR.
v.
STATE OF TRIPURA
(Criminal Appeal No. 1551 of 2007)

MARCH 19, 2013

[A.K. PATNAIK AND H. L. GOKHALE, JJ.]

Juvenile Justice (Care and Protection of Children) Act, 2000 [as amended by Amendment Act of 2006] – s.7A; and proviso & Explanation to s.20 – Applicability of the Act – To offence committed prior to commencement of the Act – Held: In view of the provisions in ss.7A and 20, the Act would be applicable – In the instant case, the accused was below 18 years on the date of commission of the offence, and hence would be treated as juvenile under the provisions of the Act – Therefore, case qua the juvenile accused remitted to concerned Juvenile Justice Board – Penal Code, 1860 – s.302/34.

Penal Code, 1860 – s.302/s.34 – Prosecution under – Conviction by courts below – Held: Appellant No.1-accused is guilty of offence u/s.302 – Prosecution case is supported by eye-witness account corroborated by reliable evidence direct as well as circumstantial – Therefore, his conviction upheld.

Criminal Trial – Discrepancy in the version of witness – Effect of – Court not to discard the evidence on the ground of discrepancies, unless they are 'material discrepancies', so as to create reasonable doubt about the credibility of witnesses.

Motive – Relevance of – Held: Motive is relevant in case where prosecution seeks to prove guilt by circumstantial evidence – It becomes irrelevant if offence is proved by direct evidence.

Appellants-accused were prosecuted for having killed one person. Prosecution case was supported by evidence of one eye-witness. Trial court convicted both the accused u/s. 302/34 IPC. High Court confirmed their conviction.

In the instant appeal, it was contended that appellant No.2 was less than 18 years of age on the date of occurrence and hence should have been treated as a juvenile within the meaning of s.2(k) of the Juvenile Justice (Care and Protection of Children) Act, 2000 and that the provisions of Juvenile Justice Act, 1986 were not applicable. As regards appellant No.1, it was contended that conviction on the testimony of sole eye-witness (PW-13) was not correct because he was not reliable as he ran away from the place of occurrence and because his evidence was without any corroboration; that there was discrepancy in the evidence of PW-2 and PW-13; that there was no recovery of the weapon of offence and further that the motive to kill the deceased was also not proved.

Allowing the appeal of appellant No.2 and dismissing that of appellant No.1, the Court

HELD: 1. The accused is entitled to the benefit of the 2000 Act, as if the provisions of Section 2(k) thereof had always been in existence even during the operation of the Juvenile Justice Act, 1986 by virtue of Section 20 of the Juvenile Justice (Care and Protection of Children) Act, 2000, as amended by the Amendment Act of 2006. Considering the provisions of Section 7A and 20 of the 2000 Act and considering that the appellant No.2 was below 18 years of age as per his birth certificate, the impugned judgment of the High Court qua the appellant No.2 is liable to be set aside and the case would be

remitted to the concerned Juvenile Justice Board for disposal of his case in accordance with the provisions of the 2000 Act. [Para 10] [592-A-D]

Hari Ram v. State of Rajasthan and Anr. **(2009) 13 SCC 211: 2009 (7) SCR 623 – relied on.**

Pratap Singh v. State of Jharkhand and Anr. **(2005) 3 SCC 551: 2005(1) SCR 1019 – held inapplicable.**

2.1. Appellant No.1 was guilty of the offence u/s. 302 IPC. It is not correct to say that the evidence of PW-13 was not reliable as he was a suspect and had ran away from the place of occurrence. As explained by PW-13 he left the place of occurrence because of his fear of the appellants who had threatened him with dire consequences if he disclosed the incident to anyone. The evidence of PW-13 is also supported by the evidence of PW-6. Moreover, the evidence of the Investigating Officer (PW-19) read with Inquest Report (Ext. P-2) prepared by him shows that there were injuries on the dead body of deceased caused by an axe and a gun. PW-19 has also stated that he recovered handle of the axe near the dead body of the deceased and he seized the handle of the axe after preparing a seizure list in presence of the witnesses. Thus, the evidence of PW-13 is corroborated by material particulars by reliable testimony, direct and circumstantial. [Para 12] [593-B-E]

2.2. Once the eye-witness account of PW-13 is found to be corroborated by material particulars and reliable, his evidence cannot be discarded only on the ground that there were some discrepancies in the evidence of PW-1, PW-2, PW-13 and PW-19. In the deposition of witnesses, there are always normal discrepancies due to normal errors of observation, loss of memory, mental disposition

of the witnesses and the like. Unless, therefore, the discrepancies are "material discrepancies" so as to create a reasonable doubt about the credibility of the witnesses, the Court will not discard the evidence of the witnesses. [Para 13] [593-F-H]

State of Rajasthan v. Smt. Kalki and Anr. **(1981) 2 SCC 752: 1981 (3) SCR 504 – relied on.**

2.3. It is correct that the prosecution has not been able to establish the motive of appellant No.1 to kill the deceased but as there is direct evidence of the accused having committed the offence, motive becomes irrelevant. Motive becomes relevant as an additional circumstance in a case where prosecution seeks to prove the guilt by circumstantial evidence only. [Para 13] [594-A-B]

Badri v. State of Rajasthan **(1976) 1 SCC 442: 1976 (2) SCR 339;** *Lallu Manjhi and Anr. v. State of Jharkhand* **AIR 2003 SC 854: 2003 (1) SCR 1;** *Suresh Chandra Bahri etc. v. State of Bihar* **AIR 1994 2420: 1994 (1) Suppl. SCR 483 – referred to.**

Case Law Reference:

1976 (2) SCR 339	**referred to**	**Para 5**
2003 (1) SCR 1	**referred to**	**Para 5**
1994 (1) Suppl. SCR 483	**referred to**	**Para 8**
2005 (1) SCR 1019	**held inapplicable**	**Para 10**
2009 (7) SCR 623	**relied on**	**Para 10**
1981 (3) SCR 504	**relied on**	**Para 13**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1551 of 2007.

From the Judgment & Order dated 08.06.2005 of the High Court of Gauhati at Agartala Bench in Criminal Appeal No. 22 of 2004.

Lalit Chouhan, Somanadri Goud, Kshatrashal Raj, Abhishek Vinod Deshmukh (for Parekh & Co.) for the Appellants.

Ritu Raj Biswas, Gopal Singh for the Respondent.

The Judgment of the Court was delivered by

A.K. PATNAIK, J. 1. This is an appeal by way of special leave under Article 136 of the Constitution against the judgment dated 08.06.2005 of the Gauhati High Court, Agartala Bench, in Criminal Appeal No. 22 of 2004.

2. The facts very briefly are that on 09.10.1998, Ashutosh took out his cows for grazing but did not return home till dusk and his cousin, Kripesh, along with others searched for Ashutosh but could not find him. On the next day (10.10.1998) at about 8.30 a.m., he again went out looking for Ashutosh and found his dead body with injuries lying in a jungle at Nalia Tilla. Kripesh then lodged an FIR at the Panisagar Police Station and the police registered a case and held an inquest over the dead body of the deceased. In course of the investigation, the police apprehended Pranajit, who was working as a labourer under Ashutosh and Kripesh, from District Cachar and brought him to Dharamnagar and during interrogation Pranajit disclosed that Ashutosh had been killed by the two appellants. The statement of Pranajit was also recorded under Section 164 of the Code of Criminal Procedure, 1973 (for short 'Cr.P.C.') and on completion of the investigation, the police filed charge-sheet against the appellants.

3. At the trial, the prosecution examined a total of 19 witnesses. Kripesh, the informant, was examined as PW-1,

Patal, the elder brother of Pranajit, was examined as PW-2 and he stated that PW-13 had disclosed to him that the appellants assaulted the deceased by an axe and a *lathi*. Pranajit was examined as PW-13 and he has stated that he had gone along with the deceased to graze cows at Nalia Tilla and the appellant no.1 had dealt an axe blow on the deceased while the appellant no.2 dealt a *lathi* blow on him. The appellants did not produce any evidence in their defence. The trial court convicted the appellants under Section 302 read with Section 34 of the Indian Penal Code, 1860 (for short 'the IPC') and sentenced them to imprisonment for life and a fine of Rs.5000/- each and in default, to undergo further imprisonment for a period of one year. The appellants filed Criminal Appeal No. 22 of 2004 before the High Court, but by the impugned judgment the High Court maintained the conviction and sentence and dismissed the appeal.

4. Mr. Lalit Chauhan, learned counsel appearing for the appellants, submitted that on 09.10.1998 when the offence was alleged to have been committed, the appellant no.2, Paritosh, was less than 18 years of age and was, therefore, a juvenile within the meaning of Section 2(k) of the Juvenile Justice (Care and Protection of Children) Act, 2000 (for short 'the 2000 Act'). He relied on the copy of the primary education certificate issued by the Teacher-in-charge of West Bilthai S.B. School, Dharmanagar, Tripura (N), to show that the date of birth of the appellant no.2 was 28.05.1983. He submitted that accordingly his age was about 16 years on 09.10.1998, the date on which the offence was committed. He submitted that the trial court and the High Court, however, took the view that the provisions of the 2000 Act would not apply to the offence which was committed on 09.10.1998 and instead the provisions of Juvenile Justice Act, 1986 (for short 'the 1986 Act') would apply and under the 1986 Act only a person who is shown to be less than 16 years of age at the time of the commission of the offence is a juvenile and it was satisfactorily proved that the

appellant no.2 was 16 years of age on the date of commission of the offence. He submitted that in *Hari Ram v. State of Rajasthan and Another* [(2009) 13 SCC 211], this Court has taken a view that all persons who were below the age of 18 years on the date of commission of the offence would have to be treated as juveniles by virtue of the 2000 Act as amended by the Amendment Act of 2006. He submitted that, therefore, the appeal of appellant no.2 will have to be allowed and the impugned judgment of the High Court *qua* appellant no.2 will have to be set aside.

5. Regarding the appeal of the appellant no.1, Mr. Chauhan submitted that his conviction is based on the sole testimony of PW-13, but PW-13 ought not to have been believed because he had ran away from the place of occurrence in North Tripura district, where he was working as a labourer, to the Cachar district and he was thus a suspect. He cited the decision of this Court in *Badri v. State of Rajasthan* [(1976) 1 SCC 442] in which it has been held that in case of a witness who is neither wholly reliable nor whole unreliable, the Court must be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial. He also relied on *Lallu Manjhi and Another v. State of Jharkhand* (AIR 2003 SC 854) in which similarly the need to look for corroboration where the evidence was neither wholly reliable nor wholly unreliable was again emphasized.

6. Mr. Chauhan next pointed out some discrepancies in the evidence of PW-2 and PW-13. He pointed out that PW-2 had stated in his evidence that PW-13 had told him that the appellant no.1 (Subodh) had restrained him and had threatened him if he disclosed it to anyone that he had dealt an axe blow on the deceased. PW-13, on the other hand, has not said that the appellant no.1 (Subodh) had restrained him and threatened him, but has only said that the appellant no.2 (Paritosh) ran after him. He also pointed out discrepancies in the evidence

of PW-1 and PW-13. He submitted that while PW-1 has stated that PW-13 had accompanied him to search for the deceased, PW-13 had stated that he never accompanied PW-1 to search for the dead body of the deceased. He also pointed out some discrepancies in the evidence of PW-2 and PW-19, the Investigation Officer. He finally submitted that in this case the weapons with which the deceased was alleged to have been killed by the appellants have not been recovered nor any motive of the appellants to kill the deceased proved. He argued that this is a clear case in which the appellants should have been acquitted of the charge under Section 302 read with Section 34 of the IPC.

7. In reply, Mr. Rituraj Biswas, learned counsel appearing for the State of Tripura, relied on the decision of this Court in *Pratap Singh v. State of Jharkhand and Another* [(2005) 3 SCC 551] to submit that the appellant no.2 was not protected by the 2000 Act and was liable to be punished for the offence under Section 302 read with Section 34 of the IPC being more than 16 years of age when the offence was committed. He submitted that, therefore, this Court should not disturb the conviction of the appellant no.2 by the trial court as well as by the High Court only on the ground that he was entitld to the benefit of the 2000 Act.

8. Regarding the appellant no.1, Mr. Biswas submitted that it is not correct as contended by the learned counsel for the appellants that the weapons with which the deceased was killed by the appellants have not been recovered. He referred to the evidence of PW-19, the Investigating Officer, as well as the inquest report, Ext. P-2, to show that pursuant to the disclosure made by the appellants, one blood stained wooden stick measuring three feet in length was found at a distance of two feet to the left side of the deceased's head, a wooden stick of about two and half feet was found nearby the place where the head of the deceased was lying and one *takkal dao* was

lying at a distance of two feet to the right side of the place where the deceased's head was lying. Mr. Biswas submitted that PW-13 had clearly stated that on the date of the incident, he and the deceased went to graze cows at about 2.00 p.m. in the rubber garden and at about 4.00 p.m., the appellants went there and they were armed with an axe, *lathi* and gun and that while appellant no.1 dealt an axe blow on the deceased, appellant no.2 started assaulting him with a stick and thereafter the appellant no.1 took a gun from the jungle and shot the deceased. He submitted that there is some corroboration of what PW-13 has stated before the court by PW-6 who has stated in his evidence that on the date of the incident at about 1.30 p.m. he found the deceased and the appellants grazing cows in Nallia Tilla. He submitted that PW-6 also identified the appellants in the court. He cited the decision of this Court in *Suresh Chandra Bahri, etc. v. State of Bihar* (AIR 1994 2420) in which it has been held that when a confessional statement of disclosure made by the accused is confirmed by recovery of incriminating articles, there is a reason to believe that the disclosure statement was true and the evidence led in that behalf is also worthy of credence.

9. We have considered the submissions of the learned counsel for the parties with regard to the appeal of the appellant no.2 and we find that the High Court has held in *Para 28* of the impugned judgment that Paritosh (appellant no.2) is satisfactorily shown to be 16 years of age at the time of the alleged occurrence, i.e., on 09.10.1998, and he was not a juvenile under the 1986 Act. The questions that we have to decide in the appeal of the appellant no.2 are whether the appellant no.2 was entitled to claim that he was a juvenile as defined in the 2000 Act, and whether his claim to juvenility has to be decided in accordance with the provisions of the 2000 Act, as amended from time to time and the rules made thereunder. Sections 7A and 20 of the 2000 Act, which are relevant for deciding these questions are quoted hereinbelow:

"Section 7**A**. **Procedure to be followed when claim of juvenility is raised before any court. -** (1) Whenever a claim of juvenility is raised before any court or a court is of the opinion that an accused person was a juvenile on the date of commission of the offence, the court shall make an inquiry, take such evidence as may be necessary (but not an affidavit) so as to determine the age of such person, and shall record a finding whether the person is a juvenile or a child or not, stating his age as nearly as may be:

Provided that a claim of juvenility may be raised before any court and it shall be recognised at any stage, even after final disposal of the case, and such claim shall be determined in terms of the provisions contained in this Act and the rules made thereunder, even if the juvenile has ceased to be so on or before the date of commencement of this Act.

(2) If the court finds a person to be a juvenile on the date of commission of the offence under sub-section (1), it shall forward the juvenile to the Board for passing appropriate orders and the sentence, if any, passed by a court shall be deemed to have no effect.

Section 20. **Special provision in respect of pending cases**.- Notwithstanding anything contained in this Act, all proceedings in respect of a juvenile pending in any court in any area on the date on which this Act comes into force in that area, shall be continued in that court as if this Act had not been passed and if the court finds that the juvenile has committed an offence, it shall record such finding and instead of passing any sentence in respect of the juvenile, forward the juvenile to the Board which shall pass orders in respect of that juvenile in accordance with the provisions of this Act as if it had been satisfied on inquiry under this Act that a juvenile has committed the offence.

Provided that the Board may, for any adequate and special reason to be mentioned in the order, review the case and pass appropriate order in the interest of such juvenile.

Explanation.— In all pending cases including trial, revision, appeal or any other criminal proceedings in respect of a juvenile in conflict with law, in any court, the determination of juvenility of such a juvenile shall be in terms of clause (l) of section 2, even if the juvenile ceases to be so on or before the date of commencement of this Act and the provisions of this Act shall apply as if the said provisions had been in force, for all purposes and at all material times when the alleged offence was committed."

10. Section 7A and the proviso and the Explanation in the aforesaid Section 20 quoted above were inserted by the Amendment Act of 2006, w.e.f. 22.08.2006 and before the insertion of the Section 7A and proviso and the Explanation in Section 20, this Court delivered the judgment in *Pratap Singh v. State of Jharkhand and Another* (supra) on 12.02.2005 cited by Mr. Biswas. The judgment of this Court in *Pratap Singh v. State of Jharkhand and Another* (supra) therefore is of no assistance to decide this matter. After the insertion of Section 7A and the proviso and explanation in Section 20 in the 2000 Act, this Court delivered the judgment in *Hari Ram v. State of Rajasthan and Another* (supra). The facts of this case were that the accused committed the offences punishable under Sections 148, 302, 149, 325/149 and 323/149 of the IPC on 30.11.1998. The date of birth of the accused was 17.10.1982. The medical examination of the accused conducted by the Medical Board indicated his age to be between 16-17 years when he committed the offence on 30.11.1998. The High Court held that on the date of the incident the accused was about 16 years of age and was not a juvenile under the 2000 Act and the provisions of 2000 Act were, therefore, not applicable to

him. This Court set aside the order of the High Court and held that the accused had not attained the age of 18 years on the date of the commission of the offence and was entitled to the benefit of the 2000 Act, as if the provisions of Section 2(k) thereof had always been in existence even during the operation of the 1986 Act by virtue of Section 20 of the 2000 Act as amended by the Amendment Act of 2006 and accordingly remitted the case of the accused to the Juvenile Justice Board, Ajmer, for disposal in accordance with law. Considering the aforesaid judgment of this Court in *Hari Ram v. State of Rajasthan and Another* (supra) and the provisions of Section 7A and 20 of the 2000 Act and considering that the appellant no.2 is below 18 years of age as per his birth certificate, the impugned judgment of the High Court qua the appellant no.2 will have to be set aside and the case will have to be remitted to the concerned Juvenile Justice Board, of North Tripura district for disposal of his case in accordance with the provisions of the said Act.

11. Regarding the appeal of the appellant no.1, PW-13, who was working as a daily labourer under the deceased and PW-1, has clearly stated that he accompanied the deceased for grazing cows to the rubber garden at 2.00 p.m. on the date of the incident and at about 4.00 p.m., the appellant no.1 along with appellant no.2 went there armed with axe, lathi and gun and the deceased directed PW-13 to bring the cows so that they could proceed towards their house, but at that moment appellant no.1 dealt an axe blow on the deceased and thereafter he took out a gun from the jungle near the place of occurrence and shot at the victim and on seeing the incident he tried to run away from the place of occurrence. PW-13 has further stated that he returned home and had not disclosed to anyone about the incident because he was afraid of the appellants. PW-13 has further stated that on the next day in the morning he went to the house of PW-2 and narrated the story to him and being afraid of the appellants, he left for Cachar and

he was arrested by the Police and brought to Panisagar and thereafter he narrated the entire story to the police officer.

12. We are not persuaded by learned counsel for the appellants to take a view that the evidence of PW-13 was not reliable as he was a suspect and had ran away to Cachar. As has been explained by PW-13 himself, he left for Cachar because of his fear of the appellants who had threatened him with dire consequences if he disclosed the incident to anyone. At any rate, we find that the evidence of PW-13 is supported by the evidence of PW-6 who has stated that on the date of the incident he had found the deceased and appellants grazing cows in Nallia Tilla at around 1.30 p.m. Moreover, the evidence of the Investigating Officer (PW-19) read with inquest report (Ext. P-2) prepared by him shows that there were injuries on the dead body of deceased caused by an axe and a gun. PW-19 has also stated that he recovered handle of the axe near the dead body of the deceased and he seized the handle of the axe after preparing a seizure list in presence of the witnesses. Thus, the evidence of PW-13 is corroborated by material particulars by reliable testimony, direct and circumstantial.

13. Once we find that the eye witness account of PW-13 is corroborated by material particulars and is reliable, we cannot discard his evidence only on the ground that there are some discrepancies in the evidence of PW-1, PW-2, PW-13 and PW-19. As has been held by this Court in *State of Rajasthan v. Smt. Kalki and Another* [(1981) 2 SCC 752], in the deposition of witnesses there are always normal discrepancies due to normal errors of observation, loss of memory, mental disposition of the witnesses and the like. Unless, therefore, the discrepancies are "material discrepancies" so as to create a reasonable doubt about the credibility of the witnesses, the Court will not discard the evidence of the witnesses. Learned counsel for the appellants

is right that the prosecution has not been able to establish the motive of the appellant no.1 to kill the deceased but as there is direct evidence of the accused having committed the offence, motive becomes irrelevant. Motive becomes relevant as an additional circumstance in a case where prosecution seeks to prove the guilt by circumstantial evidence only.

14. In the result, we hold that the appellant no.1 was guilty of the offence under Section 302 of the IPC and we accordingly dismiss the appeal of the appellant no.1. We, however, allow the appeal of the appellant no.2, set aside the impugned judgment of the High Court and the judgment of the trial court qua the appellant no.2 and remit the matter to the Juvenile Justice Board of North Tripura district for disposal in accordance with the 2000 Act within four months of receipt of a copy of this judgment.

K.K.T. Appeal of appellant No. 2 allowed & Appeal of appellant No.1 dismissed.