SATYAJIT BALLULBHAI DESAI & ORS.
v.
STATE OF GUJARAT
(Criminal Appeal No. 1158 of 2012)

JULY 20, 2012

[G. S. SINGHVI, GYAN SUDHA MISRA, JJ.]

CODE of CRIMINAL PROCEDURE, 1973:

s. 167 r/w s. 57 – Remand of accused in police custody – On revival of complaint at the instance of a third party and after accused were enlarged on bail by High Court – Held: Grant of order for police remand should be an exception and not a rule and for that investigating agency is required to make out a strong case and must satisfy the Magistrate that without police custody it would be impossible for police authorities to undertake further investigation – Order permitting police remand cannot be treated lightly or casually and strict adherence to the statutory provision is mandatory.

S 167 r/w s. 57 – Police remand – Held: In the instant case, the order for police remand of appellants cannot be sustained for: (i) courts below have overlooked the fact that complainant had entered into a compromise with the alleged accused/appellant in the civil suit and had withdrawn the complaint which was later revived at the instance of a third party who had nothing to do with the complaint and (ii) High Court had granted bail to appellants which clearly had a bearing on the plea seeking police remand — Disclosure of reasons by magistrate allowing police remand specially in a matter when accused has been enlarged on bail by High Court is all the more essential – Constitution of India, 1950 – Art. 21.

s. 167 – Police remand after accused had been granted

bail by High Court – Procedure – Held: Correct course for investigating authorities should have been to approach the High Court as power of Magistrate to grant police remand after the accused has been granted bail by the High Court, would cease to exist — Therefore, High Court as also Judicial Magistrate were not legally justified in permitting police remand of appellants even for three days in the wake of the existing facts and features of the matter — Impugned order passed by High Court as also that passed by Judicial Magistrate, permitting police remand of the appellants are set aside—Practice and Procedure.

s.57 r/w s.167 CrPC and Art. 22(2) – Detention of a person by police and period of remand in police custody – Discussed – Constitution of India, 1950 – Arts. 21 and 22(2).

A complaint for offences punishable u/ss 406, 420, 467, 468, 471, 504, 506(2) and 114, IPC was lodged against the appellants alleging that on the death of the husband of the complainant and his brothers, appellant no. 1 forged and created a bogus power of attorney in the name of a fictitious person and got executed a registered sale deed in respect of her lands in favour of a third party without her knowledge. The complaint was registered as M. Case 1/2004. The complainant also filed a suit against appellant no. 1 which was compromised. The complainant and appellant no. 1 then appeared before the Judicial Magistrate and on their request, the Judicial Magistrate directed the Deputy Superintendent of Police to return the complaint. However, the petition filed by a stranger challenging the order of the Judicial Magistrate, having been allowed by the High Court, complaint case M. Case 1/2004 got revived. Thereupon, the appellants approached the High Court and they were enlarged on regular bail. Six days thereafter, the D.S.P. filed an application before the Judicial Magistrate seeking police remand of the appellants for seven days in connection

with M. Case 1/2004. The Judicial Magistrate allowed police remand of the appellants for three days. The High Court upheld the said order of remand.

Allowing the appeal, the Court.

HELD: 1.1. Grant of order for police remand should be an exception and not a rule and for that the investigating agency is required to make out a strong case and must satisfy the Magistrate that without the police custody it would be impossible for the police authorities to undertake further investigation and only in that event police custody would be justified. It is to be borne in mind that detention in police custody is generally disfavoured by law. The scheme of s.167 of the Code of Criminal Procedure, 1973 is unambiguous in this regard and is intended to protect the accused from the methods which may be adopted by some overzealous and unscrupulous police officers which at times may be at the instance of an interested party also. But in the investigation of serious and heinous crimes, the Legislature has permitted limited police custody. [para 10]

1.2. It may be noted that Art. 22 (2) of the Constitution of India and s. 57 Cr.P.C. give a mandate that every person who is arrested and detained in police custody shall be produced before the nearest magistrate within a period of 24 hours of such arrest and no such person can be detained in the police custody beyond the said period without the authority of a magistrate. The initial period of police custody of an arrested person till he is produced before a Magistrate, is neither referable to nor is in pursuance of an order of remand passed by a Magistrate. In fact the powers of remand given to a Magistrate become exercisable only after an accused is produced before him in terms of sub s. (1) of s. 167. But, there cannot be any detention in the police custody after the expiry of first 15 days even in a case where some more

offences either serious or otherwise committed by him in the same transaction, come to light at a later stage. [para 11 and 13]

Chaganti Narayan Satyanarayan & Ors v. State of Andhra Pradesh **1986 (2) SCR 1128 = 1986 AIR 2130;** *C.B.I. v. Anupam J. Kulkarni* **1992 (3) SCR 158 = (1992) 3 SCC 141 – relied on.**

1.3. The order permitting police remand cannot be treated lightly or casually and strict adherence to the statutory provision is mandatory. In view of this, the order for police remand of the appellants cannot be sustained for more than one reason. In the first place, the courts below have overlooked the fact that the complainant had entered into a compromise with the alleged accused/ appellant in the civil suit and finally withdrew the complaint. The Judicial Magistrate by order dated 14.2.2005, therefore, rightly directed the D. S.P. to return the complaint by 15.2.2005. But, the High Court set aside this order on an application at the instance of a third person who had nothing to do with the complaint lodged by the complainant. However, the appellants having not challenged the said order passed by the High Court, as they had not been made party in the said application, this aspect of the matter cannot be examined. [para 14]

2.1. The High Court and the Magistrate also lost sight of the order of the High Court granting bail to the appellants on 23.3.2011 which clearly had a bearing on the plea seeking police remand. When the appellants were enlarged on bail, it was incumbent upon the Magistrate to meticulously examine the facts and circumstance as to whether it was so grave which persuaded the police authorities only after six days to file an application seeking police remand of the appellants. The Judicial Magistrate and the High Court have adopted a casual or a mechanical approach permitting police remand of the

appellants without scrutinizing the reasons ignoring the fact that the appellants had already been enlarged on bail by the High Court and the dispute with the complainant who had lodged the complaint had already been settled. Thus, the existing facts and circumstance prima facie were clearly not so grave or extraordinary justifying police remand which could have been overlooked by the High Court even though it was for three days only as it was bound to have ramification not only affecting the liberty of the person who was already granted bail but also the magistrate nullifying the order of the High Court granting bail. [para 15 and 17]

2.2. It is to be emphasized is that the disclosure of reasons by the magistrate allowing police remand specially in a matter when the accused has been enlarged on bail by the High Court is all the more essential and cannot be permitted in absence of a valid and sufficiently weighty reason seeking such custody as it clearly affects the liberty of an individual who has been enlarged on bail by a court of competent jurisdiction. [para 17]

2.3. The correct course for the investigating authorities seeking police remand of the appellants should have been to approach the High Court as power of the magistrate to grant police remand after the accused has been granted bail by the High Court, would cease to exist and any direction to that effect can be permitted by the High Court only and the magistrate cannot be permitted to over-ride the order of bail even if it be for a brief period of few days. [para 17]

2.4. This Court, in the facts and features of the matter, is of the considered opinion that the High Court as also the Judicial Magistrate were not legally justified in permitting the police remand of the appellants even for three days. Consequently, the impugned orders passed

by the High Court and the Principal Civil Judge and Judicial Magistrate First Class are set aside. [para 18]

Case Law Reference:

1986 (2) SCR 1128	**relied on**	**para 13**
1992 (3) SCR 158	**relied on**	**para 13**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1158 of 2012.

From the Judgment & Order dated 29.09.2011 of the High Court of Gujarat at Ahmedabad in SCRLA No. 810 of 2011.

Huzefa Ahmadi and Ejaz Maqbool for the Appellants.

Hemantika Wahi for the Respondent.

The Judgment of the Court was delivered by

GYAN SUDHA MISRA, J. 1. Leave granted.

2. The appellants herein have assailed the judgment and order of the High Court of Gujarat at Ahmedabad dated 29.09.2011 passed in Special Crl. Application No.810/2011 alongwith Criminal Miscellaneous Application No.11636/2011 whereby the learned single Judge was pleased to dismiss the applications and thus upheld the order passed by the learned Magistrate permitting police remand of the appellants herein for three days for their interrogation in complaint case No.3/2004 registered in the court of Judicial Magistrate (1st Class) Valod, Gujarat which had been referred to the police for investigation after which the said complaint was registered as Talod M. Case No.1/2004.

3. Before we consider the justification and correctness of the impugned order permitting police remand of the appellants, the relevant factual details are required to be recorded which disclose that a lady named Surjaben widow of Badharsinh @

Babarsinh Chauhan aged approximately 80 years filed a criminal complaint before the Judicial Magistrate 1st Class (JMIC) , Valod in Gujarat being case No.3/2004 against the appellants alleging inter – alia that the husband of the complainant namely Badharsinh @ Babarsinh Ratnaji Chauhan had expired on 10.6.1967 and after his death and death of other brothers of the husband of the complainant, name of the complainant got entered in the revenue record. However, when the complainant obtained a copy of the revenue record in respect of the aforesaid land, she came to know that one Satyajitbhai Ballubhai Desai forged and created a bogus power of attorney at the instance of the owner of the property in the name of one Jaydipbhai Ranchhodbhai Solanki who is a fictitious person and on the basis of the bogus and fabricated power of attorney, he got executed a registered sale deed on 2.8.2003 in favour of a 3rd party without the knowledge of the complainant. The learned Magistrate sent the matter for investigation to the police which registered it as Talod M.Case No.1/2004.

4. The complainant apart from filing the complaint against the appellants also instituted a Regular Civil Suit No. 15/2004 in the court of learned Civil Judge (Jr. Division), Valod against the appellant No.1 herein for declaration, permanent injunction and cancellation of registered sale deed executed on 2.8.2003. However, on appearance of the appellant No.1 in the civil suit, a compromise came to be arrived at between the appellant No.1 Satyajit Ballubhai Desai and the complainant Surjaben wherein the parties agreed that the criminal complaint filed by the complainant will be withdrawn unconditionally. The learned Civil Judge accepted the said compromise and directed to draw a decree as per the terms of the compromise.

5. In view of the aforesaid compromise, the complainant as also the appellant No.1 appeared before the learned Judicial Magistrate First Class, Valod and prayed to withdraw the criminal complaint. In view of the request made by the parties, the Judicial Magistrate directed the Deputy

Superintendent of Police Vyara to return the complaint by February 15, 2005. However, a third person and a stranger to the dispute namely Randhirsing Deepsing Parmar, who according to the appellants had nothing to do with the dispute between the complainant and the appellants herein, felt aggrieved with the order dated February 15, 2005 passed by the JMFC and filed a Special Criminal Application No. 918/ 2007 before the High Court of Gujarat challenging the order of JMFC by which the order of investigation in the complaint case had been directed to be returned.

6. The High Court, however, was pleased to allow this application and directed for investigation of the complaint which had been lodged by Surjaben. As a result of this order of the High Court dated November 30, 2007, the criminal complaint case No. 3/2004/Talod M.Case 1/2004 got revived in spite of the fact that a compromise decree had been drawn before the Civil Court in regard to the property for which criminal complaint had been lodged and the complainant had withdrawn the complaint but was revived by order of the High Court. The appellants, therefore, had to approach the High Court seeking anticipatory bail in the criminal complaint which was revived and the same was rejected but subsequently the High Court by order dated 23rd March, 2011 enlarged the appellants herein on regular bail. However, the Dy. S.P. Vyara only six days thereafter on 29.3.2011, filed an application before the Judicial Magistrate First Class,Valod Court, Valod seeking police remand of the appellants for seven days in connection with M.Case No.1/2004 based on the complaint of the complainant lady – Surjaben which had been registered with the Valod Police Station on the basis of the complaint lodged for offences under Section 406, 420, 467,468, 471, 504, 506 (2) and 114 of the Indian Penal Code and had been withdrawn but was later revived as stated hereinbefore.

7. The prayer made by the Dy. S.P. in the application seeking police remand for three days was partly allowed by the Principal Civil Judge and Judicial Magistrate First Class, Valod

permitting police remand of the appellants for three days against which the appellants moved the High Court whereby a stay against the order of police remand was passed in favour of the appellants herein. However, when the matter was heard finally, the High Court upheld the order passed by the magistrate permitting police remand of the appellants for a period of three days in view of the investigation which was conducted in regard to the case lodged by the complainant-Surjaben, finally giving rise to a case before the police for investigation at the instance of a third party, namely, Randhirsing Deepsing Parmar who was a stranger to the dispute.

8. The appellants feeling aggrieved with the order passed by the High Court and the JMIC permitting police remand of the appellants for a period of three days has challenged this order in this appeal essentially on the ground that the order granting police remand of the appellants are not based on valid or justifiable reason on the part of the investigating agency and hence the same encroaches on the personal liberty of the appellants as the appellants have never tried to scuttle the investigation justifying police remand. It was further submitted that the grant of police remand is an exception and not the rule and therefore the investigating agency was required to make a strong case for taking police custody of the appellants in order to undertake further investigation and only in that event police custody would be justified. The appellants having fully co-operated with the investigating authority and having appeared for questioning as and when required after the grant of bail, should not have been allowed to be sent for police remand on the pretext of conducting further investigation as prayed for by the investigating authority.

9. Learned counsel for the State however has supported the order of the JMFC and the High Court permitting police remand of the appellants herein in view of revival of investigation by the police.

10. Having considered and deliberated over the issue involved herein in the light of the legal position and existing facts of the case, we find substance in the plea raised on behalf of the appellants that the grant of order for police remand should be an exception and not a rule and for that the investigating agency is required to make out a strong case and must satisfy the learned Magistrate that without the police custody it would be impossible for the police authorities to undertake further investigation and only in that event police custody would be justified as the authorities specially at the magisterial level would do well to remind themselves that detention in police custody is generally disfavoured by law. The provisions of law lay down that such detention/police remand can be allowed only in special circumstances granted by a magistrate for reasons judicially scrutinised and for such limited purposes only as the necessities of the case may require. The scheme of Section 167 of the Criminal Procedure Code, 1973 is unambiguous in this regard and is intended to protect the accused from the methods which may be adopted by some overzealous and unscrupulous police officers which at times may be at the instance of an interested party also. But it is also equally true that the police custody although is not the be-all and end-all of the whole investigation, yet it is one of its primary requisites particularly in the investigation of serious and heinous crimes. The Legislature also noticed this and, has therefore, permitted limited police custody.

11. It may, therefore, be noted that Article 22 (2) of the Constitution of India and Section 57 of the Cr.P.C. gives a mandate that every person who is arrested and detained in police custody shall be produced before the nearest magistrate within a period of 24 hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person can be detained in the police custody beyond the said period without the authority of a magistrate. These two provisions clearly manifest the intention of the law in this regard and therefore it is the magistrate who

has to judicially scrutinise circumstances and if satisfied can order detention of the accused in police custody. The resultant position is that the initial period of custody of an arrested person till he is produced before a Magistrate is neither referable to nor in pursuance of an order of remand passed by a Magistrate. In fact, the powers of remand given to a Magistrate becomes exercisable only after an accused is produced before him in terms of sub section (1) of Section 167 Cr.P.C.

12. The Judicial Magistrate thus in the first instance can authorise the detention of the accused in such custody i.e. either police or judicial from time to time but the total period of detention cannot exceed fifteen days in the whole. Within this period of fifteen days there can be more than one order changing the nature of such custody either from police to judicial or vice-versa. If the arrested accused is produced before the Executive Magistrate he is empowered to authorise the detention in such custody either police or judicial only for a week, in the same manner namely by one or more orders but after one week he should transmit him to the nearest Judicial Magistrate along with the records. When the arrested accused is so transmitted the Judicial Magistrate, for the remaining period, that is to say excluding one week or the number of days of detention ordered by the Executive Magistrate, may authorise further detention within that period of first fifteen days to such custody either police or judicial. After the expiry of first period of fifteen days further remand during the period of investigation can only be in judicial custody. There cannot be any detention in the police custody after the expiry of first fifteen days even in a case where some more offences either serious or otherwise committed by him if the same transaction come at a later stage. But this bar does not apply if the same arrested accused is involved in a different case arising out of a different transaction.

13. As the legal position noted above have an important bearing in discharge of the day to day magisterial powers

contemplated under Section 167 (2) of the Cr.P.C., we considered it appropriate to sum up briefly and reiterate the settled legal position that whenever any person is arrested under Section 57 Cr.P.C., he should be produced before the nearest Magistrate within 24 hours as mentioned therein. Such Magistrate may or may not have jurisdiction to try the case. This position was further enunciated upon in *Chaganti Narayan Satyanarayan & Ors Vs. State of Andhra Pradesh (1986 AIR 2130)* wherein it was held that the terms of sub section (1) of Section 167 have to be read in conjunction with Section 57 which interdicts a police officer from keeping in custody a person without warrant for a longer period than 24 hours without production before a Magistrate, subject to the exception that the time taken for performing journey from the place of arrest to the Magistrate's court can be excluded from the prescribed period of 24 hours. Since sub section (1) provides that if the investigation cannot be completed within the period of 24 hours fixed by Section 57 the accused has to be forwarded to the Magistrate alongwith the entries in the Diary, it follows that a police officer is entitled to keep an arrested person in custody for a maximum period of 24 hours for purposes of investigation. In the landmark judgement of *C.B.I. Vs. Anupam J. Kulkarni (1992) 3 SCC 141*, it was held that the law does not authorise a police officer to detain an arrested person for more than 24 hours exclusive of the time necessary for the journey from the place of arrest to the magistrate court. Sub-section (1) of Section 167 covers all this procedure and also lays down that the police officer while forwarding the accused to the nearest magistrate should also transmit a copy of the entries in the diary relating to the case. As already stated herein before, the initial period of police custody of an arrested person till he is produced before a Magistrate is neither referable to nor in pursuance of an order of remand passed by a Magistrate. In fact the powers of remand given to a Magistrate become exercisable only after an accused is produced before him in terms of sub section (1) of Section 167. But there cannot be any detention in the police custody after the expiry of first 15

days even in a case where some more offences either serious or otherwise committed by him if the same transaction comes to light at the later stage.

14. While examining the case of the appellants in the light of the aforesaid legal position, it is apparent from the provisions of the Cr.P.C. that the order permitting police remand cannot be treated lightly or casually and strict adherence to the statutory provision is mandatory. In view of this, the order for police remand of the appellants cannot be sustained for more than one reason. In the first place, the courts below have overlooked that the complainant Surjaben who had lodged the complaint herself chose not to pursue the complaint as she had entered into a compromise with the alleged accused/appellant in the civil suit which she had filed against them and finally withdrew the complaint. The Judicial Magistrate 1st Class by order dated 14.2.2005 therefore had rightly directed the Dy. S.P. Vyara to return the complaint by February 15, 2005. But, thereafter, what weighed with the High Court to set aside this order and entertain an application at the instance of a third person namely Randhirsing Deepsing Parmar who had nothing to do with the complaint lodged by Surjaben is neither clear nor does it stand to reason, but the appellants having not challenged the said order passed by the High Court permitting revival of the investigation at the instance of Sri Parmar as they had not been made party in the said application, this aspect of the matter cannot be examined herein by us.

15. However, even if the revival of the investigation was rightly or wrongly justified, the High Court as also the Magistrate lost sight of an important factor which is the order of the High Court granting bail to the appellants on 23.3.2011 which clearly had a bearing on the plea seeking police remand. When the appellants were enlarged on bail vide order dated 23.3.2011, it was incumbent upon the magistrate to meticulously examine the facts and circumstance as to whether it was so grave which persuaded the police authorities only after six days to file an

application seeking police remand of the appellants for seven days by filing an application on 29.3.2011 which was allowed by the Principal Civil Judge and Judicial Magistrate 1st Class, Valod by order dated 31.3.2011 as apparently the same is beyond comprehension since no reason had been assigned. It is thus obvious that an extremely casual approach has been adopted by the Judicial Magistrate permitting such police remand overlooking the legal position and yet the High Court has also confirmed it overlooking and ignoring two very important aspects - first one being that the complainant although had withdrawn the complaint, the investigation was revived at the instance of a third party namely Sri Parmar who was wholly unconnected with the case and secondly that the appellants although had been enlarged on bail by the High Court in the case for which investigation had been revived, yet police remand was sought only six days after the grant of bail. In spite of these glaring inconsistencies writ large on the matter, the Judicial Magistrate allowed the request of the investigating authorities seeking police remand of the appellants without judicially scrutinizing and disclosing a single circumstance as to why it was so essential to seek police remand of the appellants for seven days in the interest of investigation which could not proceed until they were taken into police custody although they had already been enlarged on bail.

16. When the accused appellant in the instant matter had already been enlarged on bail by the High Court, it was all the more essential and judicial duty of the Judicial Magistrate to ensure and ascertain as to why the appellant was required to be taken into police custody/police remand for conducting further investigation specially when revival of the investigation was done not even at the instance of the complainant but by a third person, namely, Sri Parmar whose locus-standi for revival of the investigation is itself not clear. We find sufficient force in the submission advanced on behalf of the appellants that the plea for grant of police remand should be an exception and not the rule and the investigating agency ought to advance strong

reasons seeking police remand for further investigation specially in a matter where the alleged accused had been enlarged on bail and the dispute had practically come to an end when the complainant had arrived at a compromise with the accused persons and subsequently withdrew the complaint; yet the investigation was revived at the instance of a stranger, namely, Randhirsing Deepsing Parmar who admittedly is a third party unconnected with the dispute and is alleged to have demanded money from the appellants by taking undue interest in the matter and getting the investigation revived without the consent of the complainant who herself had entered into a compromise with the appellant and had not sought revival of the complaint.

17. Be that as it may, the fact remains that the learned Magistrate as also the High Court appears to have adopted a casual or a mechanical approach permitting police remand of the appellants without scrutinizing the reasons ignoring the fact that the appellants had already been enlarged on bail by the High Court and the dispute with the complainant Surjaben who had lodged the complaint had already been settled. Thus, the existing facts and circumstance prima facie were clearly not so grave or extraordinary justifying police remand which could have been overlooked by the High Court even though it was for three days only as it was bound to have ramification not only affecting the liberty of the person who was already granted bail but also the magistrate nullifying the order of the High Court granting bail even if it was for a period of three days only. In fact when the accused had been enlarged on bail by the High Court, it was all the more essential initially for the police authorities and thereafter by the magistrate to disclose and assign convincing reasons why investigation could not proceed further without seeking police remand of the accused and in case police remand was sought on any ground of interference with the investigation in any manner alleging influencing the witnesses or tampering with the evidence in any manner, straightaway it could have been a case for cancellation of bail of the accused

and the magistrate could have directed the police authorities to approach the High Court seeking cancellation or any other appropriate direction. What is sought to be emphasized is that the disclosure of reasons by the magistrate allowing police remand specially in a matter when the accused has been enlarged on bail by the High Court is all the more essential and cannot be permitted in absence of a valid and sufficiently weighty reason seeking such custody as it clearly affects the liberty of an individual who has been enlarged on bail by a court of competent jurisdiction. In fact, the correct course for the investigating authorities seeking police remand of an accused who had been granted bail by the High Court, should have been to approach the High Court as power of the magistrate to grant police remand after the accused has been granted bail by the High Court, would cease to exist and any direction to that effect can be permitted by the High Court only in view of the fact that the High Court considered it just and appropriate to enlarge the accused on bail and the magistrate cannot be permitted to over-ride the order of bail even if it be for a brief period of few days. This in our view is the only appropriate course considering the strict legal provisions in the Code of Criminal Procedure wherein the Legislature has earmarked 24 hours minus the period of transportation of the accused from police station to the magistrate as the maximum period of police custody during the initial stage and not more than fifteen days by order of the Judicial Magistrate clearly is an indication that police custody cannot be permitted without adherence to strict judicial scrutiny from which it is obvious that it cannot be allowed without assigning clear and cogent reason for enhancement of the period of police remand and the same would all the more be essential when police remand is sought for an accused who has been enlarged on bail by the High Court. The inference is thus candid and clear that police remand of the accused - more so, who has been enlarged on bail cannot be granted for an undisclosed or a flimsy reason.

18. In view of the aforesaid analysis of the legal position,

we are of the considered opinion that the High Court as also the Judicial Magistrate were not legally justified in permitting the police remand of the appellants even for three days in the wake of the existing facts and features of the matter narrated hereinbefore. Consequently, we set aside the impugned order passed by the High Court as also the order dated 31.3.2011 passed by the Principal Civil Judge and Judicial Magistrate First Class, Valod permitting police remand of the appellants and thus allow this appeal.

R.P. Appeal allowed.

STATE OF PUNJAB
v.
SALIL SABHLOK AND ORS.
(Civil Appeal No.7640 of 2011)

FEBRUARY 15, 2013

[A.K. PATNAIK AND MADAN B. LOKUR, JJ.]

Constitution of India, 1950 – Arts.226, 316 and 320 – State Public Service Commission – Appointment of Chairman – Interference u/Art.226 of the Constitution – Scope – Held: High Court should not normally, in exercise of its power u/Art.226, interfere with the discretion of the State Government in selecting and appointing the Chairman of the State Public Service Commission – But in an exceptional case, if it is shown that relevant factors implied from the very nature of the duties entrusted to Public Service Commissions u/Art.320 have not been considered by the State Government in selecting and appointing the Chairman of the State Public Service Commission, the High Court can invoke its wide and extra-ordinary powers u/Art.226 and quash the selection and appointment to ensure that the discretion of the State Government is exercised within the bounds of the Constitution –On facts, where appointment of 'H' as Chairman of the Punjab Public Service Commission was quashed by the High Court while exercising jurisdiction u/Art.226, the materials on record do not indicate that 'H' had any knowledge or experience whatsoever either in administration or in recruitment nor do the materials indicate that he had the qualities to perform the duties as the Chairman of the State Public Service Commission u/Art.320 – Decision of the State Government to appoint 'H' as the Chairman of the Punjab Public Service Commission was invalid for non-consideration of relevant factors implied from the very nature of the duties entrusted to Public Service Commissions u/Art.320 – Impugned order of High Court accordingly not interfered with.

Constitution of India, 1950 – Art.226 – Power under – Exercise of – Scope – Held: Art.226 vests in the High Court the power to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose.

Public Service Commisison – State Public Service Commission – Appointment of Chairman – Procedure – Implied relevant factors – Held: It is for the Governor who is the appointing authority u/Art.316 to lay down the procedure – But in absence of any procedure laid down by the Governor, the State Government would not have absolute discretion – The State Government has to select only persons with integrity and competence for appointment, because the discretion vested in the State Government u/Art.316 is impliedly limited by the purposes for which the discretion is vested and the purposes are discernible from the functions of the Public Service Commission enumerated in Art.320 – The State Public Service Commission is expected to act with independence from the State Government and with fairness, besides competence and maturity acquired through knowledge and experience of public administration – Even though Art.316 does not specify the aforesaid qualities of the Chairman of a Public Service Commission, these qualities are amongst the implied relevant factors which have to be taken into consideration by the Government while determining the competency of the person to be selected and appointed as Chairman of the Public Service Commission u/Art.316 – Constitution of India, 1950 – Articles 316 and 320.

Public Interest Litigation – Selection of 'H' for appointment as Chairman of the Punjab Public Service Commission –Writ petition challenging such appointment – Maintainability – Held: Respondent No.1 filed the writ petition for espousing the

cause of the general public of the State of Punjab with a view to ensure that a person appointed as the Chairman of the Punjab Public Service Commission is a man of ability and integrity so that recruitment to public services in the State of Punjab are from the best available talents and are fair and is not influenced by politics and extraneous considerations – Considering the averments in the writ petition, it cannot be held that the writ petition was just a service matter in which only the aggrieved party had the locus to initiate a legal action in the court of law – The writ petition was a matter affecting interest of the general public in the State of Punjab and any member of the public could espouse the cause of the general public so long as his bonafides was not in doubt – When respondent No.1 brought to the notice of the High Court through the writ petition that the State Government of Punjab proposed to appoint 'H' as Chairman of the Public Service Commission, only because of his political affiliation, the High Court rightly entertained the writ petition as a public interest litigation.

Practice & Procedure – Reference to larger Bench – Writ petition challenging appointment of 'H' as Chairman of the Punjab Public Service Commission – Division Bench of the High Court made academic reference to Full Bench of three Judges of the High Court on specific questions of law – Justification – Held: On facts, justified – No merit in the submission that the Division Bench of the High Court having found in its order that the irregularities and illegalities pointed out in the writ petition against 'H' were unsubstantiated, should not have made an academic reference to the larger Bench of the High Court – The Division Bench of the High Court was of the view that the persons to be appointed must have competence and integrity, but how such persons are to be identified and selected must be considered by a Bench of three Judges and accordingly made the reference – Punjab High Court Rules – rr. 6, 7, 8 and 9.

Practice & Procedure – Reference to larger Bench – Scope of reference – Writ petition challenging appointment of Chairman of the Punjab Public Service Commission – Division Bench of the High Court made reference to Full Bench of three Judges of the High Court on specific questions of law relating to procedure for identifying persons of competence and integrity for such appointment – Full Bench, instead of deciding the specific questions, gave directions to the State of Punjab and the State of Haryana to follow a particular procedure for appointment of Members and Chairman of the Public Service Commission till such time a fair, rational, objective and transparent policy to meet the mandate of Art.14 of the Constitution was made – Justification – Held: Not justified – The Full Bench of the High Court decided issues which were not referred to it by the Division Bench of the High Court – It acted beyond its jurisdiction and usurped the constitutional power of the Governor in laying down the procedure for appointment of the Chairman and Members of the Public Service Commission – Constitution of India, 1950 – Art.316.

The State Government of Punjab appointed Shri Harish Dhanda as the Chairman of the Punjab Public Service Commission. Respondent No.1, an Advocate practicing at the Punjab and Haryana High Court, Chandigarh, filed a public interest litigation under Article 226 of the Constitution praying for a mandamus directing the State Government to frame regulations governing the conditions of service and appointment of the Chairman and/or the Members of the Public Service Commission as envisaged in Article 318 of the Constitution. Respondent no.1 also prayed for a direction restraining the State Government from appointing Shri Harish Dhanda as the Chairman of the Punjab Public Service Commission in view of the fact that his appointment does not fall within the parameters of integrity, impartiality and independence as reiterated time and again by this Court.

The Division Bench of the High Court referred the matter to the Bench of three Judges of the High Court. Thereafter, the Chief Justice of the High Court constituted a Full Bench. The Full Bench of the High Court delivered judgment 17.08.2011 directing both the State of Haryana and the State of Punjab to follow a particular procedure as part of the decision-making process for appointment as Members and Chairman of the Public Service Commission, till such time a fair, rational, objective and transparent policy to meet the mandate of Article 14 was made. By the order dated 17.08.2011, the Full Bench of the High Court also ordered that the writ petition be listed before the Division Bench to be constituted by the Chief Justice of the High Court. Pursuant to the judgment dated 17.08.2011, the Division Bench constituted by the Chief Justice of the High Court quashed the appointment of Shri Harish Dhanda as Chairman of the Punjab Public Service Commission and disposed of the writ petition of respondent No.1 in terms of the judgment of the Full Bench. Aggrieved, the State of Punjab, State of Haryana and Shri H.R. Dhanda filed the instant appeals against the judgment and orders dated 17.08.2011 of the Full Bench and the Division Bench of the High Court.

The question which arose for decision of this Court was whether the High Court in exercise of its writ jurisdiction under Article 226 of the Constitution can lay down the procedure for the selection and appointment of the Chairman of the State Public Service Commission and quash his appointment in appropriate cases.

Disposing of the appeals, the Court

HELD:

Per Patnaik, J.

1. On a reading of the entire writ petition filed by respondent No.1 before the High Court, it is clear that respondent no.1 filed this writ petition for espousing the cause of the general public of the State of Punjab with a view to ensure that a person appointed as the Chairman of the Punjab Public Service Commission is a man of ability and integrity so that recruitment to public services in the State of Punjab are from the best available talents and are fair and is not influenced by politics and extraneous considerations. Considering the averments in the writ petition, it cannot be held that the writ petition is just a service matter in which only the aggrieved party has the locus to initiate a legal action in the court of law. The writ petition is a matter affecting interest of the general public in the State of Punjab and any member of the public could espouse the cause of the general public so long as his bonafides are not in doubt. Considering the past experience of the damage to recruitment to public services caused by appointing a person lacking in character as the Chairman of the Public Service Commission in the State of Punjab during the period 1996 to 2002 [as noted in the judgment of this Court in *Inderpreet Singh Kahlon* case] when respondent No.1 brought to the notice of the High Court through the writ petition that the State Government of Punjab proposed to appoint Shri Harish Dhanda as the Chairman of the Public Service Commission, only because of his political affiliation, the High Court rightly entertained the writ petition as a public interest litigation. [Paras 23, 31]

2.1. Though respondent No.1 had alleged in the writ petition some irregularities and illegalities on the part of Shri Harish Dhanda, who was proposed to be appointed as Chairman of the Public Service Commission by the State Government, the writ petition was not founded only on such irregularities and illegalities alleged against Shri Harish Dhanda. In addition, the respondent No.1 had

also alleged in the writ petition that Shri Harish Dhanda was politically affiliated to the ruling party and was not selected for appointment as Chairman of the Public Service Commission on the basis of his qualifications, experience or ability which are necessary for the post of the Chairman of the Public Service Commission. Thus, even if the Division Bench had recorded a finding in the order dated 13.07.2011 that the irregularities and illegalities pointed out in the writ petition against Shri Harish Dhanda do not stand substantiated, the writ petition could not be disposed of with the said finding only. The Division Bench of the High Court, therefore, thought it necessary to make a reference to the Full Bench and has given its reasons for the reference to the Full Bench in its order dated 13.07.2011. [Para 24]

2.2. It is clear from the order dated 13.07.2011 that the Division Bench of the High Court found that Article 316 of the Constitution, which provides for appointment of the Chairman and other Members of the Public Service Commission by the Governor, does not prescribe any particular procedure and took the view that, having regard to the purpose and nature of appointment, it cannot be assumed that power of appointment need not be regulated by any procedure. The Division Bench of the High Court was of the further view that the persons to be appointed must have competence and integrity, but how such persons are to be identified and selected must be considered by a Bench of three Judges and accordingly referred the matter to the three Judges. The Division Bench also referred the question to the larger Bench of three Judges as to whether the procedure adopted in the present case for appointing Shri Harish Dhanda as the Chairman of the Punjab Public Service Commission was valid and if not, what is the effect of not following the procedure. There is, therefore, no merit in the submission that the Division Bench of the High Court

having found in its order dated 13.07.2011 that the irregularities and illegalities pointed out in the writ petition against Shri Harish Dhanda are unsubstantiated, should not have made an academic reference to the larger Bench of the High Court. [Para 25]

3.1. However, it cannot be said that the Division Bench referred the entire case to the Full Bench by the order dated 13.07.2011. It is further found that although specific questions relating to the procedure for identifying persons of competence and integrity for appointment as the Chairman of the Public Service Commission only were referred by the Division Bench of the High Court, the Full Bench, instead of deciding these specific questions referred to it, has given directions to the State of Punjab and the State of Haryana to follow a particular procedure for appointment of Members and Chairman of the Public Service Commission till such time a fair, rational, objective and transparent policy to meet the mandate of Article 14 of the Constitution is made. The Full Bench of the High Court has decided issues which were not referred to it by the Division Bench of the High Court and the judgment dated 17.08.2011 of the Full Bench of the High Court was without jurisdiction. [Para 28]

3.2. Under Article 316 of the Constitution, the Governor of a State has not only the express power of appointing the Chairman and other Members of Public Service Commission but also the implied powers to lay down the procedure for appointment of Chairman and Members of the Public Service Commission and the High Court cannot under Article 226 of the Constitution usurp this constitutional power of the Government and lay down the procedure for appointment of the Chairman and other Members of the Public Service Commission. The Full Bench of the High Court, therefore, could not have laid down the procedure for appointment of the

Chairman and Members of the Punjab Public Service Commission and the Haryana Public Service Commission by the impugned judgment dated 17.08.2011. Inasmuch as the Full Bench of the High Court has in its judgment dated 17.08.2011 acted beyond its jurisdiction and has usurped the constitutional power of the Governor in laying down the procedure for appointment of the Chairman and Members of the Public Service Commission, the said judgment dated 17.08.2011 of the Full Bench of the High Court is being set aside. [Paras 29, 30]

3.1. Nevertheless to cut short the litigation, the writ petition is now being decided on merits instead of remanding the matter to the High Court. [Para 30]

3.2. It is for the Governor who is the appointing authority under Article 316 of the Constitution to lay down the procedure for appointment of the Chairman and Members of the Public Service Commission, but this is not to say that in the absence of any procedure laid down by the Governor for appointment of Chairman and Members of the Public Service Commission under Article 316 of the Constitution, the State Government would have absolute discretion in selecting and appointing any person as the Chairman of the State Public Service Commission. Even where a procedure has not been laid down by the Governor for appointment of Chairman and Members of the Public Service Commission, the State Government has to select only persons with integrity and competence for appointment as Chairman of the Public Service Commission, because the discretion vested in the State Government under Article 316 of the Constitution is impliedly limited by the purposes for which the discretion is vested and the purposes are discernible from the functions of the Public Service Commissions enumerated in Article 320 of the

Constitution. Under clause (1) of Article 320 of the Constitution, the State Public Service Commission has the duty to conduct examinations for appointments to the services of the State. Under clause (3) of Article 320, the State Public Service Commission has to be consulted by the State Government on matters relating to recruitment and appointment to the civil services and civil posts in the State, on disciplinary matters affecting a person serving under the Government of a State in a civil capacity, on claims by and in respect of a person who is serving under the State Government towards costs of defending a legal proceeding, on claims for award of pension in respect of injuries sustained by a person while serving under the State Government and other matters. In such matters, the State Public Service Commission is expected to act with independence from the State Government and with fairness, besides competence and maturity acquired through knowledge and experience of public administration. [Para 31]

3.3. Even though Article 316 does not specify the aforesaid qualities of the Chairman of a Public Service Commission, these qualities are amongst the implied relevant factors which have to be taken into consideration by the Government while determining the competency of the person to be selected and appointed as Chairman of the Public Service Commission under Article 316 of the Constitution. Accordingly, if these relevant factors are not taken into consideration by the State Government while selecting and appointing the Chairman of the Public Service Commission, the Court can hold the selection and appointment as not in accordance with the Constitution. To ensure this independence of the Chairman and Members of the Public Service Commission, clause (3) of Article 316 of the Constitution provides that a person shall, on

expiration of his term of office be ineligible for reappointment to that office. [Paras 32, 33]

3.4. Besides express restrictions in a statute or the Constitution, there can be implied restrictions in a statute and the Constitution and the statutory or the constitutional authority cannot in breach of such implied restrictions exercise its discretionary power. Moreover, Article 226 of the Constitution vests in the High Court the power to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of *habeas corpus, mandamus*, prohibition, *quo warranto* and *certiorari*, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose. The power of the High Court under Article 226 of the Constitution is, thus, not confined to only writ of *quo warranto* but to other directions, orders or writs. [Para 34]

3.5. The High Court should not normally, in exercise of its power under Article 226 of the Constitution, interfere with the discretion of the State Government in selecting and appointing the Chairman of the State Public Service Commission, but in an exceptional case if it is shown that relevant factors implied from the very nature of the duties entrusted to Public Service Commissions under Article 320 of the Constitution have not been considered by the State Government in selecting and appointing the Chairman of the State Public Service Commission, the High Court can invoke its wide and extra-ordinary powers under Article 226 of the Constitution and quash the selection and appointment to ensure that the discretion of the State Government is exercised within the bounds of the Constitution. [Para 34]

4. In the present case, the High Court in its order dated 13.07.2011 had held that the irregularities and

illegalities alleged against Shri Harish Dhanda have not been substantiated. This Court had passed orders on 01.08.2012 calling upon the State of Punjab to produce the material referred to in para 69 of the judgment of the Full Bench of the High Court on the basis of which Shri Harish Dhanda was selected for appointment as Chairman of the Punjab Public Service Commission. Pursuant to the order dated 01.08.2012, the State Government produced the files in which the selection and appointment of Shri Harish Dhanda was processed by the State Government. The materials indicate that Shri Harish Dhanda had B.A. and LL.B Degrees and was practicing as an Advocate at the District Courts in Ludhiana and had been elected as the President of the District Bar Association, Ludhiana for seven terms and has been member of the Legislative Assembly. These materials do not indicate that Shri Harish Dhanda had any knowledge or experience whatsoever either in administration or in recruitment nor do these materials indicate that Shri Harish Dhanda had the qualities to perform the duties as the Chairman of the State Public Service Commission under Article 320 of the Constitution. No other information through affidavit has also been placed on record to show that Shri Harish Dhanda has the positive qualities to perform the duties of the office of the Chairman of the State Pubic Service Commission under Article 320 of the Constitution. The decision of the State Government to appoint Shri Harish Dhanda as the Chairman of the Punjab Public Service Commission was thus invalid for non-consideration of relevant factors implied from the very nature of the duties entrusted to the Public Service Commissions under Article 320 of the Constitution. [Para 35]

5. In the result, the impugned order of the Division Bench of the High Court dated 17.08.2011 quashing the selection and appointment of Shri Harish Dhanda as

Chairman of the Punjab Public Service Commission, is not interfered with, but the judgment dated 17.08.2011 of the Full Bench of the High Court is set aside. [Para 36]

E.P. Royappa v. State of Tamil Nadu & Anr. **(1974) 4 SCC 3: 1974 (2) SCR 348;** *State of West Bengal & Ors. v. Manas Kumar Chakraborty & Ors.* **(2003) 2 SCC 604: 2002 (5) Suppl. SCR 72 – distinguished.**

In re Mehar Singh Singh Saini, Chairman, HPSC and others **(2010) 13 SCC 586 – explained.**

In R/o Dr. Ram Ashray Yadav, Chairman, Bihar Public Service Commission **(2000) 4 SCC 309: 2000 (2) SCR 688;** *Ram Kumar Kashyap and another vs. Union of India and another* **AIR 2010 SC 1151: 2009 (12) SCR 601;** *R.K. Jain v. Union of India & Ors.* **(1993) 4 SCC 119: 1993 (3) SCR 802;** *Dr. Duryodhan Sahu & Ors. v. Jitendra Kumar Mishra & Ors.* **(1998) 7 SCC 273: 1998 (1) Suppl. SCR 77;** *Dattaraj Nathuji Thaware v. State of Maharashtra & Ors.* **(2005) 1 SCC 590: 2004 (6) Suppl. SCR 900;** *Ashok Kumar Pandey v. State of West Bengal* **(2004) 3 SCC 349: 2003 (5) Suppl. SCR 716;** *Hari Bansh Lal v. Sahodar Prasad Mahto & Ors.* **(2010) 9 SCC 655: 2010 (10) SCR 561;** *Girjesh Shrivastava & Ors. v. State of M.P. & Ors.* **(2010) 10 SCC 707: 2010 (12) SCR 839;** *Kesho Nath Khurana v. Union of India & Ors.* **(1981) Supp.1 SCC 38;** ***The State of Punjab v. Sodhi Sukhdev Singh*** **(1961) 2 SCR 371;** *Supreme Court Employees Welfare Association v. Union of India & Anr.* **(1989) 4 SCC 187: 1989 (3) SCR 488;** *Suresh Seth v. Commissioner of Indore Municipal Corporation* **(2005) 13 SCC 287;** *Divisional Manager, Aravali Golf Club & Anr. v. Chander Hass & Anr.* **(2008) 1 SCC 683: 2007 (12) SCR 1084;** *Asif Hameed & Ors. v. State of J & K & Ors.* **(1989) 2 Supp. SCC 364: 1989 (3) SCR 19;** ***B.*** *Srinivasa Reddy v. Karnataka Urban Water Supply & Drainage Board Employees Association & Ors.* **(2006) 11 SCC 731: 2006 (5) Suppl. SCR 462;** *Ashok Kumar Yadav & Ors.* v. *State of Haryana & Ors.* **(1985) 4 SCC 417:**

1985 (1) Suppl. SCR 657; *Inderpreet Singh Kahlon and Others v. State of Punjab and Others* **(2006) 11 SCC 356: 2006 (1) Suppl. SCR 772;** *Centre for PIL and Another v. Union of India and Another* **(2011) 4 SCC 1;** *Kerala State Science & Technology Museum v. Rambal Co. & Ors*. **(2006) 6 SCC 258: 2006 (4) Suppl. SCR 243;** *Dwarka Nath v. Income-tax Officer, Special Circle, D Ward, Kanpur & Anr.* **AIR 1966 SC 81: 1965 SCR 536;** *Mohinder Singh Gill & Anr. v. The Chief Election Commissioner, New Delhi & Ors*. **(1978) 1 SCC 405: 1978 (2) SCR 272;** *M/s Hochtief Gammon v. State of Orissa and Others* **AIR 1975 SC 2226: 1976 (1) SCR 667 – referred to.**

De Smith's Judicial Review, Sixth Edition **– referred to.**

Case Law Reference:

2000 (2) SCR 688	**referred to**	**Para 4, 31**
2009 (12) SCR 601	**referred to**	**Para 4**
(2010) 13 SCC 586	**explained**	**Para 4, 26**
1993 (3) SCR 802	**referred to**	**Para 9**
1998 (1) Suppl. SCR 77	**referred to**	**Para 9**
2004 (6) Suppl. SCR 900	**referred to**	**Para 9**
2003 (5) Suppl. SCR 716	**referred to**	**Para 9, 31**
2010 (10) SCR 561	**referred to**	**Para 9**
2010 (12) SCR 839	**referred to**	**Para 9**
(1981) Supp.1 SCC 38	**referred to**	**Para 11**
(1961) 2 SCR 371	**referred to**	**Para 11**
1989 (3) SCR 488	**referred to**	**Para 12**
(2005) 13 SCC 287	**referred to**	**Para 12**

2007 (12) SCR 1084	**referred to**	**Para 12**
1989 (3) SCR 19	**referred to**	**Para 12**
1974 (2) SCR 348	**distinguished**	**Para 12**
2002 (5) Suppl. SCR 72	**distinguished**	**Para 12**
2006 (5) Suppl. SCR 462	**referred to**	**Para 13**
1985 (1) Suppl. SCR 657	**referred to**	**Para 15**
2000 (2) SCR 688	**referred to**	**Para 15**
2006 (1) Suppl. SCR 772	**referred to**	**Para 15, 32**
(2011) 4 SCC 1	**referred to**	**Para 16**
2006 (4) Suppl. SCR 243	**referred to**	**Para 18**
1965 SCR 536	**referred to**	**Para 19**
1978 (2) SCR 272	**referred to**	**Para 29,**
1976 SCR 667	**referred to**	**Para 32**

Per Lokur, J. [Concurring]

1.1. The appointment of the Chairperson of the Punjab Public Service Commission is an appointment to a constitutional position and is not a "service matter". A PIL challenging such an appointment is, therefore, maintainable both for the issuance of a writ of *quo warranto* and for a writ of declaration, as the case may be. [Para 107]

1.2. In a case for the issuance of a writ of declaration, exercise of the power of judicial review is presently limited to examining the deliberative process for the appointment not meeting the constitutional, functional and institutional requirements of the institution whose integrity and commitment needs to be maintained or the

appointment for these reasons not being in public interest. [Para 108]

1.3. The circumstances of this case leave no room for doubt that the notification dated 7th July 2011 appointing Mr. Harish Rai Dhanda was deservedly quashed by the High Court since there was no deliberative process worth the name in making the appointment and also since the constitutional, functional and institutional requirements of the Punjab Public Service Commission were not met. [Para 109]

1.4. There is a need for a word of caution to the High Courts. There is a likelihood of comparable challenges being made by trigger-happy litigants to appointments made to constitutional positions where no eligibility criterion or procedure has been laid down. The High Courts will do well to be extremely circumspect in even entertaining such petitions. It is necessary to keep in mind that sufficient elbow room must be given to the Executive to make constitutional appointments as long as the constitutional, functional and institutional requirements are met and the appointments are in conformity with the indicators given by this Court from time to time. [Para 110]

1.5. Given the experience in the making of such appointments, there is no doubt that until the State Legislature enacts an appropriate law, the State of Punjab must step in and take urgent steps to frame a memorandum of procedure and administrative guidelines for the selection and appointment of the Chairperson and members of the Punjab Public Service Commission, so that the possibility of arbitrary appointments is eliminated. [Para 111]

Hari Bansh Lal v. Sahodar Prasad Mahto, **(2010) 9 SCC 655;** *E.P. Royappa v. State of Tamil Nadu,* **(1974) 4 SCC 3;**

State of W.B. v. Manas Kumar Chakraborty, **(2003) 2 SCC 604;** *State of Mysore* v. *Syed Mahmood,* **AIR 1968 SC 1113,** *Statesman (P) Ltd.* v. *H.R. Deb,* **AIR 1968 SC 1495 and** *State Bank of India* v. *Mohd. Mynuddin,* **(1987) 4 SCC 486 – distinguished.**

R.K. Jain v. Union of India, **(1993) 4 SCC 119,** *Mor Modern Coop. Transport Society v. Govt. of Haryana,* **(2002) 6 SCC 269,** *High Court of Gujarat v. Gujarat Kishan Mazdoor Panchayat, **(2003) 4 SCC 712*** **and** *B. Srinivasa Reddy v. Karnataka Urban Water Supply & Drainage Board Employees' Association,* **(2006) 11 SCC 731 (2);** *Mahesh Chandra Gupta v. Union of India & Others,* **(2009) 8 SCC 273; Reference under Article 317(1) of the** *Constitution of India, In re,* **(1990) 4 SCC 262;** *Bihar Public Service Commission v. Shiv Jatan Thakur,* **1994 Supp. (3) SCC 220;** *Ram Ashray Yadav (Dr.), Chairman, Bihar Public Service Commission, In Re,* **(2000) 4 SCC 309; Ram Kumar Kashyap v. Union of India, (2009) 9 SCC 278;** *Mehar Singh Saini, Chairman, Haryana Public Service Commission, In re,* **(2010) 13 SCC 586;** *R.K. Jain v. Union of India,* **(1993) 4 SCC 119;** *Girjesh Shrivastava v. State of Madhya Pradesh,* **(2010) 10 SCC 707;** *Duryodhan Sahu (Dr.) v. Jitendra Kumar Mishra* **(1998) 7 SCC 273,** *B. Srinivasa Reddy, Dattaraj Nathuji Thaware v. State of Maharashtra,* **(2005) 1 SCC 590,** *Ashok Kumar Pandey v. State of W.B* **(2004) 3 SCC 349;** *T. C. Basappa v. T. Nagappa* **[1955] 1 SCR 250;** *Kumar Padma Prasad v. Union of India,* **(1992) 2 SCC 428;** *N. Kannadasan v. Ajoy Khose,* **(2009) 7 SCC 1;** *Centre for PIL v. Union of India,* **(2011) 4 SCC 1;** *Ashok Kumar Yadav v. State of Haryana,* **(1985) 4 SCC 417; In R/O Dr Ram Ashray Yadav, Chairman, Bihar Public Service Commission, (2000) 4 SCC 309;** *Inderpreet Singh Kahlon v. State of Punjab,* **(2006) 11 SCC 356;** *State of Bihar v. Upendra Narayan Singh* **(2009) 5 SCC 65;** *Mohinder Singh Gill v. Chief Election Commissioner,* **(1978) 1 SCC 405;** *Supreme Court Employees' Welfare Assn. v. Union of India,* **(1989) 4**

SCC 187; *Asif Hameed v. State of J & K,* **1989 Supp (2) SCC 364;** *Suresh Seth v. Commissioner, Indore Municipal Corpn.,* **(2005) 13 SCC 287;** *Supreme Court Employees' Welfare Assn. and State of J&K v. A.R. Zakki,* **1992 Supp (1) SCC 548;** *Kesho Nath Khurana v. Union of India,* **1981 Supp SCC 38;** *Kerala State Science & Technology Museum v. Rambal Co.,* **(2006) 6 SCC 258;** *T.A. Hameed v. M. Viswanathan,* **(2008) 3 SCC 243;** *Saquib Abdul Hameed Nachan v. State of Maharashtra,* **(2010) 9 SCC 93;** *State of Punjab v. Sodhi Sukhdev Singh,* **(1961) 2 SCR 371 – referred to.**

Case Law Reference:

(2010) 9 SCC 655	**distinguished**	**Para 16**
(1993) 4 SCC 119	**referred to**	**Para 16**
(2002) 6 SCC 269	**referred to**	**Para 16**
(2003) 4 SCC 712	**referred to**	**Para 16**
(2006) 11 SCC 731 (2)	**referred to**	**Para 16**
(2009) 8 SCC 273	**referred to**	**Para 17**
In re, (1990) 4 SCC 262	**referred to**	**Para 19**
1994 Supp. (3) SCC 220	**referred to**	**Para 20**
In Re, (2000) 4 SCC 309	**referred to**	**Para 21**
(2009) 9 SCC 278	**referred to**	**Para 22**
In re, (2010) 13 SCC 586	**referred to**	**Para 23**
(1993) 4 SCC 119	**referred to**	**Para 32**
(2010) 10 SCC 707	**referred to**	**Para 34**
(1998) 7 SCC 273	**referred to**	**Para 34**
(2005) 1 SCC 590	**referred to**	**Para 34**
(2004) 3 SCC 349	**referred to**	**Para 34**

[1955] 1 SCR 250	**referred to**	**Para 36**
(1992) 2 SCC 428	**referred to**	**Para 37**
(2009) 7 SCC 1	**referred to**	**Para 38**
(2011) 4 SCC 1	**referred to**	**Para 39**
(1985) 4 SCC 417	**referred to**	**Para 41**
(2000) 4 SCC 309	**referred to**	**Para 42**
(2006) 11 SCC 356	**referred to**	**Para 44**
(2009) 5 SCC 65	**referred to**	**Para 46**
(1978) 1 SCC 405	**referred to**	**Para 60**
(1974) 4 SCC 3	**distinguished**	**Para 69**
(2003) 2 SCC 604	**distinguished**	**Para 70**
AIR 1968 SC 1113	**distinguished**	**Para 71**
AIR 1968 SC 1495	**distinguished**	**Para 71**
(1987) 4 SCC 486	**distinguished**	**Para 71**
(1989) 4 SCC 187	**referred to**	**Para 84**
1989 Supp (2) SCC 364	**referred to**	**Para 84**
(2005) 13 SCC 287	**referred to**	**Para 85**
1992 Supp (1) SCC 548	**referred to**	**Para 85**
1981 Supp SCC 38	**referred to**	**Para 95**
(2006) 6 SCC 258	**referred to**	**Para 95**
(2008) 3 SCC 243	**referred to**	**Para 95**
(2010) 9 SCC 93	**referred to**	**Para 95**
(1961) 2 SCR 371	**referred to**	**Para 106**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7640 of 2011.

From the Judgment & Orders dated 17.08.2011 of the High Court of Punjab & Haryana at Chandigarh in CWP No, 11846 of 2011 (O & M).

WITH

C.A. Nos. 2685, 3687 of 2012 & 1365-1367 of 2013.

P.P. Rao, P.N. Misra, Sarvesh Bisaria, P.C. Sharma, Abhimanyu Tiwari, Apeksha Sharan, S. Usha Reddy, Manjit Singh, Kamal Mohan Gupta, R.S. Hegde, Rajeev Singh for the Appellant.

U.U. Lalit, Law Associates & Co., Kiran Bhardwaj, J. Wasim A. Quadri, B.V. Balramdass, Anil Katiyar, D.S. Chauhan Rajan Bharti, P.P. Singh for the Respondents.

The Judgments of the Court were delivered by

A. K. PATNAIK, J. 1. Leave granted in S.L.P. (C) Nos. 22010-22012 of 2011.

2. In these appeals against the judgment and orders of the Punjab and Haryana High Court, a very important question of law arises for our decision: whether the High Court in exercise of its writ jurisdiction under Article 226 of the Constitution can lay down the procedure for the selection and appointment of the Chairman of the State Public Service Commission and quash his appointment in appropriate cases.

Facts:

3. The relevant facts very briefly are that by notification dated 07.07.2011, the State Government of Punjab appointed Shri Harish Dhanda as the Chairman of the Punjab Public Service Commission. On 10.07.2011, the respondent No.1 who was an Advocate practicing at the Punjab and Haryana High

Court, Chandigarh, filed a public interest litigation under Article 226 of the Constitution (Writ Petition No.11846 of 2011) praying for a mandamus directing the State Government to frame regulations governing the conditions of service and appointment of the Chairman and/or the Members of the Public Service Commission as envisaged in Article 318 of the Constitution of India. The respondent No.1 also prayed for a direction restraining the State Government from appointing Shri Harish Dhanda as the Chairman of the Punjab Public Service Commission in view of the fact that his appointment does not fall within the parameters of integrity, impartiality and independence as reiterated time and again by this Court.

4. The Division Bench of the High Court, after hearing the learned counsel for the writ petitioner and the learned Additional Advocate General for the State of Punjab, passed an order on 13.07.2011 holding that even though Article 316 of the Constitution does not prescribe any particular procedure for appointment of Chairman of the Public Service Commission, having regard to the purpose and nature of the appointment, it cannot be assumed that the power of appointment need not be regulated by any procedure. Relying on the judgments of this Court in the case of *In R/O Dr. Ram Ashray Yadav, Chairman, Bihar Public Service Commission* [(2000) 4 SCC 309], *Ram Kumar Kashyap and another* vs. *Union of India and another* (AIR 2010 SC 1151) and *In re Mehar Singh Singh Saini, Chairman, HPSC and others* [(2010) 13 SCC 586], the Division Bench held that it is not disputed that the persons to be appointed as Chairman and Members of the Public Service Commission must have competence and integrity. The Division Bench of the High Court further held that a question, therefore, arises as to how such persons are to be identified and selected for appointment as Chairman of the Public Service Commission and whether, in the present case, the procedure adopted was valid and if not, the effect thereof. The Division Bench further observed that these questions need to be

considered by a Bench of three Judges and referred the matter to the Bench of three Judges of the High Court.

5. Pursuant to the order dated 13.07.2011 of the Division Bench, the Chief Justice of the High Court constituted a Full Bench. On 19.07.2011, the Full Bench of the High Court passed an order calling for certain information from the State Government of Punjab and the Punjab Public Service Commission on the number of posts filled up by the Public Service Commission in the last five years, the number of posts taken out from the purview of the Public Service Commission in the last five years and regulations, if any, framed by the State Government. On 01.08.2011, the Full Bench of the High Court also passed orders requiring the Union of India to furnish information on three questions: (1) Whether there were any criteria or guidelines to empanel a candidate for consideration for appointment as a Member of the Union India Public Service Commission; (2) Which authority or officer prepares such panel; and (3) What methodology is kept in view by the authority while preparing the panel.

6. Aggrieved by the order dated 13.07.2011 of the Division Bench of the High Court and the orders dated 19.07.2011 and 01.08.2011 of the Full Bench of the High Court, the State of Punjab filed Special Leave Petitions (C) Nos.22010-22012 of 2011 before this Court. On 05.08.2011, this Court, while issuing a notice in the Special Leave Petitions, made it clear that issuance of notice in the Special Leave Petitions will not come in the way of the High Court deciding the matter and the State of Punjab is at liberty to urge all contentions before the High Court. Accordingly, the Full Bench of the High Court heard the matters on 08.08.2011 and directed the Chief Secretary of the State of Punjab to remain present at 2.00 P.M. along with the relevant files which contain the advice of the Chief Minister to the Government. The Chief Secretary of the State of Punjab produced the original files containing the advice of the Chief Minister to the Governor of

Punjab and after seeing the original files, the Full Bench of the High Court returned the same and reserved the matter for judgment.

7. Thereafter, the Full Bench of the High Court delivered the judgment and order dated 17.08.2011 directing that till such time a fair, rational, objective and transparent policy to meet the mandate of Article 14 is made, both the State of Haryana and the State of Punjab shall follow the procedure detailed hereunder as part of the decision-making process for appointment as Members and Chairman of the Public Service Commission:-

1. There shall be Search Committee constituted under the Chairmanship of the Chief Secretary of the respective State Governments.

2. The Search Committee shall consist of at least three members. One of the members shall be serving Principal Secretary i.e. not below the rank of Financial Commissioner and the third member can be serving or retired Bureaucrat not below the rank of Financial Commissioner, or member of the Armed Forces not below the rank of Brigadier or of equivalent rank.

3. The Search Committee shall consider all the names which came to its notice or are forwarded by any person or by any aspirant. The Search Committee shall prepare panel of suitable candidates equal to the three times the number of vacancies.

4. While preparation of the panel, it shall be specifically elicited about the pendency of any court litigation, civil or criminal, conviction or otherwise in a criminal court or civil court decree or any other proceedings that may have a bearing on the integrity and character of the candidates.

5. Such panel prepared by the Search Committee shall be considered by a High Powered Committee consisting of

Hon'ble Chief Minister, Speaker of Assembly and Leader of Opposition.

6. It is thereafter, the recommendation shall be placed with all relevant materials with relative merits of the candidates for the approval of the Hon'ble Governor after completing the procedure before such approval.

7. The proceedings of the Search Committee shall be conducted keeping in view the principles laid down in Centre for Public Interest Litigation's case (supra).

By the order dated 17.08.2011, the Full Bench of the High Court also ordered that the writ petition be listed before the Division Bench to be constituted by the Chief Justice of the High Court.

8. Pursuant to the judgment dated 17.08.2011, the Division Bench constituted by the Chief Justice of the High Court quashed the appointment of Shri Harish Dhanda as Chairman of the Punjab Public Service Commission and disposed of the writ petition of respondent No.1 in terms of the judgment of the Full Bench. Aggrieved, the State of Punjab, State of Haryana and Shri H.R. Dhanda have filed these appeals against the judgment and orders dated 17.08.2011 of the Full Bench and the Division Bench of the High Court.

Contentions of the learned counsel for the parties:

9. Mr. P.P. Rao, learned senior counsel for the State of Punjab, submitted that the writ petition before the High Court was a service matter and could not have been entertained by the High Court as a Public Interest Litigation at the instance of the writ petitioner. He cited the decisions of this Court in *R.K. Jain v. Union of India & Ors.* [(1993) 4 SCC 119], *Dr. Duryodhan Sahu & Ors. v. Jitendra Kumar Mishra & Ors.* [(1998) 7 SCC 273], *Dattaraj Nathuji Thaware v. State of Maharashtra & Ors.* [(2005) 1 SCC 590], *Ashok Kumar Pandey v. State of West Bengal* [(2004) 3 SCC 349], *Hari Bansh Lal v. Sahodar Prasad Mahto & Ors.* [(2010) 9 SCC 655] and *Girjesh Shrivastava & Ors. v. State of M.P. & Ors.* [(2010) 10 SCC 707] for the proposition that a dispute relating to a service matter cannot be entertained as a Public Interest Litigation.

10. Mr. Rao next submitted that the Division Bench has recorded a clear finding in its order dated 13.07.2011 that the allegations regarding irregularities and illegalities against Shri Harish Dhanda in the writ petition do not stand substantiated and there was, therefore, absolutely no need for the Division Bench of the High Court to make an academic reference to the Full Bench of the High Court. He next submitted that this Court in the case of *Mehar Singh Saini Chairman, HPSC In Re* (supra) had already declared the law that it is for the legislature to frame the guidelines or parameters regarding the experience, qualifications and stature for appointment as Chairman/Members of the Public Service Commission and this law declared by this Court was binding on all Courts in India and hence, there was no necessity whatsoever for the Division Bench to make a reference to a Full Bench on the very same questions of law.

11. Mr. Rao submitted that this Court has held in *Kesho Nath Khurana v. Union of India & Ors.* [(1981) Supp.1 SCC 38] that a Court to which a reference is made cannot adjudicate upon an issue which is not referred to it and yet the Full Bench of the High Court in this case has gone beyond the order of reference passed by the Division Bench and held that until a fair, rational, objective and transparent policy to meet the mandate of Article 14 of the Constitution is laid down, the procedure laid down by the Full Bench must be followed and has also declared the appointment of Shri Harish Dhanda as Chairman of the Public Service Commission to be invalid. He also relied on the Punjab High Court Rules to argue that the Full Bench can be constituted only for answering the questions referred to it by the Division Bench of the High Court. He

vehemently argued that these provisions of the Rules of the Punjab High Court have been violated and the judgment of the Full Bench of the High Court is clearly without jurisdiction. He next submitted that the direction given by the Full Bench in its order dated 01.08.2011 to produce the file containing the advice tendered by the Chief Minister to the Governor is clearly unconstitutional and *ultra vires* of Article 163(3) of the Constitution and relied on the decision of this Court in *The State of Punjab v. Sodhi Sukhdev Singh* [(1961) 2 SCR 371] on this point.

12. Mr. Rao next submitted that Article 316 of the Constitution has left it to the discretion of the State Government to select and appoint the Chairman and Members of a Public Service Commission and having regard to the doctrine of separation of powers which is part of the basic structure of the Constitution, the High Court cannot direct the Government to exercise its discretion by following a procedure prescribed by the High Court. He cited *Supreme Court Employees Welfare Association v. Union of India & Anr.* [(1989) 4 SCC 187], *Suresh Seth v. Commissioner of Indore Municipal Corporation* [(2005) 13 SCC 287], *Divisional Manager, Aravali Golf Club & Anr. v. Chander Hass & Anr.* [(2008) 1 SCC 683] and *Asif Hameed & Ors. v. State of J & K & Ors.* [(1989) 2 Supp. SCC 364] in support of the aforesaid submission. He submitted that the appointments to the constitutional offices, like the Attorney General, Advocate General, Comptroller & Auditor General, Chief Election Commissioner, Chairman and Members of the Union Public Service Commission and appointments to the topmost Executive posts, like the Chief Secretary or Director General of Police, has to be made within the discretion of the Government inasmuch as persons in whom the Government has confidence are appointed to the posts. He relied on *E.P. Royappa v. State of Tamil Nadu & Anr.* [(1974) 4 SCC 3] and *State of West Bengal & Ors. v. Manas Kumar Chakraborty & Ors.* [(2003) 2 SCC 604] for this proposition.

13. Mr. Rao argued that in the absence of clear violation of statutory provisions and regulations laying down the procedure for appointment, the High Court has no jurisdiction even to issue a writ of *quo warranto*. In support of this argument, he relied on the decision of this Court in *B. Srinivasa Reddy v. Karnataka Urban Water Supply & Drainage Board Employees Association & Ors.* [(2006) 11 SCC 731]. He submitted that this a fit case in which the order of the Division Bench dated 13.07.2011 and the interim orders as well as the judgment of the Full Bench dated 17.08.2011 and the final order of the Division Bench dated 17.08.2011 of the High Court quashing the appointment of Shri Harish Dhanda as well as consequential orders passed by the Government implementing the impugned judgment and order provisionally should be set aside by this Court.

14. Mr. U.U. Lalit, learned senior counsel appearing for the respondent No.1 who had filed the writ petition before the High Court, referred to the proclamation by the Queen in Council on 1st November, 1858 to the Princes, Chiefs and the People of India to show that in the civil and military services of the East India Company persons with education, ability and integrity were to be recruited. He also referred to the report on the Public Service Commission, 1886-87 wherein the object of Public Service Commission was broadly stated to be to devise a scheme which may reasonably be hoped to possess the necessary elements of finality, and to do full justice to the claims of natives of India to higher and more extensive employment in the public service. He also referred to the report of the Royal Commission on the superior services in India dated 27.03.1924 and in particular Chapter IV thereof on "*The Public Service Commission*" in which it is stated that wherever democratic institutions exist, experience has shown that to secure an efficient civil service it is essential to protect it from political or personal influences and to give it that position of stability and security which is vital to its successful working as the impartial and efficient instrument by which Governments, of whatever

political complexion, may give effect to their policies and for this reason Public Service Commission should be detached so far as practicable from all political associations. He also referred to the speeches of Dr. B.R. Ambedkar, Shri Jaspat Roy Kapoor, Pandit Hirday Nath Kunzru and Shri H.V. Kamath in the Constitutional Assembly and argued that to perform this difficult job of finding the best talent for the State Public Services without any political influence and other extraneous considerations the Public Service Commission must have a Chairman of great ability, independence and integrity.

15. Mr. Lalit further submitted that this Court has also in a number of pronouncements emphasized on the need to appoint eminent persons possessing a high degree of competence and integrity as Chairman and Members of the Public Service Commission so as to inspire confidence in the public mind about the objectivity and impartiality of the selection to be made by the Public Service Commission. In this context he referred to the judgments of this Court in *Ashok Kumar Yadav & Ors.* v. *State of Haryana & Ors.* [(1985) 4 SCC 417], *in R/O Dr. Ram Ashray Yadav, Chairman, Bihar Public Service Commission* [(2000) 4 SCC 309], *Inderpreet Singh Kahlon and Others* v. *State of Punjab and Others* [(2006) 11 SCC 356] and *Mehar Singh Saini, Chairman, Haryana Public Service Commission and others In Re* (supra).

16. Mr. Lalit submitted that Shri Harish Dhanda may be eligible for appointment as Chairman of the Public Service Commission but eligibility is not enough to be the Chairman of the State Public Service Commission. He submitted that the person who is eligible must also have some positive qualities such as experience, ability, character and integrity for being appointed as the Chairman of the State Public Service Commission. He submitted that it is not only the personal integrity of the candidate who is to be appointed but also the integrity of the Pubic Service Commission as an institution which has to be borne in mind while making the appointment.

He referred to the decisions of this Court in *Centre for PIL and Another* v. *Union of India and Another* [(2011) 4 SCC 1] in which a distinction has been made between personal integrity of a candidate appointed as the Central Vigilance Commissioner and the integrity of the Central Vigilance Commission as an institution and it has been held that while recommending a name of the candidate for appointment as Central Vigilance Commissioner, the question that one has to ask is whether the candidate recommended to function as the Central Vigilance Commissioner would be competent to function as a Central Vigilance Commissioner. He submitted that in the aforesaid case, this Court has also held that there was a difference between judicial review and merit review and has further held that the Courts, while exercising the power of judicial review, are not concerned with the final decision of the Government taken on merit but are entitled to consider the integrity of the decision-making process.

17. Mr. Lalit submitted that the writ petitioner challenged the decision-making process of the Government in selecting and appointing Shri Harish Dhanda as Chairman of the Public Service Commission on the ground that it was not an informed process of decision-making in as much as the State Government has not collected information and materials on whether Shri Dhanda had the experience, ability and character for being appointed as the Chairman of the Public Service Commission. He submitted that as a matter of fact the State Government was also not even informed of the fact that the Central Administrative Tribunal, Chandigarh Bench, in its order dated 15.11.2007 in O.A. No.495/PB/2007 had adversely commented on the conduct of Shri Harish Dhanda. He explained that in the aforesaid O.A., Shri Amit Misra, who belonged to the Indian Forest Service and was posted as Divisional Forest Officer, Ropar in Punjab, had alleged that he had been transferred out of Ropar and posted as Division Forest Officer, Ferozpur, because of an incident which had occurred on 21.06.2007 on account of which he incurred the

displeasure of Shri Harish Dhanda, who was then the Chief Parliamentary Secretary, Department of Local Government, Punjab. He alleged that Shri Dhanda had been given the permission to stay at the Van Chetna Kendra/Forest Rest House at Pallanpur, District Ropar, for a few days, but later on he wanted to make the Forest Rest House as his permanent residence to which Shri Amit Misra objected as the same was not permitted under the Rules and Shri Amit Misra had directed the official incharge of the Rest House not to allow anybody to use the Rest House without getting permission and accordingly when Shri Dhanda wanted the keys of the Rest House on 22.06.2007 he was not given the keys of the Rest House and Shri Dhanda recorded a note addressed to the Principal Chief Conservator of Forests narrating the entire incident and ensured that Shri Amit Misra was posted out of Ropar by an order of transfer dated 31.07.2007. The Central Administrative Tribunal, Chandigarh Bench, called for the official noting which led to the passing of the transfer order dated 31.07.2007 and recorded the finding that even though the Government decided not to allow the use of the Rest House as a permanent residence of the Chief Parliamentary Secretary, yet Shri Amit Misra, being a junior officer, became the victim of the annoyance of Shri Harish Dhanda and with his political influence, the Forest Minister initiated the proposal for his transfer from Ropar, which was approved by the Chief Minister. Mr. Lalit submitted that this adverse finding of the Central Administrative Tribunal in a proceeding, in which Shri Harish Dhanda was also a respondent, was not brought to the notice of the State Government when it took the decision to select and appoint Shri Harish Dhanda as the Chairman of the Public Service Commission.

18. In reply to the submission of Mr. Rao that the Full Bench had no jurisdiction to expand the scope of the reference and should have limited itself to the questions referred to by the Division Bench by the order dated 13.07.2011, Mr. Lalit submitted that the order dated 13.07.2011 of the Division

Bench of the High Court would show that the entire case was referred to the Full Bench and, therefore, the Full Bench passed the order dated 17.08.2011 on all relevant aspects of the case. He cited the decision of this Court in *Kerala State Science & Technology Museum v. Rambal Co. & Ors*. [2006) 6 SCC 258] to argue that a reference can also be made of the entire case to a larger Bench and in such a case, the larger Bench has to decide the entire case and its jurisdiction is not limited to specific issues. He also referred to the Rules of the Punjab High Court to show that the Full Bench of the High Court can also be constituted to decide the entire case in important matters.

19. On the jurisdiction of the High Court to issue a writ for quashing the appointment of a Chairman of the Public Service Commission, Mr. Lalit cited the decision in *Dwarka Nath v. Income-tax Officer, Special Circle, D Ward, Kanpur & Anr.* [AIR 1966 SC 81] in which a three-Judge Bench of this Court has held that Article 226 of the Constitution is couched in comprehensive phraseology and it *ex facie* confers wide power on the High Court to reach injustice wherever it is found. He submitted that in this decision this Court has also explained that the High Court under Article 226 of the Constitution can issue writs in the nature of prerogative writs as understood in England and can also issue other directions, orders or writs. He vehemently submitted that the contention on behalf of the appellants that the High Court could not have issued a writ/order quashing the selection and appointment of Shri Harish Dhanda is, therefore, not correct.

20. Mr. Lalit finally submitted that pursuant to the impugned orders of the Full Bench and the Division Bench of the High Court, the Search Committee was constituted by the Government for selection of the Chairman of the Punjab Public Service Commission and the Search Committee invited the names of eminent persons of impeccable integrity, caliber and administrative experience from all walks of life, to be

considered for the post of the Chairman of Punjab Public Service Commission and thereafter the High Power Committee selected Lt. Gen. R.A. Sujlana (Retd.) who has been appointed by the State Government as the Chairman of the Punjab Public Service Commission in December, 2011 and he has been functioning as such since then. He submitted that the appointment of Lt. Gen. R.A. Sujlana is also not subject to orders passed by this Court and the news reports indicate that Lt. Gen. R.A. Sujlana has been an upright officer of the Indian Army and has wide administrative experience. He submitted that this is not a fit case in which this Court should interfere with the appointment of Lt. Gen. R.A. Sujlana as the Chairman of the Punjab Public Service Commission even if this Court finds infirmities in the impugned orders passed by the Full Bench and the Division Bench of the High Court.

21. Learned counsel for Shri Harish Dhanda, adopted the arguments of Mr. P.P. Rao and also submitted that the order of the Central Administrative Tribunal in O.A. No.495/PB/2007 was filed before the Full Bench of the High Court on 01.08.2011 which was the last date of hearing. He submitted that Shri Harish Dhanda, therefore, did not have any opportunity to reply before the Full Bench on the findings in the order of the Central Administrative Tribunal.

22. Shri P.N. Misra, learned counsel appearing for the State of Haryana, adopted the arguments of Mr. P.P. Rao and further submitted that the Full Bench should not have added the State of Haryana as a party. He also submitted that the Full Bench should not have issued the directions in its order dated 17.08.2011 to the State of Haryana to adopt the same procedure for selection and appointment of the Chairman and Members of the Haryana Public Service Commission when the State of Haryana had nothing to do with the appointment of Shri Harish Dhanda as Chairman of the Punjab Public Service Commission.

Findings of the Court:

23. The first question that I have to decide is whether the High Court was right in entertaining the writ petition as a public interest litigation at the instance of the respondent No.1. I have perused the writ petition CWP No.11846 of 2011, which was filed before the High Court by the respondent No.1, and I find that in the first paragraph of the writ petition the respondent No.1 has stated that he was a public spirited person and that he had filed the writ petition for espousing the public interest and for the betterment of citizens of the State of Punjab. In the writ petition, the respondent No.1 has relied on the provisions of Articles 315, 316, 317, 318, 319 and 320 of the Constitution relating to Public Service Commissions to contend that the functions of the Public Service Commission are sensitive and important and it is very essential that a person, who is appointed as the Chairman of the Public Service Commission, must possess outstanding and high degree educational qualifications and a great amount of experience in the field of selection, administration and recruitment and he must also be a man of integrity and impartiality. The respondent No.1 has alleged in the writ petition that the State Government has not laid down any qualification for appointment to the post of Chairman of the Punjab Public Service Commission and is continuing to appoint persons to the post of Chairman of Public Service Commission on the basis of political affiliation. In the writ petition, the respondent No.1 has also given the example of Shri Ravi Pal Singh Sidhu, who was appointed as the Chairman, Punjab Public Service Commission on the basis of political affiliation and the result was that during his period as the Chairman of the Punjab Public Service Commission, several cases of undeserving candidates being selected and appointed to the Public Service Commission in the State of Punjab came to light and investigations were carried out leading to filing of various criminal cases against the officials of the Public Service Commission as well Shri Sidhu. The respondent No.1 has further stated in the writ petition that he

has filed the writ petition after he read a news report titled: "*MLA Dhanda to be new PPSC Chairperson*". He has stated in the writ petition that Shri Harish Dhanda was an Advocate at Ludhiana before he ventured into politics and had unsuccessfully contested the Vidhan Sabha election before he was elected as MLA on the Shiromani Akali Dal ticket and that he had close political affiliation and affinity with high ups of the ruling party and that the ruling party in the State of Punjab has cleared his name for appointment as the Chairman of the Punjab Public Service Commission shortly. The respondent No.1 has also alleged in the writ petition various irregularities and illegalities committed by Shri Harish Dhanda. He has further stated in the writ petition that his colleague has even sent a representation to the Governor of Punjab and the Chief Minister of Punjab against the proposed appointment of Shri Harish Dhanda. He has accordingly prayed in the writ petition for a mandamus to the State of Punjab to frame regulations governing the conditions of service and appointment of the Chairman and Members of the Punjab Public Service Commission and for an order restraining the State of Punjab from appointing Shri Harish Dhanda as Chairman of the Punjab Public Service Commission. On a reading of the entire writ petition filed by the respondent No.1 before the High Court, I have no doubt that the respondent No.1 has filed this writ petition for espousing the cause of the general public of the State of Punjab with a view to ensure that a person appointed as the Chairman of the Punjab Public Service Commission is a man of ability and integrity so that recruitment to public services in the State of Punjab are from the best available talents and are fair and is not influenced by politics and extraneous considerations. Considering the averments in the writ petition, I cannot hold that the writ petition is just a service matter in which only the aggrieved party has the locus to initiate a legal action in the court of law. The writ petition is a matter affecting interest of the general pubic in the State of Punjab and any member of the public could espouse the cause of the general public so long as his bonafides are not in doubt.

Therefore, I do not accept the submission of Shri P.P. Rao, learned senior counsel appearing for the State of Punjab, that the writ petition was a service matter and the High Court was not right in entertaining the writ petition as a Public Interest Litigation at the instance of the respondent No.1. The decisions cited by Shri Rao were in cases where this Court found that the nature of the matter before the Court was essentially a service matter and this Court accordingly held that in such service matters, the aggrieved party and not any third party can only initiate a legal action.

24. The next question that I have to decide is whether the Division Bench of the High Court, after having recorded a finding in its order dated 13.07.2011 that the allegations of irregularities and illegalities against Shri Harish Dhanda in the writ petition do not stand substantiated, should have made an academic reference to the Full Bench of the High Court. As I have noticed, the respondent No.1 had, in the writ petition, relied on the constitutional provisions in Articles 315, 316, 317, 318, 319 and 320 of the Constitution to plead that the functions of the Public Service Commissions were of a sensitive and critical nature and hence the Chairman of the Public Service Commission must possess outstanding and high educational qualifications and a great amount of experience in the field of selection, administration and recruitment. The respondent No.1 has further pleaded in the writ petition that the State Government had on an earlier occasion made an appointment of a Chairman of the Punjab Public Service Commission on the basis of political affiliation and this has resulted in selection and appointment of undeserving persons to public service for extraneous considerations. Though respondent No.1 had alleged in the writ petition some irregularities and illegalities on the part of Shri Harish Dhanda, who was proposed to be appointed as Chairman of the Public Service Commission by the State Government, the writ petition was not founded only on such irregularities and illegalities alleged against Shri Harish Dhanda. In addition, the respondent No.1 had also

alleged in the writ petition that Shri Harish Dhanda was politically affiliated to the ruling party and was not selected for appointment as Chairman of the Public Service Commission on the basis of his qualifications, experience or ability which are necessary for the post of the Chairman of the Public Service Commission. Thus, even if the Division Bench had recorded a finding in the order dated 13.07.2011 that the irregularities and illegalities pointed out in the writ petition against Shri Harish Dhanda do not stand substantiated, the writ petition could not be disposed of with the said finding only. The Division Bench of the High Court, therefore, thought it necessary to make a reference to the Full Bench and has given its reasons for the reference to the Full Bench in Paragraphs 6 and 7 of its order dated 13.07.2011, which are quoted hereinbelow:

> "6. Even though, Article 316 of the Constitution does not prescribe any particular procedure, having regard to the purpose and nature of appointment, it cannot be assumed that power of appointment need not be regulated by any procedure. It is undisputed that person to be appointed must have competence and integrity. Reference may be made to judgments of the Hon'ble Supreme Court in In *R/o Dr. Ram Ashray Yadav, Chairman, Bihar Public Service Commission* (2000) 4 SCC 309, *Ram Kumar Kashyap and another v. Union of India and another,* AIR 2010 SC 1151 and in re *v. Mehar Singh Saini, Chairman, HPSC and others* (2010) 13 SCC 586 : (2010) 6 SLR 717.
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> 7. If it is so, question is how such persons are to be identified and selected and whether in the present case, procedure adopted is valid and if not, effect thereof. We are of the view that these questions need to be considered by a Bench of three Hon'ble Judges. Accordingly, we refer the matter to a Bench of three Hon'ble Judges."

25. It will be clear from the Paragraphs 6 and 7 of the order dated 13.07.2011 quoted above that the Division Bench of the

High Court found that Article 316 of the Constitution, which provides for appointment of the Chairman and other Members of the Public Service Commission by the Governor, does not prescribe any particular procedure and took the view that, having regard to the purpose and nature of appointment, it cannot be assumed that power of appointment need not be regulated by any procedure. The Division Bench of the High Court was of the further view that the persons to be appointed must have competence and integrity, but how such persons are to be identified and selected must be considered by a Bench of three Judges and accordingly referred the matter to the three Judges. The Division Bench also referred the question to the larger Bench of three Judges as to whether the procedure adopted in the present case for appointing Shri Harish Dhanda as the Chairman of the Punjab Public Service Commission was valid and if not, what is the effect of not following the procedure. I do not, therefore, find any merit in the submission of Shri Rao that the Division Bench of the High Court having found in its order dated 13.07.2011 that the irregularities and illegalities pointed out in the writ petition against Shri Harish Dhanda are unsubstantiated, should not have made an academic reference to the larger Bench of the High Court.

26. I may now consider the submission of Mr. Rao that this Court in the case of *Mehar Singh Saini, Chairman, HPSC In Re* (supra) had already declared the law that it is for Parliament to frame the guidelines or parameters regarding the qualifications, experience or stature for appointment as Chairman/Members of the Public Service Commission and hence it was not necessary for the Division Bench to make a reference to a Full Bench on the very same question of law. In *Mehar Singh Saini Chairman, HPSC In Re* (supra), this Court noticed that the provisions of Article 316 of the Constitution do not lay down any qualification, educational or otherwise, for appointment to the Commission as Chairman and Members and made the following observations in Para 85 of the judgment as reported in the SCC:

> **"**Desirability, if any, of providing specific qualification or experience for appointment as Chairman/members of the Commission is a function of Parliament. The guidelines or parameters, if any, including that of stature, if required to be specified, are for the appropriate Government to frame. This requires expertise in the field, data study and adoption of the best methodology by the Government concerned to make appointments to the Commission on merit, ability and integrity. Neither is such expertise available with the Court nor will it be in consonance with the constitutional scheme that this Court should venture into reading such qualifications into Article 316 or provide any specific guidelines controlling the academic qualification, experience and stature of an individual who is proposed to be appointed to this coveted office. Of course, while declining to enter into such arena, we still feel constrained to observe that this is a matter which needs the attention of the Parliamentarians and quarters concerned in the Governments. One of the factors, which has persuaded us to make this observation, is the number of cases which have been referred to this Court by the President of India in terms of Article 317(1) of the Constitution in recent years. A large number of inquiries are pending before this Court which itself reflects that all is not well with the functioning of the Commissions."

The observations of this Court in the aforesaid case of *Mehar Singh Saini Chairman, HPSC In Re* (supra) relate to qualification and experience for appointment as Chairman/ Members of the Commission and have nothing to do with the questions relating to the procedure for identifying persons of integrity and competence to be appointed as Chairman of the Public Service Commission, which were referred by the Division Bench of the High Court to the Full Bench by the order dated 13.07.2011. Mr. Rao is, therefore, not right in his submission that in view of the law declared by this Court in *Mehar Singh Saini, Chairman, HPSC In Re* (supra), there was

no necessity for the Division Bench to make a reference to the Full Bench by the order dated 13.07.2011.

27. I may next deal with the contention of Mr. Rao that the Full Bench exceeded its jurisdiction by enlarging the scope of reference and deciding matters which were not referred to it by the order dated 13.07.2011 of the Division Bench. Rule 4 of the Punjab High Court Rules reads as follows:

> "Save as provided by law or by these rules or by special order of the Chief Justice, all cases shall be heard and disposed of by a Bench of two Judges."

I have perused Rules 6, 7, 8 and 9 of the Punjab High Court Rules which relate to Full Bench and I do not find therein any provision which provides what matters a Full Bench comprising three Judges of the High Court will decide. Hence, the Division Bench of the High Court has the jurisdiction to decide a case, unless otherwise provided by law or by a special order of the Chief Justice and the jurisdiction of a Full Bench to decide matters will flow either from the order of the Chief Justice of the High Court or from the order of the Division Bench which makes a reference to the Full Bench. In the present case, there is no order of the Chief Justice making a reference but only the order dated 13.07.2011 of the Division Bench of the High Court making a reference to the Full Bench of three Judges of the High Court. Thus, I have to look at the order dated 13.07.2011 of the Division Bench to find out whether the Division Bench referred only specific questions to the Full Bench as contended by Mr. Rao or referred the entire case to the Full Bench as contended by Mr. Lalit.

28. On a close scrutiny of Paragraphs 6 and 7 of the order dated 13.07.2011 of the Division Bench of the High Court which are extracted above, I find that the Division Bench of the High Court has referred only specific questions to the Full Bench: how persons of competence and integrity are to be identified and selected for appointment as Chairman of the Public

Service Commission and if the procedure adopted for such appointment in the present case was not valid, the effect thereof. The Division Bench of the High Court has made it clear in Para 7 of its order dated 13.07.2001 that "these questions need to be considered by a Bench of three Hon'ble Judges". I, therefore, do not agree with Mr. Lalit that the Division Bench referred the entire case to the Full Bench by the order dated 13.07.2011. I further find that although the aforesaid specific questions relating to the procedure for identifying persons of competence and integrity for appointment as the Chairman of the Public Service Commission only were referred by the Division Bench of the High Court, the Full Bench, instead of deciding these specific questions referred to it, has given directions to the State of Punjab and the State of Haryana to follow a particular procedure for appointment of Members and Chairman of the Public Service Commission till such time a fair, rational, objective and transparent policy to meet the mandate of Article 14 of the Constitution is made. I, therefore, agree with Mr. Rao that the Full Bench of the High Court has decided issues which were not referred to it by the Division Bench of the High Court and the judgment dated 17.08.2011 of the Full Bench of the High Court was without jurisdiction.

29. I may next consider the contention of Mr. Rao that as the Constitution has left it to the discretion of the State Government to select and appoint the Chairman and Members of a State Public Commission, the High Court cannot direct the Government to exercise its discretion by following a procedure prescribed by the High Court. Mr. Rao has relied on Article 316 of the Constitution and the decision of this Court in *Mohinder Singh Gill & Anr. v. The Chief Election Commissioner, New Delhi & Ors*. [(1978) 1 SCC 405]. Article 316 of the Constitution of India is quoted hereinbelow:

"**316. Appointment and term of office of members.-**

(1) The Chairman and other members of a Public Service Commission shall be appointed, in the case of the Union

Commission or a Joint Commission, by the President, and in the case of a State Commission, by the Governor of the State:

Provided that as nearly as may be one-half of the members of every Public Service Commission shall be persons who at the dates of their respective appointments have held office for at least ten years either under the Government of India or under the Government of a State, and in computing the said period of ten years any period before the commencement of this Constitution during which a person has held office under the Crown in India or under the Government of an Indian State shall be included.

(1A) If the office of the Chairman of the Commission becomes vacant or if any such Chairman is by reason of absence or for any other reason unable to perform the duties of his office, those duties shall, until some persons appointed under clause (1) to the vacant office has entered on the duties thereof or, as the case may be, until the Chairman has resumed his duties, be performed by such one of the other members of the Commission as the President, in the case of the Union Commission or a Joint Commission, and the Governor of the State in the case of a State in the case of a State Commission, may appoint for the purpose.

(2) A member of a Public Service Commission shall hold office for a term of six years from the date on which he enters upon his office or until he attains, in the case of the Union Commission, the age of sixty-five years, and in the case of a State Commission or a Joint Commission, the age of sixty-two years, whichever is earlier:

Provided that -

(a) a member of a Public Service Commission may, by writing under his hand addressed, in

the case of the Union Commission or a Joint Commission, to the President, and in the case of a State Commission, to the Governor of the State, resign his office;

(b) a member of a Public Service Commission may be removed from his office in the manner provided in clause (1) or clause (3) of Article 317.

(3) A person who holds office as a member of a Public Service Commission shall, on the expiration of his term of office, be ineligible for re-appointment to that office."

A reading of Article 316 of the Constitution would show that it confers power on the Governor of the State to appoint the Chairman and other Members of a Public Service Commission. It has been held by this Court in *Mohinder Singh Gill & Anr. v. The Chief Election Commissioner, New Delhi & Ors*. (supra) that an authority has implied powers to make available and carry into effect powers expressly conferred on it. Thus, under Article 316 of the Constitution, the Governor of a State has not only the express power of appointing the Chairman and other Members of Public Service Commission but also the implied powers to lay down the procedure for appointment of Chairman and Members of the Public Service Commission and the High Court cannot under Article 226 of the Constitution usurp this constitutional power of the Government and lay down the procedure for appointment of the Chairman and other Members of the Public Service Commission. The Full Bench of the High Court, therefore, could not have laid down the procedure for appointment of the Chairman and Members of the Punjab Public Service Commission and the Haryana Public Service Commission by the impugned judgment dated 17.08.2011.

30. Having held that the Full Bench of the High Court has in its judgment dated 17.08.2011 acted beyond its jurisdiction and has usurped the constitutional power of the Governor in

laying down the procedure for appointment of the Chairman and Members of the Public Service Commission, I have to set aside the judgment dated 17.08.2011 of the Full Bench of the High Court. Thereafter, either of the two courses are open to me: remand the matter to the High Court for disposal of the writ petition in accordance with law or decide the writ petition on merits. To cut short the litigation, I proceed to decide the writ petition on merits instead of remanding the matter to the High Court.

31. This Court has had the occasion to consider the qualities which a person should have for being appointed as Chairman and Member of Public Service Commission and has made observations after considering the nature of the functions entrusted to the Public Service Commissions under Article 320 of the Constitution. In *Ashok Kumar Yadav & Ors. v. State of Haryana & Ors.* (supra), a Constitution Bench of this Court speaking through P.N. Bhagwati, J, observed:

"We would therefore like to strongly impress upon every State Government to take care to see that its Public Service Commission is manned by competent, honest and independent persons of outstanding ability and high reputation who command the confidence of the people and who would not allow themselves to be deflected by any extraneous considerations from discharging their duty of making selections strictly on merit."

In *R/O Dr. Ram Ashray Yadav, Chairman, Bihar Public Service Commission* (supra), Dr. A.S. Anand, C.J. speaking for a three Judge Bench, cautioned:

"The credibility of the institution of a Public Service Commission is founded upon the faith of the common man in its proper functioning. The faith would be eroded and confidence destroyed if it appears that the Chairman or the members of the Commission act subjectively and not objectively or that their actions are suspect. Society

expects honesty, integrity and complete objectivity from the Chairman and members of the Commission. The Commission must act fairly, without any pressure or influence from any quarter, unbiased and impartially, so that he society does not lose confidence in the Commission. The high constitutional trustees, like the Chairman and members of the Public Service Commission must forever remain vigilant and conscious of these necessary adjuncts."

Despite these observations of this Court, the State Government of Punjab appointed Shri Ravi Pal Singh Sidhu as the Chairman of the Punjab Public Service Commission between 1996 to 2002 and as has been noted in the judgment of S.B. Sinha, J. of this Court in *Inderpreet Singh Kahlon and Others* v. *State of Punjab and Others* (supra), allegations were made against him that he got a large number of persons appointed on extraneous considerations including monetary consideration during the period 1998 to 2001 and raids were conducted in his house on more that one occasion and a large sum of money was recovered from his custody and his relatives and FIRs were lodged and criminal cases initiated by the Vigilance Bureau of the State of Punjab. Writing a separate judgment in the aforesaid case, Dalveer Bhandari, J, had to comment:

"This unfortunate episode teaches us an important lesson that before appointing the constitutional authorities, there should be a thorough and meticulous inquiry and scrutiny regarding their antecedents. Integrity and merit have to be properly considered and evaluated in the appointments to such high positions. It is an urgent need of the hour that in such appointments absolute transparency is required to be maintained and demonstrated. The impact of the deeds and misdeeds of the constitutional authorities (who are highly placed), affect a very large number of people for a very long time, therefore, it is absolutely imperative that only people of high integrity, merit rectitude and honesty are appointed to these constitutional positions."

Considering this experience of the damage to recruitment to public services caused by appointing a person lacking in character as the Chairman of the Public Service Commission in the State of Punjab, when the respondent No.1 brought to the notice of the High Court through the writ petition that the State Government of Punjab proposed to appoint Shri Harish Dhanda as the Chairman of the Public Service Commission, only because of his political affiliation, the Division Bench of the High Court rightly entertained the writ petition as a public interest litigation. The Division Bench of the High Court, however, found that no procedure for appointment of Chairman and Members of the Public Service Commission has been laid down in Article 316 of the Constitution and therefore posed the question in Paragraphs 6 and 7 of its order dated 13.07.2011 as to what should be the procedure for identifying and selecting persons of integrity and competence for appointment of Chairman of the Public Service Commission and referred the question to a larger Bench of three Judges. I have already held that it is for the Governor who is the appointing authority under Article 316 of the Constitution to lay down the procedure for appointment of the Chairman and Members of the Public Service Commission, but this is not to say that in the absence of any procedure laid down by the Governor for appointment of Chairman and Members of the Public Service Commission under Article 316 of the Constitution, the State Government would have absolute discretion in selecting and appointing any person as the Chairman of the State Public Service Commission. Even where a procedure has not been laid down by the Governor for appointment of Chairman and Members of the Public Service Commission, the State Government has to select only persons with integrity and competence for appointment as Chairman of the Public Service Commission, because the discretion vested in the State Government under Article 316 of the Constitution is impliedly limited by the purposes for which the discretion is vested and the purposes

are discernible from the functions of the Public Service Commissions enumerated in Article 320 of the Constitution. Under clause (1) of Article 320 of the Constitution, the State Public Service Commission has the duty to conduct examinations for appointments to the services of the State. Under clause (3) of Article 320, the State Public Service Commission has to be consulted by the State Government on matters relating to recruitment and appointment to the civil services and civil posts in the State, on disciplinary matters affecting a person serving under the Government of a State in a civil capacity, on claims by and in respect of a person who is serving under the State Government towards costs of defending a legal proceeding, on claims for award of pension in respect of injuries sustained by a person while serving under the State Government and other matters. In such matters, the State Public Service Commission is expected to act with independence from the State Government and with fairness, besides competence and maturity acquired through knowledge and experience of public administration.

32. I, therefore, hold that even though Article 316 does not specify the aforesaid qualities of the Chairman of a Public Service Commission, these qualities are amongst the implied relevant factors which have to be taken into consideration by the Government while determining the competency of the person to be selected and appointed as Chairman of the Public Service Commission under Article 316 of the Constitution. Accordingly, if these relevant factors are not taken into consideration by the State Government while selecting and appointing the Chairman of the Public Service Commission, the Court can hold the selection and appointment as not in accordance with the Constitution. To quote De Smith's Judicial Review, Sixth Edition:

> "If the exercise of a discretionary power has been influenced by considerations that cannot lawfully be taken into account, or by the disregard of relevant considerations

> required to be taken into account (expressly or impliedly), a court will normally hold that the power has not been validly exercised. (Page 280)
>
> If the relevant factors are not specified (e.g. if the power is merely to grant or refuse a licence, or to attach such conditions as the competent authority thinks fit), it is for the courts to determine whether the permissible considerations are impliedly restricted, and, if so, to what extent (Page 282)"

In *M/s Hochtief Gammon v. State of Orissa and Others* (AIR 1975 SC 2226), A. Alagiriswamy writing the judgment for a three Judge Bench of this Court explained this limitation on the power of the Executive in the following words:

> "The Executive have to reach their decisions by taking into account relevant considerations. They should not refuse to consider relevant matter nor should take into account wholly irrelevant or extraneous consideration. They should not misdirect themselves on a point of law. Only such a decision will be lawful. The Courts have power to see that the Executive acts lawfully".

33. Mr. Rao, however, relied on a decision of the Constitution Bench of this Court in *E.P. Royappa v. State of Tamil Nadu & Anr.* (supra) in which it was held that the post of Chief Secretary is a highly sensitive post and the Chief Secretary is a lynchpin in the administration and for smooth functioning of the administration, there should be complete rapport and understanding between the Chief Secretary and the Chief Minister and, therefore, it is only the person in whom the Chief Minister has complete confidence who can be appointed as Chief Secretary of the State and hence the Chief Secretary of a State cannot be displaced from his post on the ground that his appointment was arbitrary and violative of Articles 14 and 16 of the Constitution. Mr. Rao also relied on the decision of a two-Judge Bench of this Court in *State of West Bengal & Ors.*

v. Manas Kumar Chakraborty & Ors. (supra) in which it was similarly observed that the post of DG and IG Police was a selection post and it is not open to the courts to sit in appeal over the view taken by the appointing authority with regard to the choice of the officer to be appointed as DG and IG Police and for such selection, the Government of the State must play a predominant role. I am of the considered opinion that the Chairman of the Public Service Commission, who along with its other members has to perform his duties under Article 320 of the Constitution with independence from the State Government cannot be equated with the Chief Secretary or the DG and IG Police, who are concerned solely with the administrative functions and have to work under the State Government. To ensure this independence of the Chairman and Members of the Public Service Commission, clause (3) of Article 316 of the Constitution provides that a person shall, on expiration of his term of office be ineligible for reappointment to that office.

34. Mr. Rao has also relied on the decision of this Court in *B. Srinivasa Reddy v. Karnataka Urban Water Supply & Drainage Board Employees Association & Ors.* (supra) to argue that the High Court's jurisdiction to issue a writ of *quo warranto* is limited to only cases where the appointment to an office is contrary to the statutory rules. He also distinguished the decision of this Court in *Centre for PIL and Another* v. *Union of India and Another* (supra) cited by Mr. Lalit and submitted that in that case the Court had found that the appointment of the Central Vigilance Commissioner was in contravention of the statutory provisions of the Central Vigilance Commission Act, 2003 and for this reason, this Court quashed the appointment of the Central Vigilance Commissioner. I have already held that besides express restrictions in a statute or the Constitution, there can be implied restrictions in a statute and the Constitution and the statutory or the constitutional authority cannot in breach of such implied restrictions exercise its discretionary power. Moreover, Article 226 of the

Constitution vests in the High Court the power to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of *habeas corpus, mandamus*, prohibition, *quo warranto* and *certiorari*, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose. The power of the High Court under Article 226 of the Constitution is, thus, not confined to only writ of *quo warranto* but to other directions, orders or writs. In *Dwarka Nath v. Income-tax Officer, Special Circle, D Ward, Kanpur & Anr.* (supra), K. Subba Rao, J. speaking for a three-Judge Bench, has explained the wide scope of the powers of the High Court under Article 226 of the Constitution thus:

> "This article is couched in comprehensive phraseology and it ex facie confers a wide power on the High Courts to reach injustice wherever it is found. The Constitution designedly used a wide language in describing the nature of the power, the purpose for which and the person or authority against whom it can be exercised. It can issue writs in the nature of prerogative writs as understood in England; but the scope of those writs also is widened by the use of the expression "nature", for the said expression does not equate the writs that can be issued in India with those in England, but only draws an analogy from them. That apart, High Courts can also issue directions, orders or writs other than the prerogative writs. It enables the High Courts to mould the reliefs to meet the peculiar and complicated requirements of this country. Any attempt to equate the scope of the power of the High Court under Article 226 of the Constitution with that of the English Courts to issue prerogative writs is to introduce the unnecessary procedural restrictions grown over the years in a comparatively small country like England with a unitary form of government to a vast country like India functioning under a federal structure. Such a construction defeats the purpose of the article itself. To say this is not to say that

the High Courts can function arbitrarily under this Article. Some limitations are implicit in the article and others may be evolved to direct the article through defined channels. This interpretation has been accepted by this Court in *T.C. Basappa* v. *Nagappa,* 1955-1 SCR 250: (AIR 1954 SC 440) and *Irani* v. *State of Madras,* 1962 (2) SCR 169: (AIR 1961 SC 1731)."

Therefore, I hold that the High Court should not normally, in exercise of its power under Article 226 of the Constitution, interfere with the discretion of the State Government in selecting and appointing the Chairman of the State Public Service Commission, but in an exceptional case if it is shown that relevant factors implied from the very nature of the duties entrusted to Public Service Commissions under Article 320 of the Constitution have not been considered by the State Government in selecting and appointing the Chairman of the State Public Service Commission, the High Court can invoke its wide and extra-ordinary powers under Article 226 of the Constitution and quash the selection and appointment to ensure that the discretion of the State Government is exercised within the bounds of the Constitution.

35. Coming now to the facts of the present case, I find that the Division Bench of the High Court in its order dated 13.07.2011 has already held that the irregularities and illegalities alleged against Shri Harish Dhanda have not been substantiated. I must, however, enquire whether the State Government took into consideration the relevant factors relating to his competency to act as the Chairman of the State Public Service Commission. We had, therefore, passed orders on 01.08.2012 calling upon the State of Punjab to produce before us the material referred to in para 69 of the judgment of the Full Bench of the High Court on the basis of which Shri Harish Dhanda was selected for appointment as Chairman of the Punjab Public Service Commission. Pursuant to the order dated 01.08.2012, the State Government has produced the

files in which the selection and appointment of Shri Harish Dhanda was processed by the State Government. At page 26 of the file on the subject "*Appointment of Chairman of P.P.S.C. – Shri S.K. Sinha, IAS, Shri Harish Rai Dhanda*", I find that a bio-data in one sheet has been placed at page 41 of the file, which reads as under:

"BIO DATA

Harish Rai Dhanda S/o Sh. Kulbhushan Rai

Resident: The Retreat, Ferozepur Road, Ludhiana

Date of Birth: 15th May, 1960

Attained Bachelor in Arts from SCD Government College, Ludhiana, Punjab University, (1979).

Attained Bachelor in Laws from Law College, Punjab University (1982).

Registered with Bar Council of Punjab and Haryana as Advocate in 1982.

Practiced Law at District Courts, Ludhiana from 1982 to 2007.

Elected as President of District Bar Association, Ludhiana for seven terms."

Besides the aforesaid bio-data, there is a certificate dated 06.07.2011 given by the Speaker, Punjab Vidhan Sabha, certifying that Shri Harish Rai Dhanda, MLA, has resigned from the membership of the 13th Punjab Legislative Assembly with effect from 06.07.2011 and that his resignation has been accepted by the Speaker. The aforesaid materials indicate that Shri Harish Dhanda had B.A. and LL.B Degrees and was practicing as an Advocate at the District Courts in Ludhiana and had been elected as the President of the District Bar

Association, Ludhiana for seven terms and has been member of the Legislative Assembly. These materials do not indicate that Shri Harish Dhanda had any knowledge or experience whatsoever either in administration or in recruitment nor do these materials indicate that Shri Harish Dhanda had the qualities to perform the duties as the Chairman of the State Public Service Commission under Article 320 of the Constitution which I have discussed in this judgment. No other information through affidavit has also been placed on record before us to show that Shri Harish Dhanda has the positive qualities to perform the duties of the office of the Chairman of the State Pubic Service Commission under Article 320 of the Constitution. The decision of the State Government to appoint Shri Harish Dhanda as the Chairman of the Punjab Public Service Commission was thus invalid for non-consideration of relevant factors implied from the very nature of the duties entrusted to the Public Service Commissions under Article 320 of the Constitution.

36. In the result, I am not inclined to interfere with the impugned order of the Division Bench of the High Court dated 17.08.2011 quashing the selection and appointment of Shri Harish Dhanda as Chairman of the Punjab Public Service Commission, but I set aside the judgment dated 17.08.2011 of the Full Bench of the High Court. Considering, however, the fact that the State Government of Punjab has already selected and appointed Lt. Gen. R.A. Sujlana as the Chairman of the Punjab Public Service Commission, I am not inclined to disturb his appointment only on the ground that his appointment was consequential to the judgment dated 17.08.2011 of the Full Bench of the High Court which I have set aside. The appeal of the State of Punjab is partly allowed and the appeal of the State of Haryana is allowed, but the appeal of Shri Harish Dhanda is dismissed. The parties to bear their own costs.

MADAN B. LOKUR, J. 1. While I entirely agree with Brother Patnaik, but given the seminal importance of the issues raised, I think it appropriate to separately express my views in the case.

2. The facts have been stated in detail by Brother Patnaik and it is not necessary to repeat them.

The issues:

3. The primary substantive issue that arises for consideration is whether the High Court could have – and if it could have, whether it ought to have - interfered in the appointment, by a notification published on 7th July 2011, of Mr. Harish Rai Dhanda as Chairperson of the Punjab Public Service Commission. In my opinion, the answer to both questions must be in the affirmative.

4. However, it must be clarified that even though a notification was issued of his appointment, Mr. Dhanda did not actually assume office or occupy the post of Chairperson of the Punjab Public Service Commission. Before he could do so, his appointment was challenged by Salil Sabhlok through a writ petition being Writ Petition (Civil) No.11848 of 2011 filed in the Punjab & Haryana High Court. When the writ petition was taken up for consideration, a Division Bench of the High Court observed in its order of 13th July 2011 that his "oath ceremony" was fixed for the same day but learned counsel appearing for the State of Punjab stated that the ceremony would be deferred till the writ petition is decided. Thereafter, the statement was sought to be withdrawn on 1st August 2011. However, the Full Bench of the High Court, which had heard the matter in considerable detail, passed an order on that day retraining administering of the oath of office to Mr. Dhanda. As such, Mr. Dhanda did not take the oath of allegiance, of office and of secrecy as the Chairperson of the Punjab Public Service Commission. Later, since his appointment was quashed by the High Court, the question of his taking the oaths as above did not arise.

5. Another substantive issue raised is whether the High Court could have entertained a Public Interest Writ Petition in respect of a "service matter", namely, the appointment of Mr. Harish Rai Dhanda as Chairperson of the Punjab Public Service Commission. In my opinion, the appointment of the Chairperson of the Punjab Public Service Commission is not a "service matter" and so a Public Interest Litigation could have been entertained by the High Court.

6. A few procedural issues have also arisen for consideration and they relate to the desirability of making a reference by the Division Bench to the Full Bench of the High Court of issues said to have been settled by this Court; the framing of questions by the Full Bench of the High Court, over and above the questions referred to it; the necessity of impleadment of the State of Haryana in the proceedings before the Full Bench, even though it had no concern with the appointment of the Chairperson of the Punjab Public Service Commission; the validity of the direction given by the Full Bench to produce the advice tendered by the Chief Minister of the State of Punjab to the Governor of the State in respect of the appointment of the Chairperson of the Punjab Public Service Commission; the power of the Full Bench to frame guidelines for the appointment of the Chairperson of the Punjab Public Service Commission and of the Haryana Public Service Commission and a few other incidental issues.

Public Interest Writ Petition in respect of a "service matter":

7. At the outset, it is important to appreciate that the Chairperson of a Public Service Commission holds a constitutional position and not a statutory post. The significance of this is that the eligibility parameters or selection indicators for appointment to a statutory post are quite different and distinct from the parameters and indicators for appointment to a constitutional position.

8. The appointment of a Chairperson of a State Public Service Commission is in terms of Article 316 of the Constitution, which reads as follows:

"**316. Appointment and term of office of members.**— (1) The Chairman and other members of a Public Service Commission shall be appointed, in the case of the Union Commission or a Joint Commission, by the President, and in the case of a State Commission, by the Governor of the State:

> Provided that as nearly as may be one-half of the members of every Public Service Commission shall be persons who at the dates of their respective appointments have held office for at least ten years either under the Government of India or under the Government of a State, and in computing the said period of ten years any period before the commencement of this Constitution during which a person has held office under the Crown in India or under the Government of an Indian State shall be included.

(1-A) If the office of the Chairman of the Commission becomes vacant or if any such Chairman is by reason of absence or for any other reason unable to perform the duties of his office, those duties shall, until some person appointed under clause (1) to the vacant office has entered on the duties thereof or, as the case may be, until the Chairman has resumed his duties, be performed by such one of the other members of the Commission as the President, in the case of the Union Commission or a Joint Commission, and the Governor of the State in the case of a State Commission, may appoint for the purpose.

(2) A member of a Public Service Commission shall hold office for a term of six years from the date on which he enters upon his office or until he attains, in the case of the

Union Commission, the age of sixty-five years, and in the case of a State Commission or a Joint Commission, the age of sixty-two years, whichever is earlier:

Provided that—

(*a*) a member of a Public Service Commission may, by writing under his hand addressed, in the case of the Union Commission or a Joint Commission, to the President, and in the case of a State Commission, to the Governor of the State, resign his office;

(*b*) a member of a Public Service Commission may be removed from his office in the manner provided in clause (1) or clause (3) of Article 317.

(3) A person who holds office as a member of a Public Service Commission shall, on the expiration of his term of office, be ineligible for re-appointment to that office."

9. Two features clearly stand out from a bare reading of Article 316 of the Constitution, and these are: (1) No qualification has been laid down for the appointment of the Chairperson of a State Public Service Commission. Theoretically therefore, the Chief Minister of a State can recommend to the Governor of a State to appoint any person walking on the street as the Chairperson of the State Public Service Commission. (2) The Chairperson of the State Public Service Commission is provided security of tenure since the term of office is fixed at six years or until the age of 62 years, whichever is earlier.

10. The security of tenure is confirmed by the provision for removal of the Chairperson of the State Public Service Commission from office as provided for in Article 317 of the Constitution. This reads as follows:

"**317. Removal and suspension of a member of a**

Public Service Commission.—(1) Subject to the provisions of clause (3), the Chairman or any other member of a Public Service Commission shall only be removed from his office by order of the President on the ground of misbehaviour after the Supreme Court, on reference being made to it by the President, has, on inquiry held in accordance with the procedure prescribed in that behalf under Article 145, reported that the Chairman or such other member, as the case may be, ought on any such ground to be removed.

(2) The President, in the case of the Union Commission or a Joint Commission, and the Governor, in the case of a State Commission, may suspend from office the Chairman or any other member of the Commission in respect of whom a reference has been made to the Supreme Court under clause (1) until the President has passed orders on receipt of the report of the Supreme Court on such reference.

(3) Notwithstanding anything in clause (1), the President may by order remove from office the Chairman or any other member of a Public Service Commission if the Chairman or such other member, as the case may be,—

(*a*) is adjudged an insolvent; or

(*b*) engages during his term of office in any paid employment outside the duties of his office; or

(*c*) is, in the opinion of the President, unfit to continue in office by reason of infirmity of mind or body.

(4) If the Chairman or any other member of a Public Service Commission is or becomes in any way concerned or interested in any contract or agreement made by or on behalf of the Government of India or the Government of a

State or participates in any way in the profit thereof or in any benefit or emolument arising therefrom otherwise than as a member and in common with the other members of an incorporated company, he shall, for the purposes of clause (1), be deemed to be guilty of misbehaviour."

11. An aspect that clearly stands out from a reading of Article 317 is that the Chairperson of the State Public Service Commission can be removed from office on the ground of misbehaviour only after an inquiry is held by this Court on a reference made by the President and that inquiry results in a report that he or she ought to be removed on such ground. The Governor of the State is not empowered to remove the Chairperson of the State Public Service Commission even though he or she is the appointing authority. There are, of course, other grounds mentioned in Article 317 of the Constitution but none of them are of any concern for the purposes of this case.

12. A reading of Article 316 and Article 317 of the Constitution makes it clear that to prevent the person walking on the street from being appointed as the Chairperson of a State Public Service Commission, the Constitution has provided that the appointment is required to be made by the Governor of the State, on advice. Additionally, the Chairperson has security of tenure to the extent that that person cannot be effortlessly removed from office even by the President as long as he or she is not guilty of proven misbehaviour, or is insolvent, or does not take up any employment or is not bodily or mentally infirm. There is, therefore, an in-built constitutional check on the arbitrary appointment of a Chairperson of a State Public Service Commission. The flip side is that if an arbitrary appointment is made, removal of the appointee is a difficult process.

13. If the person walking on the street is appointed in a God-forbid kind of situation, as the Chairperson of a State Public Service Commission, what remedy does an aggrieved

citizen have? This question arises in a unique backdrop, in as much as no eligibility criterion has been prescribed for such an appointment and the suitability of a person to hold a post is subjective.

14. In this context, three submissions have been put forward by learned counsel supporting the appointment of Mr. Dhanda. If these submissions are accepted, then one would have to believe that a citizen aggrieved by such an appointment would have no remedy. The first submission is that a writ of *quo warranto* would not lie since there is no violation of a statute in the appointment – indeed, no statutory or other qualification or eligibility criterion has been laid down for the appointment. Therefore, a petition for a writ of *quo warranto* would not be maintainable. The second submission is that the appointment to a post is a "service matter". Therefore, a public interest litigation (or a PIL for short) would not be maintainable. The third submission is that the remedy in a "service matter" would lie with the Administrative Tribunal, but an application before the Tribunal would not be maintainable since the aggrieved citizen is not a candidate for the post and, therefore, would have no *locus standii* in the matter. It is necessary to consider the correctness of these submissions and the availability of a remedy, if any, to an aggrieved citizen.

Maintainability of a PIL:

(i) A writ of *quo warranto*

15. Learned counsel supporting Mr. Dhanda are right that there is no violation of any statutory requirement in the appointment of Mr. Dhanda. This is because no statutory criterion or parameters have been laid for the appointment of the Chairperson of a Public Service Commission. Therefore, a petition for a writ of *quo warranto* would clearly not lie.

16. A couple of years ago, in *Hari Bansh Lal v. Sahodar Prasad Mahto,* (2010) 9 SCC 655 this Court considered the

position at law and, after referring to several earlier decisions, including *R.K. Jain v. Union of India,* (1993) 4 SCC 119, *Mor Modern Coop. Transport Society v. Govt. of Haryana,* (2002) 6 SCC 269, *High Court of Gujarat v. Gujarat Kishan Mazdoor Panchayat,* (2003) 4 SCC 712 and *B. Srinivasa Reddy v. Karnataka Urban Water Supply & Drainage Board Employees' Association,* (2006) 11 SCC 731 (2) held that "even for issuance of a writ of quo warranto, the High Court has to satisfy that the appointment is contrary to the statutory rules."

17. This principle was framed positively in *Mahesh Chandra Gupta v. Union of India & Others,* (2009) 8 SCC 273 wherein it was said: "In cases involving lack of "eligibility" writ of quo warranto would certainly lie."

(ii) **Is it a service matter?**

18. Is the appointment of a person to a constitutional post a "service matter"? The expression "service matter" is generic in nature and has been specifically defined (as far as I am aware) only in the Administrative Tribunals Act, 1985. Section 3(q) of the Administrative Tribunals Act is relevant in this regard and it reads as follows:

"**3. Definitions.—**In this Act, unless the context otherwise requires,—

(*q*) "service matters", in relation to a person, means all matters relating to the conditions of his service in connection with the affairs of the Union or of any State or of any local or other authority within the territory of India or under the control of the Government of India, or, as the case may be, of any corporation or society owned or controlled by the Government, as respects—

(*i*) remuneration (including allowances), pension and other retirement benefits;

(*ii*) tenure including confirmation, seniority, promotion, reversion, premature retirement and superannuation;

(*iii*) leave of any kind;

(*iv*) disciplinary matters; or

(*v*) any other matter whatsoever;"

19. It cannot be said that the Chairperson of the Public Service Commission holds a post in connection with the affairs of the Union or the State. He or she is not a Government servant, in the sense of there being a master and servant relationship between the Union or the State and the Chairperson. In view of the constitutional provisions pertaining to the security of tenure and the removal procedure of the Chairperson and members of the Public Service Commission, it can only be concluded that he or she holds a constitutional post. In this context, in *Reference under Article 317(1) of the Constitution of India, In re,* (1990) 4 SCC 262 it was held:

"The case of a government servant is, subject to the special provisions, governed by the law of master and servant, but the position in the case of a Member of the Commission is different. The latter holds a constitutional post and is governed by the special provisions dealing with different aspects of his office as envisaged by Articles 315 to 323 of Chapter II of Part XIV of the Constitution."

20. Similarly, in *Bihar Public Service Commission v. Shiv Jatan Thakur,* 1994 Supp. (3) SCC 220 the Public Service Commission is referred to as a "constitutional institution" and its Chairperson and members as "constitutional functionaries".

21. In *Ram Ashray Yadav (Dr.), Chairman, Bihar Public Service Commission, In Re,* (2000) 4 SCC 309 a reference was made to the "constitutional duties and obligations" of the Public Service Commissions. It was also observed that the

Chairperson of the Public Service Commission is in the position of a constitutional trustee.

22. In *Ram Kumar Kashyap v. Union of India,* (2009) 9 SCC 278 the obligations of the Public Service Commission were referred to as "constitutional obligations" and on a review of the case law, it was held that:

> "... since the Public Service Commissions are a constitutional creation, the principles of service law that are ordinarily applicable in instances of dismissals of government employees cannot be extended to the proceedings for the removal and suspension of the members of the said Commissions."

23. Finally, in *Mehar Singh Saini, Chairman, Haryana Public Service Commission, In re,* (2010) 13 SCC 586 a distinction was made between service under the Government of India or a State Government and a constitutional body like a Public Service Commission. It was observed that,

> "A clear distinction has been drawn by the Framers [of our Constitution] between service under the Centre or the States and services in the institutions which are creations of the Constitution itself. Article 315 of the Constitution commands that there shall be a Union Public Service Commission for the Centre and State Public Service Commissions for the respective States. This is not, in any manner, linked with the All-India Services contemplated under Article 312 of the Constitution to which, in fact, the selections are to be made by the Commission. The fact that the Constitution itself has not introduced any element of interdependence between the two, undoubtedly, points to the cause of Commission being free from any influence or limitation."

24. A little later in the judgment, the Public Service Commission is described as a "constitutional body".

25. This being the position, it is not possible to say that the Chairperson of the Public Service Commission does not occupy a constitutional position or a constitutional post. To describe the appointment to a constitutional post generically or even specifically as a "service matter" would be most inappropriate, to say the least.

(iii) **Functional test**

26. The employment embargo laid down in the Constitution and the functions of a Public Service Commission also indicate that its Chairperson has a constitutional status.

27. Article 319 of the Constitution provides that on ceasing to hold office, the Chairperson of a State Public Service Commission cannot take up any other employment either under the Government of India or under the Government of a State, except as the Chairperson or member of the Union Public Service Commission or as the Chairperson of any other State Public Service Commission.

28. Among other things, the functions of the State Public Service Commission include, as mentioned in Article 320 of the Constitution, conducting examinations for appointments to the services of the State. The State Public Service Commission may also be consulted by the President or the Governor of the State, subject to regulations that may be made in that behalf, on all matters relating *inter alia* to methods of recruitment to civil services and for civil posts and on the principles to be followed in making appointments to civil services and posts.

29. Article 322 of the Constitution provides that the expenses of the State Public Service Commission, including salaries, allowances and pensions of its members shall be charged on the Consolidated Fund of the State. Article 323 of the Constitution requires the Public Service Commission to annually present a report of the work done by it to the Governor of the State.

30. All these are serious constitutional functions and obligations cast on the Chairperson and members of the Public Service Commission and to equate their appointment with a statutory appointment and slotting their appointment in the category of a "service matter" would be reducing the Constitution into just another statute, which it is not.

(iv) **The remedy**

31. What then is the remedy to a person aggrieved by an appointment to a constitutional position like the Chairperson of a Public Service Commission?

32. About twenty years ago, in a case relating to the appointment of the President of a statutory tribunal, this Court held in *R.K. Jain v. Union of India,* (1993) 4 SCC 119 that an aggrieved person – a "non-appointee" – would alone have the locus standii to challenge the offending action. A third party could seek a remedy only through a public law declaration. This is what was held:

> "In service jurisprudence it is settled law that it is for the aggrieved person i.e. non-appointee to assail the legality of the offending action. Third party has no locus standi to canvass the legality or correctness of the action. Only public law declaration would be made at the behest of the petitioner, a public-spirited person."

33. This view was reiterated in *B. Srinivasa Reddy*. Therefore, assuming the appointment of the Chairperson of a Public Service Commission is a "service matter", a third party and a complete stranger such as the writ petitioner cannot approach an Administrative Tribunal to challenge the appointment of Mr. Dhanda as Chairperson of the Punjab Public Service Commission

34. However, as an aggrieved person he or she does have a public law remedy. But in a service matter the only available remedy is to ask for a writ of *quo warranto*. This is the opinion

expressed by this Court in several cases. One of the more recent decisions in this context is *Hari Bansh Lal* wherein it was held that "…except for a writ of quo warranto, public interest litigation is not maintainable in service matters." This view was referred to (and not disagreed with) in *Girjesh Shrivastava v. State of Madhya Pradesh,* (2010) 10 SCC 707 after referring to and relying on *Duryodhan Sahu (Dr.) v. Jitendra Kumar Mishra* (1998) 7 SCC 273, *B. Srinivasa Reddy, Dattaraj Nathuji Thaware v. State of Maharashtra,* (2005) 1 SCC 590, *Ashok Kumar Pandey v. State of W.B* (2004) 3 SCC 349 and *Hari Bansh Lal*.

35. The significance of these decisions is that they prohibit a PIL in a service matter, except for the purposes of a writ of *quo warranto*. However, as I have concluded, the appointment of the Chairperson in a Public Service Commission does not fall in the category of a service matter. Therefore, a PIL for a writ of *quo warranto* in respect of an appointment to a constitutional position would not be barred on the basis of the judgments rendered by this Court and mentioned above.

36. However, in a unique situation like the present, where a writ of *quo warranto* may not be issued, it becomes necessary to mould the relief so that an aggrieved person is not left without any remedy, in the public interest. This Court has, therefore, fashioned a writ of declaration to deal with such cases. Way back, in *T. C. Basappa v. T. Nagappa* [1955] 1 SCR 250 it was said:

> "The language used in articles 32 and 226 of our Constitution is very wide and the powers of the Supreme Court as well as of all the High Courts in India extend to issuing of orders, writs or directions including writs in the nature of habeas corpus, mandamus, quo warranto, prohibition and certiorari as may be considered necessary for enforcement of the fundamental rights and in the case of the High Courts, for other purposes as well. In view of the express provisions of our Constitution we need not now

look back to the early history or the procedural technicalities of these writs in English law, nor feel oppressed by any difference or change of opinion expressed in particular cases by English Judges".

37. More recently, such a writ was issued by this Court was in *Kumar Padma Prasad v. Union of India,* (1992) 2 SCC 428 when this Court declared that Mr. K.N. Srivastava was not qualified to be appointed a Judge of the Gauhati High Court even after a warrant for his appointment was issued by the President under his hand and seal. This Court, therefore, directed:

> "As a consequence, we quash his appointment as a Judge of the Gauhati High Court. We direct the Union of India and other respondents present before us not to administer oath or affirmation under Article 219 of the Constitution of India to K.N. Srivastava. We further restrain K.N. Srivastava from making and subscribing an oath or affirmation in terms of Article 219 of the Constitution of India and assuming office of the Judge of the High Court."

38. Similarly, in *N. Kannadasan v. Ajoy Khose,* (2009) 7 SCC 1 this Court held that Justice N. Kannadasan (retired) was ineligible to hold the post of the President of the State Consumer Redressal Forum. It was then concluded:

> "The superior courts may not only issue a writ of quo warranto but also a writ in the nature of quo warranto. It is also entitled to issue a writ of declaration which would achieve the same purpose."

39. Finally and even more recently, in *Centre for PIL v. Union of India,* (2011) 4 SCC 1 the recommendation of a High Powered Committee recommending the appointment of Mr. P.J. Thomas as the Central Vigilance Commissioner under the proviso to Section 4(1) of the Central Vigilance Commission Act, 2003 was held to be *non est* in law and his appointment

as the Central Vigilance Commissioner was quashed. This Court opined:

> "At the outset it may be stated that in the main writ petition the petitioner has prayed for issuance of any other writ, direction or order which this Court may deem fit and proper in the facts and circumstances of this case. Thus, nothing prevents this Court, if so satisfied, from issuing a writ of declaration."

Who may be appointed - views of this Court:

40**.** Having come to a conclusion that an aggrieved citizen has only very limited options available to him or her, is there no redress if an arbitrary appointment is made, such as of the person walking on the street. Before answering this question, it would be worth considering who may be appointed to a constitutional post such as the Chairperson of the Public Service Commission.

41. In *Ashok Kumar Yadav v. State of Haryana,* (1985) 4 SCC 417 this Court looked at the appointment of the Chairperson and members of the Public Service Commission from two different perspectives: firstly, from the perspective of the requirement to have able administrators in the country and secondly from the perspective of the requirement of the institution as such. In regard to the first requirement, it was said:

> "It is absolutely essential that the best and finest talent should be drawn in the administration and administrative services must be composed of men who are honest, upright and independent and who are not swayed by the political winds blowing in the country. The selection of candidates for the administrative services must therefore be made strictly on merits, keeping in view various factors which go to make up a strong, efficient and people oriented administrator. This can be achieved only if the Chairman and members of the Public Service Commission are

eminent men possessing a high degree of calibre, competence and integrity, who would inspire confidence in the public mind about the objectivity and impartiality of the selections to be made by them."

In regard to the second requirement, it was said:

"We would therefore like to strongly impress upon every State Government to take care to see that its Public Service Commission is manned by competent, honest and independent persons of outstanding ability and high reputation who command the confidence of the people and who would not allow themselves to be deflected by any extraneous considerations from discharging their duty of making selections strictly on merit."

42. In *In R/O Dr Ram Ashray Yadav, Chairman, Bihar Public Service Commission,* (2000) 4 SCC 309 this Court considered the functional requirements of the Public Service Commission and what is expected of its members and held:

"Keeping in line with the high expectations of their office and need to observe absolute integrity and impartiality in the exercise of their powers and duties, the Chairman and members of the Public Service Commission are required to be selected on the basis of their merit, ability and suitability and they in turn are expected to be models themselves in their functioning. The character and conduct of the Chairman and members of the Commission, like Caesar's wife, must therefore be above board. They occupy a unique place and position and utmost objectivity in the performance of their duties and integrity and detachment are essential requirements expected from the Chairman and members of the Public Service Commissions."

43. With specific reference to the Chairperson of the Public

Service Commission who is in the position of a "constitutional trustee", this Court said:

"The Chairman of the Public Service Commission is in the position of a constitutional trustee and the morals of a constitutional trustee have to be tested in a much stricter sense than the morals of a common man in the marketplace. Most sensitive standard of behaviour is expected from such a constitutional trustee. His behaviour has to be exemplary, his actions transparent, his functioning has to be objective and in performance of all his duties he has to be fair, detached and impartial."

44. *Inderpreet Singh Kahlon v. State of Punjab,* (2006) 11 SCC 356 was decided in the backdrop of a Chairperson of the Punjab Public Service Commission, "an important constitutional authority", being put behind bars, *inter alia*, for being caught red-handed accepting a bribe.

45. This Court asserted the necessity of transparency in the appointment to such constitutional positions. It was said:

"This unfortunate episode teaches us an important lesson that before appointing the constitutional authorities, there should be a thorough and meticulous inquiry and scrutiny regarding their antecedents. Integrity and merit have to be properly considered and evaluated in the appointments to such high positions. It is an urgent need of the hour that in such appointments absolute transparency is required to be maintained and demonstrated. The impact of the deeds and misdeeds of the constitutional authorities (who are highly placed), affect a very large number of people for a very long time, therefore, it is absolutely imperative that only people of high integrity, merit, rectitude and honesty are appointed to these constitutional positions."

46. Subsequently, in *State of Bihar v. Upendra Narayan Singh* (2009) 5 SCC 65 this Court expressed its anguish with

the appointments generally made to the Public Service Commissions. It was observed:

> "The Public Service Commissions which have been given the status of constitutional authorities and which are supposed to be totally independent and impartial while discharging their function in terms of Article 320 have become victims of spoils system.
>
> "In the beginning, people with the distinction in different fields of administration and social life were appointed as Chairman and members of the Public Service Commissions but with the passage of time appointment to these high offices became personal prerogatives of the political head of the Government and men with questionable background have been appointed to these coveted positions. Such appointees have, instead of making selections for appointment to higher echelons of services on merit, indulged in exhibition of faithfulness to their mentors totally unmindful of their constitutional responsibility."

47. While it is difficult to summarize the indicators laid down by this Court, it is possible to say that the two most important requirements are that personally the Chairperson of the Public Service Commission should be beyond reproach and his or her appointment should inspire confidence among the people in the institution. The first 'quality' can be ascertained through a meaningful deliberative process, while the second 'quality' can be determined by taking into account the constitutional, functional and institutional requirements necessary for the appointment.

Selection and appointment of Mr. Dhanda:

48. Given the views expressed by this Court from time to time, learned counsel for the writ petitioner submitted that Mr. Dhanda ought not to have been appointed as the Chairperson

of the Public Service Commission. Three reasons were given in this regard and all of them have been refuted by learned counsel supporting the cause of Mr. Dhanda. They are: (1) There is a question mark about the character and conduct of Mr. Dhanda. (2) Mr. Dhanda lacks the qualifications and stature to hold a constitutional position of the Chairperson of a Public Service Commission. (3) The record shows that no meaningful and effective thought was given before appointing Mr. Dhanda as the Chairperson of the Public Service Commission.

49. As regards the first reason, certain allegations were made against Mr. Dhanda in the writ petition filed in the High Court. However, in its order dated 13th July 2011 a Division Bench of the High Court held that: "As regards irregularities and illegalities pointed out in the petition, the same do not stand substantiated." This conclusion is strongly relied on by learned counsel supporting Mr. Dhanda.

50. However, the judgment under appeal records that the writ petitioner had alleged that Mr. Dhanda had used his political influence to effect the transfer of an officer and that the transfer was set aside by the Central Administrative Tribunal as being *mala fide*. In this context, during the hearing of this appeal, we were handed over a copy of the decision rendered by the Central Administrative Tribunal (Chandigarh Bench) in Original Application No. 495/PB/2007 decided on 15th November 2007. We were informed that this decision was placed before the High Court and that this decision has attained finality, not having been challenged by anybody.

52. A reading of the decision, particularly paragraph 12 thereof, does show that the applicant before the Central Administrative Tribunal was subjected to a transfer contrary to the policy decision relating to mid-term transfers. The relevant portion of paragraph 12 of the decision reads as follows:

> "Even though the Government decided not to allow use of the Rest house as a permanent residence of the Chief

Parliamentary Secretary, yet the applicant, being a junior officer became the victim of the annoyance of Respondent No.3 [Mr. Dhanda] and with his political influence, the Forest Minister initiated the proposal for his transfer from Ropar, which was approved by the Chief Minister….. ….But a transfer made in this manner when the work and conduct of the officer is not only being appreciated by the Secretary, but also by the Finance Minister is unwarranted and also demoralizing. These are the situations when the courts have to interfere to prevent injustice to employees who are doing their duty according to rules."

53. While it may be that Mr. Dhanda was given a clean chit by the Division Bench when the case was first before it, the fact is that information subsequently came to the notice of the High Court which indicated that Mr. Dhanda was not above using his political influence to get his way. That Mr. Dhanda came in for an adverse comment in a judicial proceeding was certainly known to him, since he was a party to the case before the Central Administrative Tribunal. But he did not disclose this fact to the Chief Minister. In the deliberative process (or whatever little there was of it) the Chief Minister did not even bother to check whether or not Mr. Dhanda was an appropriate person to be appointed as the Chairperson of the Punjab Public Service Commission in the light of the adverse comment. The "thorough and meticulous inquiry and scrutiny" requirement mentioned in *Inderpreet Singh Kahlon* was not at all carried out.

54. As regards the second reason, the qualifications of Mr. Dhanda are as mentioned in his bio-data contained in the official file and reproduced by the High Court in the judgment under appeal. The bio-data reads as follows:

" - Harish Rai Dhanda son of Shri Kulbhushan Rai.

- Resident: The Retreat, Ferozepur Road, Ludhiana.

- Date of Birth: 15th May, 1960.

- Attained Bachelor in Arts from SCD Government College, Ludhiana, Panjab University, 1979.

- Attained Bachelor in Laws from Law College, Panjab University (1982).

- Registered with Bar Council of Punjab and Haryana as Advocate in 1982.

- Practiced Law at District Courts, Ludhiana from 1982 to 2007.

- Elected as President of District Bar Association, Ludhiana for seven terms.

55. The High Court noted that the official file shows that Mr. Dhanda resigned from the membership of the Punjab Legislative Assembly on 6th July 2011. The resignation was accepted the same day.

56. Mr. Dhanda had filed an affidavit in the High Court in which he disclosed that he was or had been the Vice President of the Shiromani Akali Dal and the President of its Legal Cell and its spokesperson.

57. In fairness to Mr. Dhanda it must be noted that his affidavit clearly mentions that he did not apply for or otherwise seek the post of Chairperson of the Punjab Public Service Commission. He was invited by the Chief Minister to submit his bio-data and to accept the post. The question is that with these qualifications, could it be said that Mr. Dhanda was eminently suited to holding the post of the Chairperson of the Public Service Commission? The answer to this must be in the negative if one is to agree with the expectations of this Court declared in various decisions. This is not to say that Mr. Dhanda lacks integrity or competence, but that he clearly has no administrative experience for holding a crucial constitutional

position. Merely because Mr. Dhanda is an advocate having had electoral successes does not make him eminently suitable for holding a constitutional position of considerable importance and significance. It is more than apparent that Mr. Dhanda's political affiliation weighed over everything else in his appointment as the Chairperson of the Punjab Public Service Commission.

58. But, as pointed out in *Mahesh Chandra Gupta* the suitability of a person to hold a post is a matter of opinion and this is also a peg on which learned counsel supporting Mr. Dhanda rest their case. The "suitability test" is said to be beyond the scope of judicial review.

59. The third reason is supported by the writ petitioner through the finding given by the High Court that the official file relating to the appointment of Mr. Dhanda as the Chairperson of the Punjab Public Service Commission contains only his bio-data, a certificate to the effect that he resigned from the membership of the Punjab Legislative Assembly on 6th July 2011 and his resignation was accepted the same day and the advice of the Chief Minister to the Governor apparently to appoint Mr. Dhanda as the Chairperson of the Punjab Public Service Commission. The advice was immediately acted upon and Mr. Dhanda was appointed as the Chairperson of the Punjab Public Service Commission by a notification published on 7th July 2011. In other words, the entire exercise relating to the appointment of the Chairperson of the Public Service Commission was completed in a day.

60. Learned counsel supporting the appointment of Mr. Dhanda submitted that no procedure is prescribed for the selection of the Chairperson of the Public Service Commission. Therefore, no fault can be found in the procedure adopted by the State Government. It was submitted, relying on *Mohinder Singh Gill v. Chief Election Commissioner,* (1978) 1 SCC 405 that there is an implied power to adopt any appropriate procedure for making the selection and the State

Government and the Governor cannot be hamstrung in this regard.

61. It is true that no parameters or guidelines have been laid down in Article 316 of the Constitution for selecting the Chairperson of the Public Service Commission and no law has been enacted on the subject with reference to Entry 41 of List II of the 7th Schedule of the Constitution. It is equally true that the State Government and the Governor have a wide discretion in the procedure to be followed. But, it is also true that ***Mohinder Singh Gill*** refers to Lord Camden as having said that wide discretion is fraught with tyrannical potential even in high personages. Therefore, the jurisprudence of prudence demands a fairly high degree of circumspection in the selection and appointment to a constitutional position having important and significant ramifications.

62. Two factors that need to be jointly taken into account for the exercise of the power of judicial review are: the deliberative process and consideration of the institutional requirements.

63. As far as the deliberative process is concerned (or lack of effective consultation, as described in *Mahesh Chandra Gupta*) it is quite apparent that the entire process of selection and appointment of Mr. Dhanda took place in about a day. There is nothing to show the need for a tearing hurry, though there was some urgency, in filling up the post following the demise of the then Chairperson of the Punjab Public Service Commission in the first week of May 2011. But, it is important to ask, since the post was lying vacant for a couple of months, was the urgency such that the appointment was required to be made without considering anybody other than Mr. Dhanda. There is nothing to show that any consideration whatsoever was given to appointing a person with adequate administrative experience who could achieve the constitutional purpose for which the Public Service Commission was created. There is nothing to show that any background check was carried out to

ascertain whether Mr. Dhanda had come in for any adverse notice, either in a judicial proceeding or any police inquiry. It must be remembered that the appointment of Mr. Dhanda was to a constitutional post and the basis of deliberation before making the selection and appointment were imperative. In this case, clearly, there was no deliberative process, and if any semblance of it did exist, it was irredeemably flawed. The in-built constitutional checks had, unfortunately, broken down.

64. In *Centre for PIL* this Court struck down the appointment of the Central Vigilance Commissioner while reaffirming the distinction between merit review pertaining to the eligibility or suitability of a selected candidate and judicial review pertaining to the recommendation making process. In that case, the selection of the Central Vigilance Commissioner was made under Section 4(1) of the Central Vigilance Commission Act, 2003 (for short the Act) which reads as follows:

> "4. **Appointment of Central Vigilance Commissioner and Vigilance Commissioners**.—(1) The Central Vigilance Commissioner and the Vigilance Commissioners shall be appointed by the President by warrant under his hand and seal:
>
> Provided that every appointment under this sub-section shall be made after obtaining the recommendation of a Committee consisting of—
>
> (*a*) the Prime Minister — Chairperson;
>
> (*b*) the Minister of Home Affairs — Member;
>
> *(c*) the Leader of the Opposition in the House of the People — Member.
>
> *Explanation*.—For the purposes of this sub-section, 'the Leader of the Opposition in the House of the People' shall, when no such Leader has been so recognised,

> include the Leader of the single largest group in opposition of the Government in the House of the People."

65. As can be seen, only the establishment of a High Powered Committee (HPC) for making a recommendation is provided for - the procedure to be followed by the HPC is not detailed in the statute. This is not unusual since a statute cannot particularize every little procedure; otherwise it would become unmanageable and maybe unworkable. Moreover, some situations have to be dealt with in a common sense and pragmatic manner.

66. Acknowledging this, this Court looked at the appointment of the Central Vigilance Commissioner not as a merit review of the integrity of the selected person, but as a judicial review of the recommendation making process relating to the integrity of the institution. It was made clear that while the personal integrity of the candidate cannot be discounted, institutional integrity is the primary consideration to be kept in mind while recommending a candidate. It was observed that while this Court cannot sit in appeal over the opinion of the HPC, it can certainly see whether relevant material and vital aspects having nexus with the objects of the Act are taken into account when a recommendation is made. This Court emphasized the overarching need to act for the good of the institution and in the public interest. Reference in this context was made to *N. Kannadasan*.

67. Keeping in mind the law laid down and the facts as they appear from the record, it does appear that the constitutional, functional and institutional requirements of the Punjab Public Service Commission were not kept in mind when Mr. Dhanda was recommended for appointment as its Chairperson.

A suitable appointee:

68. A submission was made by learned counsel supporting

the appointment of Mr. Dhanda that ultimately it is for the State Government to decide who would be the most suitable person to be appointed as the Chairperson of the Public Service Commission.

69. In this regard, reliance was placed on three decisions. In the first such decision, that is, *E.P. Royappa v. State of Tamil Nadu,* (1974) 4 SCC 3 the post of the Chief Secretary of the State was under consideration. This Court observed that the post is a sensitive one. The post is one of confidence and the Chief Secretary is a lynchpin in the administration of the State. Therefore, the Chief Secretary and the Chief Minister of the State must have complete rapport and understanding between them. If the Chief Secretary forfeits the confidence of the Chief Minister, then he may be shifted to some other post in the larger interests of the administration, provided that no legal or constitutional right of the Chief Secretary is violated.

70. The second decision relied upon was *State of W.B. v. Manas Kumar Chakraborty,* (2003) 2 SCC 604. That case concerned itself with the post of the Director General and Inspector General of Police (DG&IP) in a State. This Court observed that the said post was of a very sensitive nature. It could only be filled up by a person in whom the State Government had confidence. Consequently, it was held that such a post need not be filled up only by seniority, but merit, credibility and confidence that the person can command with the State Government "must play a predominant role in selection of an incumbent to such a post."

71. Finally, in *Hari Bansh Lal*, a case concerning an appointment to a statutory post of Chairperson of a State Electricity Board, reference was made to *State of Mysore v. Syed Mahmood,* AIR 1968 SC 1113, *Statesman (P) Ltd. v. H.R. Deb,* AIR 1968 SC 1495 and *State Bank of India v. Mohd. Mynuddin,* (1987) 4 SCC 486 and it was held:

"It is clear from the above decisions, suitability or otherwise

of a candidate for appointment to a post is the function of the appointing authority and not of the court unless the appointment is contrary to the statutory provisions/rules."

72. These decisions are clearly distinguishable. First of all, none of the cited decisions dealt with the appointment to a constitutional position such as the one that we are concerned with. A constitutional position such as that of the Chairperson of a Public Service Commission cannot be equated with a purely administrative position – it would be rather facetious to do so. While the Chief Secretary and the Director General of Police are at the top of the ladder, yet they are essentially administrative functionaries. Their duties and responsibilities, however onerous, cannot be judged against the duties and responsibilities of an important constitutional authority or a constitutional trustee, whose very appointment is not only expected to inspire confidence in the aspirational Indian but also project the credibility of the institution to which he or she belongs. I am, therefore, unable to accept the view that the suitability of an appointee to the post of Chairperson of a Public Service Commission should be evaluated on the same yardstick as the appointment of a senior administrative functionary.

73. Secondly, it may be necessary for a State Government or the Chief Minister of a State to appoint a "suitable" person as a Chief Secretary or the Director General of Police or perhaps to a statutory position, the connotation not being derogatory or disparaging, but because both the State Government or the Chief Minister and the appointee share a similar vision of the administrative goals and requirements of the State. The underlying premise also is that the State Government or the Chief Minister has confidence that the appointee will deliver the goods, as it were, and both are administratively quite compatible with each other. If there is a loss of confidence or the compatibility comes to an end, the appointee may simply be shifted out to some other assignment,

provided no legal or constitutional right of the appointee is violated.

74. The question of the Chief Minister or the State Government having "confidence" (in the sense in which the word is used with reference to the Chief Secretary or the Director General of Police or any important statutory post) in the Chairperson of a State Public Service Commission simply does not arise, nor does the issue of compatibility. The Chairperson of a Public Service Commission does not function at the pleasure of the Chief Minister or the State Government. He or she has a fixed tenure of six years or till the age of sixty two years, whichever is earlier. Security of tenure is provided through a mechanism in our Constitution. The Chairperson of a State Public Service Commission, even though appointed by the Governor, may be removed only by the President on the ground of misbehaviour after an inquiry by this Court, or on other specified grounds of insolvency, or being engaged in any other paid employment or being unfit to continue in office by reason of infirmity of mind or body. There is no question of the Chairperson of a Public Service Commission being shifted out if his views are not in sync with the views of the Chief Minister or the State Government.

75. The independence of the post of the Chairperson or the member of the Punjab Public Service Commission cannot be forgotten or overlooked. That independence is attached to the post is apparent from a reading of the Punjab State Public Service Commission (Conditions of Service) Regulations, 1958 framed by the Governor of Punjab in exercise of power conferred by Article 318 of the Constitution.

76. Regulation 2(c) of the Punjab State Public Service Commission (Conditions of Service) Regulations, 1958 defines "Member" as:

> "Member" means a Member for the time being of the Commission and includes the Chairman thereof";

77. Regulation 4 of these Regulations provides that "Every Member shall on appointment be required to take the oaths in the form laid down in Appendix 'A' to these regulations."

78. The oaths that a member (including the Chairperson) is required to take in the form laid down in Appendix 'A' are oaths of allegiance, of office and of secrecy. A Note given in Appendix 'A' states: "These oaths will be administered by the Governor in person in the presence of the Chief Secretary." The oaths read as follows:

> "*Form of Oath of Allegiance*
>
> I _____, solemnly affirm that I will be faithful and bear true allegiance to India and to the Constitution of India as by law established and that I will loyally carry out the duties of my office."
>
> "Form of Oath of Office
>
> I, _____, appointed a Member of the Punjab Public Service Commission do solemnly declare, that I will faithfully perform the duties of my office to the best of my ability, knowledge and judgment."
>
> "Form of Oath of Secrecy
>
> I, _____, solemnly affirm that I will not directly or indirectly communicate or reveal to any person or persons any matter which shall be brought under my consideration or shall become known to me as a Member of the Punjab Public Service Commission, except as may be required for due discharge of my duties as such Member or as may be specially permitted by the Governor."

79. There is, therefore, a great deal of solemnity attached to the post of the Chairperson of the Public Service Commission. The Chairperson takes the oath of allegiance to

India and to the Constitution of India – not an oath of allegiance to the Chief Minister. An appointment to that position cannot be taken lightly or on considerations other than the public interest. Consequently, it is not possible to accept the contention that the Chief Minister or the State Government is entitled to act only on the perceived suitability of the appointee, over everything else, while advising the Governor to appoint the Chairperson of the Public Service Commission. If such a view is accepted, it will destroy the very fabric of the Public Service Commission.

Finding an appropriate Chairperson:

80. Taking all this into consideration, how can an appropriate person be searched out for appointment to the position of a Chairperson of a Public Service Commission? This question arises in the context of the guidelines framed by the High Court and which have been objected to by the State of Punjab and the State of Haryana. This Court found itself helpless in resolving the dilemma in *Mehar Singh Saini*. This Court pointed out the importance of the Public Service Commission vis-à-vis good governance and the "common man". In this regard, it was observed that:

"The adverse impact of lack of probity in discharge of functions of the [Public Service] Commission can result in defects not only in the process of selection but also in the appointments to the public offices which, in turn, will affect effectiveness of administration of the State."

It was then noted that:

"The conduct of the Chairman and members of the Commission, in discharge of their duties, has to be above board and beyond censure. The credibility of the institution of the Public Service Commission is founded upon faith of the common man on its proper functioning."

81. In this background and in this perspective, this Court

drew a distinction between the exercise of legislative power by Parliament and the executive power of the Government. It was held that laying down the qualifications and experience required for holding the office of Chairperson or member of the Public Service Commission is a legislative function. This is what this Court said:

"Desirability, if any, of providing specific qualification or experience for appointment as Chairman/members of the Commission is a function of Parliament."

82. However, the necessary guidelines and parameters for holding such an office are within the executive power of the State. It was held by this Court:

"The guidelines or parameters, if any, including that of stature, if required to be specified are for the appropriate Government to frame. This requires expertise in the field, data study and adoption of the best methodology by the Government concerned to make appointments to the Commission on merit, ability and integrity."

83. On the "legislative front", this Court found itself quite helpless. This Court obviously could not read those qualifications into Article 316 of the Constitution which were not there, nor could it direct Parliament to enact a law. All that could be done (and which it did) was to draw the attention of Parliament to the prevailing situation in the light of "the number of cases which have been referred to this Court by the President of India in terms of Article 317(1) of the Constitution in recent years." It was also noted that "A large number of inquiries are pending before this Court which itself reflects that all is not well with the functioning of the Commissions."

84. Apart from this Court's inability to read qualifications into Article 316 of the Constitution, it was submitted by learned counsel supporting the cause of Mr. Dhanda that this Court cannot direct that legislation be enacted on the subject.

Reference was made to *Supreme Court Employees' Welfare Assn. v. Union of India,* (1989) 4 SCC 187 wherein it was held:

> "There can be no doubt that no court can direct a legislature to enact a particular law. Similarly, when an executive authority exercises a legislative power by way of subordinate legislation pursuant to the delegated authority of a legislature, such executive authority cannot be asked to enact a law which he has been empowered to do under the delegated legislative authority."

A similar view was expressed in *Asif Hameed v. State of J & K,* 1989 Supp (2) SCC 364. It was held in that decision that:

> "The Constitution has laid down elaborate procedure for the legislature to act thereunder. The legislature is supreme in its own sphere under the Constitution. It is solely for the legislature to consider as to when and in respect of what subject-matter, the laws are to be enacted. No directions in this regard can be issued to the legislature by the courts."

85. In *Suresh Seth v. Commissioner, Indore Municipal Corpn.,* (2005) 13 SCC 287 this Court referred to *Supreme Court Employees' Welfare Assn.* and *State of J&K v. A.R. Zakki,* 1992 Supp (1) SCC 548 and held:

> "….. this Court cannot issue any direction to the legislature to make any particular kind of enactment. Under our constitutional scheme Parliament and Legislative Assemblies exercise sovereign power to enact laws and no outside power or authority can issue a direction to enact a particular piece of legislation."

86. There is, therefore, no doubt that this Court can neither legislate on the subject nor issue any direction to Parliament or the State Legislature to enact a law on the subject.

87. On the "executive front", this Court expressed its helplessness in framing guidelines or parameters due to its lack of "expertise in the field, data study and adoption of the best methodology". Keeping this in mind, the High Court was in error in framing the guidelines that it did in the absence of any expertise in the field, data study or knowledge of the best methodology for selecting the Chairperson of the Punjab Public Service Commission.

Options before this Court:

88. But, is this Court really helpless, broadly, in the matter of laying down appropriate guidelines or parameters for the appointment of a Chairperson or members of the Public Service Commission? If *Mehar Singh Saini* is understood in its correct perspective, the answer to this question would be in the negative.

89. First of all, this Court cannot overlook the administrative imperative. There was and still is a need for the Public Service Commission to deliver the goods, as it were. In this context, the Second Administrative Reform Commission in its 15th Report looked at the past, present and future of the Public Service Commission and observed:

> "2.5.3. In the early years of Independence, State Public Service Commissions throughout the country functioned well primarily on account of the fact that:
>
> (a) There was objectivity in selection of competent and experienced people as Chairman and Members of the Commission. The government treated the Public Service Commission as a sacrosanct institution and the Chairman and Members were either very senior government servants (drawn usually from the ICS) or academicians of high standing in their field.
>
> (b) The Commission enjoyed excellent reputation for objectivity, transparency and fairplay.

"2.5.4 But in recent years, this Constitutional body has suffered extensive loss of reputation in many States, mainly on account of (a) charges of corruption, favouritism and nepotism in matters of recruitment and (b) use of archaic processes and procedures in its functioning which leads to inordinate delays. For example, the civil services examinations conducted by a State Public Service Commission take a minimum time period of one and half year to complete. In some cases, it may take even longer.

"2.5.6.6 The Commission is of the view that the intention behind creation of an autonomous Public Service Commission as a Constitutional authority was to create a body of achievers and ex-administrators who could select meritorious candidates for recruitment and promotion to various civil service positions under the State Government with utmost probity and transparency. There is need to take steps to ensure that only persons of high standing, intellectual ability and reputation are selected as Chairman and Members of the Public Service Commission."

90. In this context, the views of the Law Commission of India as contained in its 14th Report, which are at variance with the views of the Second Administrative Reform Commission contained in its 15th Report are worth highlighting, one of the reasons being that the luminaries who assisted the Law Commission reads like a veritable Who's Who from the legal firmament. This is what was said:

"Having regard to the important part played by the Public Service Commission in the selection of the subordinate judiciary, we took care to examine as far as possible the Chairman and some of the members of the Public Service Commissions in the various States. We are constrained to state that the personnel of these Public Service Commissions in some of the States was not such as could inspire confidence, from the points of view of either efficiency or of impartiality. There appears to be little doubt

that in some of the States appointments to these Commissions are made not on considerations of merit but on grounds of party and political affiliations. The evidence given by members of the Public Service Commissions in some of the States does create the feeling that they do not deserve to be in the responsible posts they occupy."

91. Secondly, the constitutional and more important imperative is that of good governance for the benefit of the aspirational Indian. For this, an appropriate person should be selected to fill up the position of a constitutional trustee.

92. In the light of the various decisions of this Court adverted to above, the administrative and constitutional imperative can be met only if the Government frames guidelines or parameters for the appointment of the Chairperson and members of the Punjab Public Service Commission. That it has failed to do so does not preclude this Court or any superior Court from giving a direction to the State Government to conduct the necessary exercise within a specified period. Only because it is left to the State Legislature to consider the desirability or otherwise of specifying the qualifications or experience for the appointment of a person to the position of Chairperson or member of the Punjab Public Service Commission, does not imply that this Court cannot direct the Executive to frame guidelines and set the parameters. This Court can certainly issue appropriate directions in this regard, and in the light of the experience gained over the last several decades coupled with the views expressed by the Law Commission, the Second Administrative Reform Commission and the views expressed by this Court from time to time, it is imperative for good governance and better administration to issue directions to the Executive to frame appropriate guidelines and parameters based on the indicators mentioned by this Court. These guidelines can and should be binding on the State of Punjab till the State Legislature exercises its power.

Additional questions framed by the Full Bench:

93. Learned counsel supporting the appointment of Mr. Dhanda submitted that the Full Bench could not expand the scope of the reference made to it by the Division Bench, nor could it frame additional questions.

94. Generally speaking, they are right in their contention, but it also depends on the reference made.

95. The law on the subject has crystallized through a long line of decisions and it need not be reiterated again and again. The decisions include *Kesho Nath Khurana v. Union of India,* 1981 Supp SCC 38 (The Division Bench ought to have sent the appeal back to the Single Judge with the answer rendered by them to the question referred by the Single Judge and left it to the Single Judge to dispose of the second appeal according to law.). *Kerala State Science & Technology Museum v. Rambal Co.,* (2006) 6 SCC 258 (It is fairly well settled that when reference is made on a specific issue either by a learned Single Judge or Division Bench to a larger Bench i.e. Division Bench or Full Bench or Constitution Bench, as the case may be, the larger Bench cannot adjudicate upon an issue which is not the question referred to.). ***T.A.*** *Hameed v. M. Viswanathan, (2008) 3 SCC 243* (Since, only reference was made to the Full Bench, the Full Bench should have answered the question referred to it and remitted the matter to the Division Bench for deciding the revision petition on merits.). And more recently, *Saquib Abdul Hameed Nachan v. State of Maharashtra,* (2010) 9 SCC 93 (Normally, after answering the reference by the larger Bench, it is for the Reference Court to decide the issue on merits on the basis of the answers given by the larger Bench.).

96. There is no bar shown whereby a Bench is precluded from referring the entire case for decision by a larger Bench - it depends entirely on the reference made. In any event, that

issue does not arise in this appeal and so nothing more need be said on the subject.

97. What was the reference made by the Division Bench to the Full Bench and did that Bench frame additional questions? The answer to this is to be found in the judgment of the High Court. The reference has not been artistically drafted, but it reads as follows:

> "6. Even though, Article 316 of the Constitution does not prescribe any particular procedure, having regard to the purpose and nature of appointment, it cannot be assumed that power of appointment need not be regulated by any procedure. It is undisputed that person to be appointed must have competence and integrity. Reference may be made to the judgments of the Hon'ble Supreme Court in *R/o Dr. Ram Ashray Yadav, Chairman, Bihar Public Service Commission*, (2000) 4 SCC 309, *Ram Kumar Kashyap and Anr. v. Union of India and Anr*., AIR 2010 SC 1151 and *In re Mehar Singh Saini, Chairman, HPSC and Ors.,* (2010) 13 SCC 586.
>
> 7. If it is so, question is how such persons are to be identified and selected and whether in the present case, procedure adopted is valid and if not, effect thereof. We are of the view that these questions need to be considered by a Bench of three Hon'ble Judges. Accordingly, we refer the matter to a Bench of three Hon'ble Judges."

98. On the basis of the submissions made, the Full Bench reformulated the questions referred to it in the following words:

> "1. Whether the present petition is not maintainable as the questions raised are the concluded questions by the decisions of the Supreme Court?
>
> 2. Whether the present petition is public interest litigation in a service matter, and hence not maintainable on the said ground also?

3. Whether this Court can issue directions in the nature of guidelines for a transparent, fair and objective procedure to ensure that the persons of impeccable personal integrity, caliber and qualifications alone are appointed as the members / Chairman of State Public Service Commission?

4. Whether in exercise of power of judicial review, it could be stated that the decision making process leading to the appointment of Respondent No. 4 [Mr. Harish Rai Dhanda] as Chairman of Commission was arbitrary, capricious or violative of Article 14?"

99. The reformulation was explained by the Full Bench by stating that the first two questions were raised on behalf of the State of Punjab regarding the maintainability of the reference itself. In my opinion, the first two questions actually touch upon the maintainability of the writ petition itself. These issues should have been decided by the Division Bench and had it answered the questions in the negative, there would have been no need to make any reference to the Full Bench.

100. Much was sought to be made by learned counsel for the writ petitioner that the "matter" (that is the entire matter) was referred to the Full Bench. It is difficult to agree that the entire "matter" was referred to the Full Bench. Firstly, the word "matter" must take colour from the context in which it was used, which is with reference only to the two questions placed before the Full Bench. Secondly, even the Full Bench did not think that the entire matter was referred to it and that is why after answering the reference the "matter" was remitted to the Division Bench for disposal in accordance with law.

101. To this extent, learned counsel supporting the cause of Mr. Dhanda are right that the Full Bench overstepped its mandate. But where does this discussion lead us to? The two questions were fully argued in this Court for the purposes of obtaining a decision on them, and no suggestion was made that the decision of the Full Bench on these questions be set

aside because of a jurisdictional error and the Division Bench be asked to decide them quite independently. Therefore, this issue is only of academic interest so far as this appeal is concerned notwithstanding the law that a larger Bench should decide only the questions referred to it. Of course, if a subsidiary question logically and unavoidably arises, the larger Bench cannot be dogmatic and refuse to answer it. A common sense approach must be taken on such occasions.

102. So far as questions 3 and 4 formulated by the Full Bench are concerned, I am of the opinion that they merely articulate and focus on the issues that were not quite attractively phrased by the Division Bench. I am not in agreement that the Full Bench overstepped its jurisdiction in the reformulation of the issues before it.

103. It was then submitted that there was really no occasion for the Division Bench to make any reference to the Full Bench of the High Court on the question of framing guidelines or parameters for the appointment of the Chairperson of the Punjab Public Service Commission. This Court had already laid down the law in *Mehar Singh Saini* and the High Court was merely required to follow it. The argument puts the issue rather simplistically. The Division Bench was fully entitled to refer to the Full Bench the applicability of the decision of this Court to the facts of the case and for further follow up action, if necessary. This argument is mentioned only because it was raised and nothing really turns on it, except to the extent that it is another way of questioning the maintainability of the writ petition filed in the High Court.

Impleadment of the State of Haryana by the Full Bench:

104. The justification given by the Full Bench for *suo motu* impleading the State of Haryana and the Haryana Public Service Commission is because "issues common in respect of the States of Punjab and Haryana, were likely to arise." I think this is hardly a reason for impleadment. The case concerned the appointment of the Chairperson of the Punjab Public

Service Commission and it should have and could have been left at that without enlarging the scope of the controversy before it.

Production of the Chief Minister's advice:

105. Learned counsel for the State of Punjab submitted that the High Court could not have directed production of the advice tendered by the Chief Minister to the Governor. The basis of this argument is the order dated 1st August 2011 passed by the Full Bench. The relevant portion of the order reads as follows:

> "Mr. Jindal, Addl. Advocate General shall also produce the record relating to the appointment process of respondent No.4 [Mr. Dhanda]."

106. The grievance made by learned counsel in this regard is justified. It need only be pointed out that in *State of Punjab v. Sodhi Sukhdev Singh,* (1961) 2 SCR 371 this Court clearly held that:

> "It is hardly necessary to recall that advice given by the Cabinet to the Rajpramukh or the Governor is expressly saved by Article 163, sub-article (3) of the Constitution; and in the case of such advice no further question need to be considered."

It is not necessary to say anything more on this subject.

Conclusion:

107. The appointment of the Chairperson of the Punjab Public Service Commission is an appointment to a constitutional position and is not a "service matter". A PIL challenging such an appointment is, therefore, maintainable both for the issuance of a writ of *quo warranto* and for a writ of declaration, as the case may be.

108. In a case for the issuance of a writ of declaration, exercise of the power of judicial review is presently limited to examining the deliberative process for the appointment not

meeting the constitutional, functional and institutional requirements of the institution whose integrity and commitment needs to be maintained or the appointment for these reasons not being in public interest.

109. The circumstances of this case leave no room for doubt that the notification dated 7th July 2011 appointing Mr. Harish Rai Dhanda was deservedly quashed by the High Court since there was no deliberative process worth the name in making the appointment and also since the constitutional, functional and institutional requirements of the Punjab Public Service Commission were not met.

110. In the view that I have taken, there is a need for a word of caution to the High Courts. There is a likelihood of comparable challenges being made by trigger-happy litigants to appointments made to constitutional positions where no eligibility criterion or procedure has been laid down. The High Courts will do well to be extremely circumspect in even entertaining such petitions. It is necessary to keep in mind that sufficient elbow room must be given to the Executive to make constitutional appointments as long as the constitutional, functional and institutional requirements are met and the appointments are in conformity with the indicators given by this Court from time to time.

111. Given the experience in the making of such appointments, there is no doubt that until the State Legislature enacts an appropriate law, the State of Punjab must step in and take urgent steps to frame a memorandum of procedure and administrative guidelines for the selection and appointment of the Chairperson and members of the Punjab Public Service Commission, so that the possibility of arbitrary appointments is eliminated.

112. The Civil Appeals are disposed of as directed by Brother Patnaik.

B.B.B. Appeals disposed of.

VOLUNTARY HEALTH ASSOCIATION OF PUNJAB
v.
UNION OF INDIA & OTHERS
(Writ Petition (Civil) No. 349 of 2006)

MARCH 04, 2013

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

Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition on Sex-Selection) Act, 1994 – ss. 7 and 16A – Discrimination towards female child – Sex Selective Abortion – Misuse of pre-natal diagnostic techniques for elimination of female foetus – Lack of proper supervision and effective implementation of the Act by various States – Directions given for proper and effective implementation of the provisions of the Act as well as the various directions issued by the Supreme Court – All the State Governments to file status report within three months – Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition on Sex-Selection) Rules, 1996 – rr.3A and 9(8).

Per K.S. Radhakrishnan, J. :

Centre for Enquiry into Health and Allied Themes v. Union of India **(2001) 5 SCC 577: 2001 (3) SCR 534 and** *Centre for Enquiry into Health and Allied Themes v. Union of India* **(2003) 8 SCC 398: 2003 (3) Suppl. SCR 593 – referred to.**

Case Law Reference:

2001 (3) SCR 534	**referred to**	**Para 3**
2003 (3) Suppl. SCR 593	**referred to**	**Para 3**

Per Dipak Misra, J.:

Centre for Enquiry into Health and Allied Themes

(CEHAT) and others v. Union of India and others **(2001) 5 SCC 577: 2001 (3) SCR 534;** *State of H.P. v. Nikku Ram and others* **(1995) 6 SCC 219: 1995 (3) Suppl. SCR 177;** *M.C. Mehta v. State of Tamil Nadu and others* **AIR 1997 SC 699: 1996 (9) Suppl. SCR 726;** *Ajit Savant Majagvai v. State of Karnataka* **(1997) 7 SCC 110: 1997 (3) Suppl. SCR 444 and** *Madhu Kishwar v. State of Bihar* **AIR 1996 SC 1864 – referred to.**

Case Law Reference:

2001 (3) SCR 534	**referred to**	**Para 4**
1995 (3) Suppl. SCR 177	**referred to**	**Para 6, 18**
1996 (9) Suppl. SCR 726	**referred to**	**Para 7**
1997 (3) Suppl. SCR 444	**referred to**	**Para 14**
1996 (1) Suppl. SCR 442	**referred to**	**Para 15**

CIVIL ORIGINAL JURISDICTION : Writ Petition (C) No. 349 of 2006.

Under Article 32 of the Constitution of India

Colin Gonsalves, Jubli, Jyoti Mendiratta for the Petitioner.

H.P. Rawal, ASG, P.N. Misra, Dr. Manish Singhvi, Ajay Bansal, Manjit Singh, AAG, S.W.A. Quadri, M. Khairati, Sunita Sharma, Asha G. Nair, D.S. Mahra, Gunwant Dara, Seema Thukural, Seema Thapliyal, Abisth Kumar, Archana Singh, Amit Lubhaya, Irshad Ahmad, Devendra Singh, Kuldip Singh, Pardaman Singh, Gaurav Yadav, Rajiv Kumar, Tarjit Singh, Kamal Mohan Gupta, Gopal Singh, Manish Kumar, Chandan Kumar, Sanjay V. Kharde, Abhishek Kumar Pandey, Aman Ahluwalia, Supriya Jain, Sushma Suri, Vartika Sahay Walia (for Corporate Law Group), Khwairakpam Nobin Singh, Sapam Biswajit Meitei, Arjun Garg, Saurabh Misha, Aruna Mathur, Yusuf Khan, Avijit Bhattacharjee, Bikas Kargupta, Sarbani Kar,

D. Mahesh Babu, Mayur Shah, Suchitra Hrangkhawl, Amit K. Nain, Amjid Maqbool, Anil Shrivastav, Rituraj Biswas, Rachna Srivastav, Utkarsh Sharma, B. Balaji, R. Rakesh Sharma, P. Krishna Moorthy, K. Enatoli Sema, Amit Kumar Singh, Bhavanishankar V. Gadnis, B. Sunita Rao, Hemantika Wahi, Shubhada Despande, Nandani Gupta, V.G. Pragasam, S.J. Aristotle, Prabu Ramasubramanian, Jatinder Kumar Bhatia, Mukesh Verma, A. Subhashini, Mike P. Desai, Arun K. Sinha, Kamini Jaiswal, P.N. Gupta, Rajesh Srivastava, P.V. Dinesh, Shibhashish Misra, T. Harish Kumar. T.V. George, Balaji Srinivasan, Gaurav Kejriwal, Milind Kumar, P.V. Yogeswaran, B.S. Banthia, Arvind Kumar Sharma for the Respondents.

The Order of the Court were delivered by

O R D E R

Indian society's discrimination towards female child still exists due to various reasons which has its roots in the social behaviour and prejudices against the female child and, due to the evils of the dowry system, still prevailing in the society, in spite of its prohibition under the Dowry Prohibition Act. The decline in the female child ratio all over the country leads to an irresistible conclusion that the practice of eliminating female foetus by the use of pre-natal diagnostic techniques is widely prevalent in this country. Complaints are many, where at least few of the medical professionals do perform Sex Selective Abortion having full knowledge that the sole reason for abortion is because it is a female foetus. The provisions of the Medical Termination of Pregnancy Act, 1971 are also being consciously violated and misused.

The Parliament wanted to prevent the same and enacted the Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition on Sex-Selection) Act, 1994 (for short 'the Act') which has its roots in Article 15(2) of the Constitution of India. The Act is a welfare legislation. The Parliament was fully conscious of the fact that the increasing imbalance between

men and women leads to increased crime against women, trafficking, sexual assault, polygamy etc. Unfortunately, facts reveal that perpetrators of the crime also belong to the educated middle class and often they do not perceive the gravity of the crime.

This Court, as early as, in 2001 in *Centre for Enquiry into Health and Allied Themes v. Union of India* (2001) 5 SCC 577 had noticed the misuse of the Act and gave various directions for its proper implementation. Non-compliance of various directions was noticed by this Court again in *Centre for Enquiry into Health and Allied Themes v. Union of India* (2003) 8 SCC 398 and this Court gave various other directions.

Having noticed that those directions as well as the provisions of the Act are not being properly implemented by the various States and Union Territories, we passed an order on 8.1.2013 directing personal appearance of the Health Secretaries of the States of Punjab, Haryana, NCT Delhi, Rajasthan, Uttar Pradesh, Bihar and Maharashtra, to examine what steps they have taken for the proper and effective implementation of the provisions of the Act as well as the various directions issued by this Court.

We notice that, even though, the Union of India has constituted the Central Supervisory Board and most of the States and Union Territories have constituted State Supervisory Boards, Appropriate Authorities, Advisory Committees etc. under the Act, but their functioning are far from satisfactory.

2011 Census of India, published by the Office of the Registrar General and Census Commissioner of India, would show a decline in female child sex ratio in many States of India from 2001-2011. The Annual Report on Registration of Births and Deaths - 2009, published by the Chief Registrar of NCT of Delhi would also indicate a sharp decline in the female sex ratio in almost all the Districts. Above statistics is an indication that the provisions of the Act are not properly and effectively

being implemented. There has been no effective supervision or follow up action so as to achieve the object and purpose of the Act. Mushrooming of various Sonography Centres, Genetic Clinics, Genetic Counselling Centres, Genetic Laboratories, Ultrasonic Clinics, Imaging Centres in almost all parts of the country calls for more vigil and attention by the authorities under the Act. But, unfortunately, their functioning is not being properly monitored or supervised by the authorities under the Act or to find out whether they are misusing the pre-natal diagnostic techniques for determination of sex of foetus leading to foeticide.

The Union of India has filed an affidavit in September 2011 giving the details of the prosecutions launched under the Act and the Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition on Sex-Selection) Rules, 1996 (for short 'the Rules'), up to June 2011. We have gone through the chart as well as the data made available by various States, which depicts a sorry and an alarming state of affairs. Lack of proper supervision and effective implementation of the Act by various States, are clearly demonstrated by the details made available to this Court. However, State of Maharashtra has comparatively a better track record. Seldom, the ultrasound machines used for such sex determination in violation of the provisions of the Act are seized and, even if seized, they are being released to the violators of the law only to repeat the crime. Hardly few cases end in conviction. Cases booked under the Act are pending disposal for several years in many Courts in the country and nobody takes any interest in their disposal and hence, seldom, those cases end in conviction and sentences, a fact well known to the violators of law. Many of the ultra-sonography clinics seldom maintain any record as per rules and, in respect of the pregnant women, no records are kept for their treatment and the provisions of the Act and the Rules are being violated with impunity.

The Central Government vide GSR 80(E) dated 7.2.2002

issued a notification amending the Act and regulating usage of mobile machines capable of detecting the sex of the foetus, including portable ultrasonic machines, except in cases to provide birth services to patients when used within its registered premises as part of the Mobile Medical Unit offering a bouquet or other medical and health services. The Central Government also vide GSR 418(E) dated 4.6.2012 has notified an amendment by inserting a new Rule 3.3(3) with an object to regulate illegal registrations of medical practitioners in genetic clinics, and also amended Rule 5(1) by increasing the application fee for registration of every genetic clinic, genetic counselling centre, genetic laboratory, ultrasound clinic or imaging centre and amended Rule 13 by providing that an advance notice by any centre for intimation of every change in place, intimation of employees and address. Many of the clinics are totally unaware of those amendments and are carrying on the same practises. In such circumstances, the following directions are given:

1. The Central Supervisory Board and the State and Union Territories Supervisory Boards, constituted under Sections 7 and 16A of PN&PNDT Act, would meet at least once in six months, so as to supervise and oversee how effective is the implementation of the PN&PNDT Act.

2. The State Advisory Committees and District Advisory Committees should gather information relating to the breach of the provisions of the PN&PNDT Act and the Rules and take steps to seize records, seal machines and institute legal proceedings, if they notice violation of the provisions of the PN&PNDT Act.

3. The Committees mentioned above should report the details of the charges framed and the conviction of the persons who have committed the offence, to the State Medical Councils for proper action,

including suspension of the registration of the unit and cancellation of licence to practice.

4. The authorities should ensure also that all Genetic Counselling Centres, Genetic Laboratories and Genetic Clinics, Infertility Clinics, Scan Centres etc. using pre-conception and pre-natal diagnostic techniques and procedures should maintain all records and all forms, required to be maintained under the Act and the Rules and the duplicate copies of the same be sent to the concerned District Authorities, in accordance with Rule 9(8) of the Rules.

5. States and District Advisory Boards should ensure that all manufacturers and sellers of ultra-sonography machines do not sell any machine to any unregistered centre, as provided under Rule 3-A and disclose, on a quarterly basis, to the concerned State/Union Territory and Central Government, a list of persons to whom the machines have been sold, in accordance with Rule 3-A(2) of the Act.

6. There will be a direction to all Genetic Counselling Centres, Genetic Laboratories, Clinics etc. to maintain forms A, E, H and other Statutory forms provided under the Rules and if these forms are not properly maintained, appropriate action should be taken by the authorities concerned.

7. Steps should also be taken by the State Government and the authorities under the Act for mapping of all registered and unregistered ultra-sonography clinics, in three months time.

8. Steps should be taken by the State Governments and the Union Territories to educate the people of

the necessity of implementing the provisions of the Act by conducting workshops as well as awareness camps at the State and District levels.

9. Special Cell be constituted by the State Governments and the Union Territories to monitor the progress of various cases pending in the Courts under the Act and take steps for their early disposal.

10. The authorities concerned should take steps to seize the machines which have been used illegally and contrary to the provisions of the Act and the Rules thereunder and the seized machines can also be confiscated under the provisions of the Code of Criminal Procedure and be sold, in accordance with law.

11. The various Courts in this country should take steps to dispose of all pending cases under the Act, within a period of six months. Communicate this order to the Registrars of various High Courts, who will take appropriate follow up action with due intimation to the concerned Courts.

All the State Governments are directed to file a status report within a period of three months from today.

Ordered accordingly.

O R D E R

DIPAK MISRA, J. I respectfully concur with the delineation and the directions enumerated in seriatim by my respected learned Brother. However, regard being had to the signification of the issue, the magnitude of the problem in praesenti, and the colossal cataclysm that can visit this country in future unless apposite awareness is spread, I intend to add something pertaining to the direction No. (8).

2. To have a comprehensive view I think it seemly to reproduce the said direction: -

> "8. Steps should be taken by the State Governments and the Union Territories to educate the people of the necessity of implementing the provisions of the Act by conducting workshops as well as awareness camps at the State and District levels."

3. It is common knowledge that the State Governments and Union Territories some times hold workshops as well as awareness camps at the State and District levels which have the characteristic of a routine performance, sans sincerity, bereft of seriousness and shorn of meaning. It is embedded on data-orientation. It does not require Solomon's wisdom to realize that there has not yet been effective implementation of the provisions of the Act, for there has not only been total lethargy and laxity but also failure on the part of the authorities to give accent on social, cultural, psychological and legal awareness that a female foetus is not to be destroyed for many a reason apart from command of the law. Needless to emphasise, there has to be awareness of the legal provisions and the consequences that have been provided for violation of the Pre-Conception and Pre-Natal Diagnostic Techniques (Prohibition on Sex-Selection) Act, 1994 (for brevity "the Act") but, a significant one, the awareness in other spheres are absolutely necessitous for concretizing the purposes of the Act.

4. Be it noted, this is not for the first time that this Court is showing its concern. It has also been done before. In *Centre for Enquiry into Health and Allied Themes (CEHAT) and others v. Union of India and others*[1], the two-Judge Bench commenced the judgment stating that the practice of female infanticide still prevails despite the fact that the gentle touch of a daughter and her voice has a soothing effect on the parents.

1. (2001) 5 SCC 577.

The Court also commented on the immoral and unethical part of it as well as on the involvement of the qualified and unqualified doctors or compounders to abort the foetus of a girl child. It is apposite to state here that certain directions were given in the said decision.

5. Female foeticide has its roots in the social thinking which is fundamentally based on certain erroneous notions, ego-centric traditions, pervert perception of societal norms, and obsession with ideas which are totally individualistic sans the collective good. All involved in female foeticide deliberately forget to realize that when the foetus of a girl child is destroyed, a woman of future is crucified. To put it differently, the present generation invites the sufferings on its own and also sows the seeds of suffering for the future generation, as in the ultimate eventuate, the sex ratio gets affected and leads to manifold social problems. I may hasten to add that no awareness campaign can ever be complete unless there is real focus on the prowess of women and the need for women empowerment.

6. On many an occasion this Court has expressed its anguish over this problem in many a realm. Dealing with the unfortunate tradition of demand of dowry from the girl's parents at the time of marriage despite the same being a criminal offence, a two-Judge Bench in *State of H.P. v. Nikku Ram and others*[2] has expressed its agony thus: -

> "Dowry, dowry and dowry. This is the painful repetition which confronts, and at times haunts, many parents of a girl child in this holy land of ours where, in good old days the belief was : "???? ????????? ????????? ?????? ???? ?????:" ["Yatra naryastu pujyante ramante tatra dewatah"] (where woman is worshipped, there is abode of God). We have mentioned about dowry thrice, because this demand is made on three occasions: (i) before marriage; (ii) at the time of marriage; and (iii) after the

2. (1995) 6 SCC 219.

marriage. Greed being limitless, the demands become insatiable in many cases, followed by torture on the girl, leading to either suicide in some cases or murder in some."

The aforesaid passage clearly reflects the degree of anguish of this Court in regard to the treatment meted out to the women in this country.

7. It is not out of place to state here that the restricted and constricted thinking with regard to a girl child eventually leads to female foeticide. A foetus in the womb, because she is likely to be born as a girl child, is not allowed to see the mother earth. In *M.C. Mehta v. State of Tamil Nadu and others*[3], a three-Judge Bench, while dealing with the magnitude of the problem in engagement of the child labour in various hazardous factories or mines, etc., speaking through Hansaria, J., commenced the judgment thus: -

"I am the child.

All the word waits for my coming.

All the earth watches with interest to see what I shall become.

Civilization hangs in the balance.

For what I am, the world of tomorrow will be.

I am the child.

You hold in your hand my destiny.

You determine, largely, whether I shall succeed or fail,

Give me, I pray you, these things that make for happiness.

Train me, I beg you, that I may be a blessing to the world."

3. AIR 1997 SC 699.

8. The aforesaid lines from Mamie Gene Cole were treated as an appeal by this Court and the Bench reproduced the famous line from William Wordsworth "child is the father of the man". I have reproduced the same to highlight that this Court has laid special emphasis on the term "child" as a child feels that the entire world waits for his/her coming. A female child, as stated earlier, becomes a woman. Its life-spark cannot be extinguished in the womb, for such an act would certainly bring disaster to the society. On such an act the collective can neither laugh today nor tomorrow. There shall be tears and tears all the way because eventually the spirit of humanity is comatosed.

9. Vishwakavi Rabindranath Tagore, while speaking about a child, had said thus: -

"Every child comes with the message that God is not yet discouraged of man."

10. Long back, speaking about human baby, Charles Dickens had said thus : -

"Every baby born into the world is a finer one than the last."

11. A woman has to be regarded as an equal partner in the life of a man. It has to be borne in mind that she has also the equal role in the society, i.e., thinking, participating and leadership. The legislature has brought the present piece of legislation with an intention to provide for prohibition of sex selection before or after conception and for regulation of pre-natal diagnostic techniques for the purposes of detecting genetic abnormalities or metabolic disorders or chromosomal abnormalities or certain congenital malformations or sex-linked disorders and for the prevention of their misuse for sex determination leading to female foeticide. The purpose of the enactment can only be actualised and its object fruitfully realized when the authorities under the Act carry out their functions with devotion, dedication and commitment and further there is awakened awareness with regard to the role of women in a

society.

12. It would not be an exaggeration to say that a society that does not respect its women cannot be treated to be civilized. In the first part of the last century Swami Vivekanand had said: -

> "Just as a bird could not fly with one wing only, a nation would not march forward if the women are left behind."

13. When a female foeticide takes place, every woman who mothers the child must remember that she is killing her own child despite being a mother. That is what abortion would mean in social terms. Abortion of a female child in its conceptual eventuality leads to killing of a woman. Law prohibits it; scriptures forbid it; philosophy condemns it; ethics deprecate it, morality decries it and social science abhors it. Henrik Ibsen emphasized on the individualism of woman. John Milton treated her to be the best of all God's work. In this context, it will be appropriate to quote a few lines from Democracy in America by Alexis De Tocqueville: -

> "If I were asked ... to what the singular prosperity and growing strength of that people [Americans] ought mainly to be attributed, I should reply: to the superiority of their women."

14. At this stage, I may with profit reproduce two paragraphs from *Ajit Savant Majagvai v. State of Karnataka*[4]:-

> "3. Social thinkers, philosophers, dramatists, poets and writers have eulogised the female species of the human race and have always used beautiful epithets to describe her temperament and personality and have not deviated from that path even while speaking of her odd behaviour, at times. Even in sarcasm, they have not crossed the literary limit and have adhered to a particular standard of

4. (1997) 7 SCC 110.

> nobility of language. Even when a member of her own species, Madame De Stael, remarked "I am glad that I am not a man; for then I should have to marry a woman", there was wit in it. When Shakespeare wrote, "Age cannot wither her; nor custom stale, her infinite variety", there again was wit. Notwithstanding that these writers have cried hoarse for respect for "woman", notwithstanding that Schiller said "Honour women! They entwine and weave heavenly roses in our earthly life" and notwithstanding that the Mahabharata mentioned her as the source of salvation, crime against "woman" continues to rise and has, today undoubtedly, risen to alarming proportions.
>
> 4. It is unfortunate that in an age where people are described as civilised, crime against "female" is committed even when the child is in the womb as the "female" foetus is often destroyed to prevent the birth of a female child. If that child comes into existence, she starts her life as a daughter, then becomes a wife and in due course, a mother. She rocks the cradle to rear up her infant, bestows all her love on the child and as the child grows in age, she gives to the child all that she has in her own personality. She shapes the destiny and character of the child. To be cruel to such a creature is unthinkable. To torment a wife can only be described as the most hated and derisive act of a human being."
>
> [Emphasis supplied]

15. In *Madhu Kishwar v. State of Bihar*[5] this Court had stated that Indian women have suffered and are suffering discrimination in silence. Self-sacrifice and self-denial are their nobility and fortitude and yet they have been subjected to all inequities, indignities, inequality and discrimination.

16. The way women had suffered has been aptly reflected by an author who has spoken with quite a speck of sensibility:-

5. AIR 1996 SC 1864.

"Dowry is an intractable disease for women, a bed of arrows for annihilating self-respect, but without the boon of wishful death."

17. Long back, Charles Fourier had stated "The extension of women's rights is the basic principle of all social progress".

18. Recapitulating from the past, I may refer to certain sayings in the Smritis which put women in an elevated position. This Court in Nikku Ram's case (supra) had already reproduced the first line of the "Shloka". The second line of the same which is also significant is as follows: -

"???? ?????? ? ????????? ??????????????: ??????:"

[Yatra t?stu na p?jyante sarv?statraphal?h kriy?h]

A free translation of the aforesaid is reproduced below:-

"All the actions become unproductive in a place, where they are not treated with proper respect and dignity."

19 Another wise man of the past had his own way of putting it:

"??????????????????????????????????: |

?????????? ???????: ??????: ??????????????: ||"

[Bh?rtr bhratr pitrijn?ti ?wa?r?swa?uradevaraih| Bandhubhi?ca striyah p?jy?h bhusnachh?dan??naih||].

A free translation of the aforesaid is as follows:-

"The women are to be respected equally on par with husbands, brothers, fathers, relatives, in-laws and other kith and kin and while respecting, the women gifts like ornaments, garments, etc. should be given as token of honour."

20. Yet again, the sagacity got reflected in following lines: -

"????? ???? ??????: ????????????? |

?????? ?????????? ????????????????? ?????? ||"

[Atulam yatra tattejah ?arvadevasarirajam| Ekastham tadabh?nn?ri vy?ptalokatrayam tvis?||]

A free translation of the aforesaid is reproduced below:-

"The incomparable valour (effulgence) born from the physical frames of all the gods, spreading the three worlds by its radiance and combining together took the form of a woman."

21. From the past, I travel to the present and respectfully notice what Lord Denning had to say about the equality of women and their role in the society: -

"A woman feels as keenly, thinks as clearly, as a man. She in her sphere does work as useful as man does in his. She has as much right to her freedom – to develop her personality to the full as a man. When she marries, she does not become the husband's servant but his equal partner. If his work is more important in life of the community, her's is more important of the family. Neither can do without the other. Neither is above the other or under the other. They are equals."

22. I have referred to certain pronouncements of this Court, the sayings of the sagacious ones, thinkers, poets, philosophers and jurists about the child and women only to emphasise that they play a seminal role in the society. The innocence of a child and the creative intelligence of a woman can never ever be brushed aside or marginalized. Civilization of a country is known how it respects its women. It is the requisite of the present day that people are made aware that it is obligatory to treat the

women with respect and dignity so that humanism in its conceptual essentiality remains alive. Each member of the society is required to develop a scientific temper in the modern context because that is the social need of the present. A cosmetic awareness campaign would never subserve the purpose. The authorities of the Government, the Non-Governmental Organisations and other volunteers are required to remember that there has to be awareness camps which are really effective. The people involved with the same must take it up as a service, a crusade. They must understand and accept that it is an art as well as a science and not simple arithmetic. It cannot take the colour of a routine speech. The awareness camps should not be founded on the theory of Euclidian geometry. It must engulf the concept of social vigilance with an analytical mind and radiate into the marrows of the society. If awareness campaigns are not appositely conducted, the needed guidance for the people would be without meaning and things shall fall apart and everyone would try to take shelter in cynical escapism. It is difficult to precisely state how an awareness camp is to be conducted. It will depend upon what kind and strata of people are being addressed to. The persons involved in such awareness campaign are required to equip themselves with constitutional concepts, culture, philosophy, religion, scriptural commands and injunctions, the mandate of the law as engrafted under the Act and above all the development of modern science. It needs no special emphasis to state that in awareness camps while the deterrent facets of law are required to be accentuated upon, simultaneously the desirability of law to be followed with spiritual obeisance, regard being had to the purpose of the Act, has to be stressed upon. The seemly synchronization shall bring the required effect. That apart, documentary films can be shown to highlight the need; and instill the idea in the mind of the public at large, for when mind becomes strong, mountains do melt. The people involved in the awareness campaigns should have boldness and courage. There should not be any iota of confusion or perplexity in their thought or action. They should treat it as a

problem and think that a problem has to be understood in a proper manner to afford a solution. They should bear in mind that they are required to change the mindset of the people, the grammar of the society and unacceptable beliefs inherent in the populace. It should be clearly spelt out that female foeticide is the worst type of dehumanisation of the human race.

23. I have highlighted the aforesaid aspects so that when awareness campaigns are held, they are kept in view, for that is the object and purpose to have real awareness.

24. The matter be listed as directed.

B.B.B. Matter adjourned.

STATE OF MAHARASHTRA
v.
KAMAL AHMED MOHAMMED VAKIL ANSARI & ORS.
(Criminal Appeal No. 445 of 2013)

MARCH 14, 2013

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

Maharashtra Control of Organised Crime Act, 1999 (MCOCA) - ss.3(1)(i), 3(2), 3(3), 3(4), 3(5) & 18 - Bomb blasts in local trains of Mumbai Suburban Railways - Two set of cases - Special Case no.21 of 2006 and Special Case no.4 of 2009 - Accused in Special Case no.4 of 2009, different from accused in Special Case no.21 of 2006 - Special Case no.4 of 2009, not jointly tried with Special Case no.21 of 2006 - Confessional statements made by three accused in Special Case no.4 of 2009 before witnesses at serial nos. 64 to 66 holding the rank of Deputy Commissioners of Police - Accused-respondents in Special Case no.21 of 2006, to establish their own innocence, desired to produce the witnesses at serial nos. 64 to 66 in Special Case no. 4 of 2009, and prayed for summoning them as defence witnesses - Prayer declined by trial court - Order set aside by High Court - On appeal, held: In view of the expressed bar contained in s.60 of the Evidence Act, it is not open to the accused-respondents, to prove the confessional statements through the witnesses at serial nos. 64 to 66 - Said witnesses cannot vouchsafe the truth or falsity of the confessional statements - Only those who had made the confessional statements can vouchsafe for the same and may be produced as defence witnesses by the accused-respondents, for their statements would fall in the realm of relevance u/s.11 of the Evidence Act - S.18 of the MCOCA overrides the mandate contained in ss.25 and 26 of the Evidence Act, by rendering a confession as admissible, even if it is made to a police officer (not below

the rank of Deputy Commissioner of Police) - However, s.18 of the MCOCA makes such confessional statements admissible, only for "the trial of such person, or co-accused, abettor or conspirator" - It is not the contention of the accused-respondents that the three accused in Special Case no. 4 of 2009 who made confessional statements were the accused themselves along with the co-accused (abettor or conspirator) in Special Case no.21 of 2006 - Ingredients for admissibility of a confessional statement u/s.18 of the MCOCA thus not satisfied - From different angles and perspectives based on the provisions of the Evidence Act and MCOCA, it is inevitable that the accused-respondents cannot be permitted to summon the witnesses at serial nos. 63 to 66 as defence witnesses, in order to substantiate the confessional statements made by the three accused in Special Case no. 4 of 2009, who were not accused/co-accused in Special Case no. 21 of 2006 - Evidence Act, 1872 - ss.60 and 11 - IPC - ss.302, 307, 324, 325, 326, 327, 427, 436, 120B, 121-A, 122, 123, 124A, 201, 212 - Unlawful Activities (Prevention) Act, 1967 - ss.10, 13, 16, 17, 18, 19, 20, 40 - Explosives Act, 1884 - ss.6, 9B - Explosive Substances Act, 1908 - ss.3, 4, 5, 6 - Prevention of Damage to Public Property Act, 1984 - ss.3, 4 - Railways Act, 1989 - ss.151, 152, 153, 154.

Maharashtra Control of Organised Crime Act, 1999 (MCOCA) - s.18 - Confession made to a police officer (not below the rank of Deputy Commissioner of Police) - Admissibility - Held: S.18 of the MCOCA makes such confessional statements admissible, only for "the trial of such person, or co-accused, abettor or conspirator" - Since s.18 of the MCOCA is an exception to the rule laid down in ss.25 and 26 of the Evidence Act, the same has to be interpreted strictly, and for the limited purpose contemplated thereunder - Evidence Act, 1872 - ss.25 and 26.

Criminal trial - Confessional statement - Admissibility of - Discussed, with reference to the provisions of the Evidence Act - Evidence Act, 1872.

On 11.7.2006 there were seven bomb blasts in seven different first class compartments of local trains of Mumbai Suburban Railways. These bomb blasts resulted in the death of 187 persons while 829 persons were injured. The accused-respondents were alleged to be members of Students Islamic Movement of India ("SIMI"), a terrorist organization. Charge-sheet came to be filed as MCOCA Special Case no.21 of 2006 against the accused-respondents for offences punishable under Sections 302, 307, 324, 325, 326, 327, 427, 436, 120B, 121-A, 122, 123, 124A, 201, 212 of IPC read with Sections 3(1)(i), 3(2), 3(3), 3(4), 3(5), of the Maharashtra Control of Organised Crime Act, 1999 (MCOCA), read with Sections 10, 13, 16, 17, 18, 19, 20, 40 of Unlawful Activities (Prevention) Act, 1967, read with Sections 6, 9B of the Explosives Act, 1884, read with Sections 3, 4, 5, 6 of the Explosive Substances Act, 1908, read with Sections 3, 4 of the Prevention of Damage to Public Property Act, 1984, read with Sections 151, 152, 153, 154 of the Railways Act, 1989, read with Section 12(1)(c) of the Passports Act, 1967.

As against the accusations contained in Special Case no.21 of 2006, in another MCOCA Special Case no.4 of 2009, it was alleged by the prosecution, that the accused therein were members of the Indian Mujahideen ("the IM"), also a terrorist organization. During the course of investigation in Special Case no. 4 of 2009, some of the accused therein (Special Case no. 4 of 2009) had confessed that they, as members of the IM had carried out bomb blasts, in Mumbai Suburban trains on 11.7.2006. Three accused - 'Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah', in Special Case no.4 of 2009, had made these confessional statements under Section 16 of the MCOCA which were recorded by high ranking police officials (witnesses respectively at serial nos.64, 65 and 66). The witness at serial No.63 had granted sanction for the prosecution of

the aforesaid accused in Special Case No.4 of 2009, by relying inter alia on the confessional statements.

The accused-respondents desired to produce the aforesaid witnesses at serial nos. 63 to 66 in Special Case no. 4 of 2009, to establish their own innocence in MCOCA Special Case no.21 of 2006 and pressed for summoning them as defence witnesses. The object of the accused-respondents (of producing these witnesses in defence) was to show, that others were responsible for actions for which the accused-respondents were being blamed.

The Trial Court declined the prayer made by the accused-respondents for summoning the witnesses at serial Nos.63 to 66 in Special Case no. 4 of 2009. The High Court, however, held that the appellants were entitled to have the witnesses in question summoned, and examine them as witnesses for the defence, and therefore the instant appeal by the State of Maharashtra.

Allowing the appeal, the Court

HELD: 1.1. There is, a common thread in the scheme of admissibility of admissions/confessions under the Evidence Act, namely, that the admission/confession is admissible only as against the person who had made such admission/confession. Naturally, it would be inappropriate to implicate a person on the basis of a statement made by another. Therefore, the next logical conclusion, that the person who has made the admission/confession (or at whose behest, or on whose behalf it is made), should be a party to the proceeding because that is the only way a confession can be used against him. Section 24 of the Evidence Act leads to such a conclusion. The scheme of the provisions pertaining to admissions/confessions depicts a one way traffic. Such statements are admissible only as against the author thereof. [Para 18]

1.2. The admissibility of confessions which have been made by the accused (Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah, in Special Case no. 4 of 2009) who are not the accused in Special Case no. 21 of 2006, will lead to the clear conclusion, that they are inadmissible as admissions/confessions under the provisions of the Evidence Act. Had those persons who had made these confessions, been accused in Special Case no. 21 of 2006, certainly the witnesses at serial nos. 64 to 66 could have been produced to substantiate the same (subject to the same being otherwise permissible). Therefore, the evidence of confessional statements recorded before the witnesses at serial nos. 64 to 66 would be impermissible, within the scheme of admissions/confessions contained in the Evidence Act. [Para 19]

1.3. The issue in hand can also be examined from another perspective, though on the same reasoning. As is evident from Section 30 of the Evidence Act, a confessional statement can be used even against a co-accused. For such admissibility it is imperative, that the person making the confession besides implicating himself, also implicates others who are being jointly tried with him. In that situation alone, such a confessional statement is relevant even against the others implicated. Insofar as the present controversy is concerned, the substantive provision of Section 30 of the Evidence Act has clearly no applicability because Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah have not implicated any of the accused-respondents herein. [Para 20]

1.4. Further, since admittedly the confessional statements, which are sought to be substantiated at the behest of the accused-respondents, were made by the accused (Sadiq Israr Shaikh, Arif Badruddin Shaikh and

Ansar Ahmad Badshah) in Special Case no. 4 of 2009, to different "police officers" (all holding the rank of Deputy Commissioners of Police), the said confessional statements are inadmissible under Sections 25 and 26 of the Evidence Act. [Para 22]

State of Gujarat v. Mohammed Atik **AIR 1998 SC 1686: 1998 (2) SCR 664 - referred to.**

2.1. In order to determine the truthfulness of the confessional statements which are sought to be relied upon by the accused-respondents, it is inevitable in terms of the mandate of Section 60 of the Evidence Act, that the accused (Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah) in Special Case no. 4 of 2009, who had made the said confessional statements, must themselves depose before a Court for effective reliance, consequent upon the relevance thereof having been affirmed under Section 11 of the Evidence Act. The confessional statements made by Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah, would only constitute "a statement as to the existence of such fact". That would not be direct/primary evidence. The same would clearly fall in the mischief of the "hearsay rule". In order to be relevant under Section 11 of the Evidence Act, such statement ought to be "a statement about the existence of a fact", and not "a statement as to its existence". Therefore, whilst it is permissible to the accused-respondents to rely on the confessional statements made by Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah, it is open to them to do so only through the persons who had made the confessional statements. By following the mandate contained in Section 60 of the Evidence Act, it is not open to the accused-respondents, in view of the expressed bar contained in Section 60 of the Evidence Act, to prove the confessional statements through the witnesses at serial nos. 63 to 66. [Para 35]

2.2. The confessional statements made by the accused (Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah) in Special Case no. 4 of 2009 cannot be proved in evidence, through the statements of the witnesses at serial nos. 63 to 66. The authors of the confessional statements (Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah) may be produced as defence witnesses by the accused-respondents, for their statements would fall in the realm of relevance under Section 11 of the Evidence Act. And in case Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah appear as defence witnesses in Special Case no. 21 of 2006, the protection available to a witness under Section 132, would also extend to them, if they are compelled to answer questions posed to them, while appearing as defence witnesses in Special Case no. 21 of 2006. [Para 39]

2.3. Section 18 of the Maharashtra Control of Organised Crime Act, 1999 (MCOCA) through a non-obstante clause, overrides the mandate contained in Sections 25 and 26 of the Evidence Act, by rendering a confession as admissible, even if it is made to a police officer (not below the rank of Deputy Commissioner of Police). However, Section 18 of the MCOCA makes such confessional statements admissible, only for "the trial of such person, or co-accused, abettor or conspirator". Since Section 18 of the MCOCA is an exception to the rule laid down in Sections 25 and 26 of the Evidence Act, the same will have to be interpreted strictly, and for the limited purpose contemplated thereunder. The admissibility of a confessional statement would clearly be taken as overriding Sections 25 and 26 of the Evidence Act for purposes of admissibility, but must mandatorily be limited to the accused-confessor himself, and to a co-accused (abettor or conspirator). It is not the contention of the counsel for the accused-respondents that the

persons who had made the confession (Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah) before witnesses at serial nos. 64 to 66 are the accused themselves along with the co-accused (abettor or conspirator) in Special Case no.21 of 2006. It is therefore apparent, that the ingredients which render a confessional statement admissible under Section 18 of the MCOCA are not satisfied in the facts of the present case. Section 18 of the MCOCA cannot constitute the basis of relevance of the confessional statements made by the accused (Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah) in Special Case no. 4 of 2009, to the case in hand. It is therefore not possible to accept the admissibility of the witnesses at serial nos. 63 to 66 in so far as Special Case no. 21 of 2006 is concerned. [Para 40]

2.4. It clearly emerges from the submissions advanced at the behest of the accused-respondents, that the confessions made by the accused in Special Case no.4 of 2009 are sought to be adopted for establishing the fact, that it was not the accused-respondents herein who are responsible for the seven bomb blasts in seven different first class compartments of local trains of Mumbai Suburban Railways on 11.7.2006, but it was the accused (Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah) in Special Case no. 4 of 2009 who had already confessed to the same. It is therefore apparent, that the objective of the accused-respondents is not to rely on the factum of a confessional statement having been recorded. The objective is to achieve exculpation of blameworthiness on the basis of the truth of the confessional statements made before witnesses at serial nos. 63 to 66. However, the witnesses sought to be produced in their defence by the accused-respondents (the witnesses at serial nos. 64 to 66), cannot vouchsafe the truth or falsity of the confessional statements made

by Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah. It is indeed the persons who had made such confessions who can do so. Since it is the truthfulness of the confessional statements made before the witnesses at serial nos. 63 to 66 which is the real purpose sought to be achieved, only those who had made the confessional statements (Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah) can vouchsafe for the same. This can only be done under the provisions of the Evidence Act. For that the accused-respondents, can only pin their hopes on the persons who had made the confessional statements. There is certainly no escape from the above course in view of the mandate of Section 60 of the Evidence Act. [Para 43]

Venkateshan v. State, **1997 Cr. L.J. 3854;** *Gentela Vijaya Vardhan Rao v. State of A.P.* **1996 (6) SCC 241;** *Munna Lal v. Kameshwari* **AIR 1929 Oudh 113;** *Mt.Naima Khatun v. Basant Singh* **AIR 1934 Allahabad 406;** *A.PL.S.V.L. Sevugan Chettiar v. Raja Srimathu Muthu Vijaya Raghunath* **AIR 1940 Madras 273;** *R.D. Sethna v. Mirza Mahomed Shrazi* **(No.4) (1907) 9 Bombay Law Reporter 1047** *Nihar Bera v. Kadar Bux Mohammed* **AIR 1923 Calcutta 290 - referred to.**

3. From different angles and perspectives based on the provisions of the Evidence Act and MCOCA, it is inevitable that the accused-respondents cannot be permitted to summon the witnesses at serial nos. 63 to 66 as defence witnesses, for the specific objective sought to be achieved by them. It is not open to the accused-respondents to produce the witnesses at serial nos. 63 to 66 in order to substantiate the confessional statements made by Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah (the accused in Special Case no. 4 of 2009), who are not accused/co-accused in Special Case no. 21 of 2006 (out of the proceedings whereof, the instant appeal has arisen). [Paras 44, 45]

Case Law Reference:

1998 (2) SCR 664	**referred to**	**Para 23, 24**
1997 Cr. L.J. 3854	**referred to**	**Para 28**
1996 (6) SCC 241	**referred to**	**Para 28**
AIR 1929 Oudh 113	**referred to**	**Para 28**
AIR 1934 Allahabad 406	**referred to**	**Para 32**
AIR 1940 Madras 273	**referred to**	**Para 32**
(1907) 9 BLR 1047	**referred to**	**Para 32**
AIR 1923 Calcutta 290	**referred to**	**Para 32**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 445 of 2013.

From the Judgments & Orders dated 26.11.2012 of the High Court of Judicature at Bombay, in Criminal Appeal No. 972 of 2012.

Shekhar Naphade, Sanjay V. Kharde, Aparajita Singh, Chinmoy Khaladkar, Asha Gopalan Nair for the Appellant.

Amrendra Sharan, Dr. Yug Mohit Choudhary, Khan Abdul Wahab, Izhar Ahmed Siddiqui, Ansari Feroz, Sheikh Naima, Rishi Maheshwari, Abu John Mathew, P.S. Sudheer for the Respondents.

The Judgment of the Court was delivered by

JAGDISH SINGH KHEHAR, J. 1. On 11.7.2006 there were seven bomb blasts in seven different first class compartments of local trains of Mumbai Suburban Railways. These bomb blasts resulted in the death of 187 persons. Severe injuries on account of the said bomb blasts were caused to 829 persons. These blasts led to the registration of following seven criminal reports:

(i) CR No.77 of 2006 at Mumbai Central Police Station.

(ii) CR No.78 of 2006 at Mumbai Central Police Station.

(iii) CR No.86 of 2006 at Bandra Railway Police Station

(iv) CR No.87 of 2006 at Bandra Railway Police Station

(v) CR No.41 of 2006 at Andheri Railway Police Station.

(vi) CR No.59 of 2006 at Vasai Road Railway Police Station

(vii) CR No.156 of 2006 at Borivli Railway Police Station.

In all these cases investigation was transferred to the Anti Terrorists Squad, Mumbai (hereinafter referred to as "the ATS"), wherein the matter was registered as CR No.5 of 2006.

2. In all 13 accused were arrested in connection with the bomb blasts of 11.7.2006. The accused-respondents herein are the accused in the controversy. Initially the accused-respondents were charged with offences punishable under Sections 302, 307, 326, 427, 436, 20A, 120B, 123 and 124 of the Indian Penal Code, 1860 read with Section 34 of the Indian Penal Code. The accused-respondents were also charged with offences under the Indian Explosives Act, the Prevention of Damage to Public Property Act, the offences under the Indian Railways Act and the offences punishable under the Unlawful Activities (Prevention) Act, 1967. Later, the provisions of Maharashtra Control of Organised Crime Act, 1999 (hereinafter referred to as "the MCOCA") were applied to the case. Thereupon, the accused-respondents were

charged under Sections 3(1)(i), 3(2) and 3(4) of the MCOCA. On 30.11.2006 the charge-sheet in CR no.5 of 2006 came to be filed as MCOCA Special Case no.21 of 2006 (hereinafter referred to as Special Case No.21 of 2006) for offences punishable under Sections 302, 307, 324, 325, 326, 327, 427, 436, 120B, 121-A, 122, 123, 124A, 201, 212 Indian Penal Code, 1860, read with Sections 3(1)(i), 3(2), 3(3), 3(4), 3(5), the MCOCA, read with Sections 10, 13, 16, 17, 18, 19, 20, 40 of Unlawful Activities (Prevention) Act, 1967, read with Sections 6, 9B of the Explosives Act, 1884, read with Sections 3, 4, 5, 6 of the Explosive Substances Act, 1908, read with Sections 3, 4 of the Prevention of Damage to Public Property Act, 1984, read with Sections 151, 152, 153, 154 of the Railways Act, 1989, read with Section 12(1)(c) of the Passports Act, 1967.

3. The prosecution case (in Special Case No.21 of 2006) in brief is, that bombs were planted on 11.7.2006 in seven different first class compartments of local trains of Mumbai Suburban Railways by the Students Islamic Movement of India (hereinafter referred to as "the SIMI"). SIMI is a terrorist organization, the accused-respondents are allegedly its members. According to the prosecution, the accused-respondents had conspired to plant bombs at Mumbai's local trains to create panic in furtherance of terrorist activities being carried out by the SIMI in India.

4. Having examined its witnesses, and having placed on the record of Special Case No.21 of 2006, the necessary exhibits, the prosecution closed its evidence on 4.4.2012. Thereafter, witnesses were examined in defence by the accused-respondents. On 19.7.2012, accused Nos.2, 6, 7 and 13 filed an application (at Exhibit 2891) praying for issuance of summons to 79 witnesses named therein. On 24.7.2012, the accused-respondents filed another application (at Exhibit 2914), again for summoning defence witness. The application filed by the accused-respondents, inter alia, included the names of the following witnesses :

(i) Witness at serial No.63 - Chitkala Zutshi, Additional Chief Secretary (Home Department)

(ii) Witness at serial No.64 - Vishwas Nangre Patil, Deputy Commissioner of Police

(iii) witness at serial No.65 - Milind Bharambe, Deputy Commissioner of Police

(iv) Witness at serial No.66 - Dilip Sawant, Deputy Commissioner of Police.

5. To appreciate the reason for summoning the witnesses at serial nos. 63 to 66, it is necessary to refer to some more facts. As against the accusations contained in Special Case no.21 of 2006, referred to above, in another MCOCA Special Case no.4 of 2009 (hereinafter referred to as 'Special Case No.4 of 2009'), it was alleged by the prosecution, that the accused therein were members of the Indian Mujahideen (hereinafter referred to as "the IM"). The IM is also allegedly a terrorist organization, blameworthy of such activities within the territorial jurisdiction of India. The investigating agency had been claiming, that all bomb blasts in Mumbai since the year 2005 had been carried out by the IM. During the course of investigation in Special Case no. 4 of 2009, some of the accused therein (Special Case no. 4 of 2009) had confessed that they, as members of the IM had carried out bomb blasts, in Mumbai Suburban trains on 11.7.2006. In fact, 'the accused Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah', in Special Case no.4 of 2009, had made these confessional statements under Section 16 of the MCOCA. The confessional statement of Sadiq Israr Shaikh was recorded by Vishwas Nangre Patil, Deputy Commissioner of Police (witness at serial no.64). Likewise, the statement of Arif Badruddin Sheikh was recorded by Miland Bharambe, Deputy Commissioner of Police (witness at serial No.65). And, the

statement of Ansar Ahmad Badshah was recorded by Dilip Sawant, Deputy Commissioner of Police (witness at serial No.66). Chitkala Zutshi, the then Additional Chief Secretary, Home Department (witness at serial No.63) had granted sanction for the prosecution of the aforesaid accused in Special Case No.4 of 2009 on 21.2.2009, by relying interalia on the confessional statements made by Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah. The accused (respondents herein) desire to produce the witnesses at serial nos. 63 to 66, to establish their own innocence.

6. The Trial Court by its order dated 1.8.2012, declined the prayer made by the accused-respondents for summoning the witnesses at serial Nos.63 to 66. Dissatisfied with the order dated 1.8.2012, the accused-respondents preferred Criminal Appeal No.972 of 2012 before the High Court of Judicature at Bombay (hereinafter referred to as 'the High Court'). The High Court by its order dated 26.11.2012 allowed the appeal preferred by the accused-respondents. The operative part of the aforesaid order dated 26.11.2012, is being extracted hereunder:

> "83. As a result of the aforesaid discussion, it is clear that the evidence sought to be adduced by the appellants is relevant and admissible. The appellants cannot be prevented from bringing on record such evidence. The impugned order is contrary to law, and needs to be interfered with.
>
> 84. The appeal is allowed. The impugned order is set aside.
>
> 85. The appellants shall be entitled to have the witnesses in question summoned, and examine them as witnesses for the defence.
>
> 86. Appeal is disposed of accordingly."

7. Aggrieved with the order dated 26.11.2012, passed in

Criminal Appeal No.972 of 2012, the State of Maharashtra preferred the instant Special Leave Petition (Crl.) No.9707 of 2012.

8. Leave granted.

9. It is necessary to first define the contours of the controversy, which we are called upon to adjudicate, in the present appeal. The accused-respondents press for summoning the witnesses at serial nos. 63 to 66 as defence witnesses. The object for summoning the aforesaid witnesses is, that the witnesses at serial nos. 64 to 66 had recorded the confessional statements of Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah during the course of investigation in Special Case no. 4 of 2009. Based interalia on the aforesaid confessional statements, the witness at serial no. 63 had accorded sanction for prosecution of the accused in Special Case no. 4 of 2009. The object of the accused-respondents (of producing these witnesses in defence) is to show, that others are responsible for actions for which the accused-respondents are being blamed. It is relevant to pointedly notice, that the aforesaid confessional statements were not made by persons who are accused in Special Case no. 21 of 2006 (i.e. they are not co-accused with the accused-respondents). The first question for determination therefore would be, whether the confessional statements recorded before the witnesses at serial nos. 64 to 66, by persons who are not accused in Special Case no. 21 of 2006, would be admissible in Special Case no. 21 of 2006. The instant question will have to be examined with reference to the provisions of the Indian Evidence Act, 1872 (hereinafter referred to as, the Evidence Act) and the MCOCA. Alternatively, the question that would need an answer would be, whether the said confessional statements are admissible under Sections 6 and 11 of the Evidence Act not as confessional statements, but as "relevant facts". The answers of the two alternate questions will have to be determined on totally different parameters, and under

different statutory provisions. Both the questions are, therefore, being examined by us independently hereinafter.

10. Before venturing into the two alternate questions referred to in the foregoing paragraph, it is necessary to delineate a few salient features on which there is no dispute between the rival parties. It is not a matter of dispute, that confessional statements have been made during the course of investigation in Special Case no. 4 of 2009. The aforesaid confessional statements were made before the witnesses at serial nos. 64 to 66. The witnesses at serial nos. 64 to 66 were then holding the rank of Deputy Commissioners of Police (at the time when the confessional statements were recorded). The present appeal is a proceeding, emerging out of Special Case no. 21 of 2006. The accused in Special Case no. 4 of 2009, are different from the accused in Special Case no. 21 of 2006. Importantly, Special Case no. 4 of 2009, is not being jointly tried with Special Case no. 21 of 2006. The accused in Special Case no. 4 of 2009 (who had made the confessional statements under reference), are available. In other words, those who had made the confessional statements (Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah) before the witnesses at serial nos. 64 to 66, can be summoned to be produced in Special Case no. 21 of 2006, as defence witnesses, at the choice and asking of the accused-respondents (in Special Case no. 21 of 2006), for affirming or denying the correctness of the confessional statements made by them (before the witnesses at serial nos. 64 to 66). According to the learned counsel for the appellant, those who had made the confessional statements (Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah) before the witnesses at serial nos. 64 to 66, have since retracted their confessional statements. Insofar as the latter aspect of the matter is concerned, the same is neither acknowledged nor denied at the behest of the accused-respondents.

11. When a question pertaining to the admissibility of

evidence before an Indian court arises, it has to be determined with reference to the provisions of the Evidence Act. Alternatively, the question may be determined under a special enactment, which may either make such evidence admissible, or render it inadmissible. The special enactment relied upon in the present controversy is, the MCOCA. Therefore, the questions posed for determination in the present case, will have to be adjudicated on the basis of the provisions of the Evidence Act, and/or the MCOCA.

12. It is relevant in the first instance to describe the expanse/sphere of admissible evidence. The same has been postulated in Section 5 of the Evidence Act. Under Section 5 aforementioned, evidence may be given "of every fact in issue" and of such other facts which are expressly "declared to be relevant", and of no other facts. For the present controversy, the facts in issue are the seven bomb blasts, in seven different first class compartments, of local trains of Mumbai Suburban Railways, on 11.7.2006. Thus far, there is no serious dispute. But then, evidence may also be given of facts which are "declared to be relevant" under the Evidence Act. Under the Evidence Act, Sections 6 to 16 define "relevant facts", in respect whereof evidence can be given. Therefore, Sections 5 to 16 are the provisions under the Evidence Act, which alone have to be relied upon for determining admissibility of evidence.

13. Sections 17 to 31 of the Evidence Act pertain to admissions and confessions. Sections 17 to 31 define admissions/confessions, and also, the admissibility and inadmissibility of admissions/confessions. An analysis of the aforesaid provisions reveals, that an admission or a confession to be relevant must pertain to a "fact in issue" or a "relevant fact". In that sense, Section 5 (and consequently Sections 6 to 16) of the Evidence Act are inescapably intertwined with admissible admissions/confessions. It is, therefore, essential to record here, that admissibility of admissions/confessions,

would depend on whether they would fall in the realm of "facts in issue" or "relevant facts". That in turn is to be determined with reference to Sections 5 to 16 of the Evidence Act. The parameters laid down for the admissibility of admissions/confessions are, however, separately provided for under the Evidence Act, and as such, the determination of admissibility of one (admissions/confessions) is clearly distinguishable from the other (facts in issue/relevant facts).

14. We shall now endeavour to delve into the first question, namely, whether the confessional statements recorded by the three accused (Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah, in Special Case no. 4 of 2009), before the witnesses at serial nos. 64 to 66, are admissible as confessions in the trial of Special Case no. 21 of 2006. There seems to be a serious dispute between the rival parties, whether the deposition in respect of these confessional statements, can only be made by producing as witnesses, the person who had made such admission/confession; or in the alternative, deposition thereof can also be made through the persons before whom such confessions were made.

15. Admissions and confessions are exceptions to the "hearsay" rule. The Evidence Act places them in the province of relevance, presumably on the ground, that they being declarations against the interest of the person making them, they are in all probability true. The probative value of an admission or a confession does not depend upon its communication to another. Just like any other piece of evidence, admissions/confessions can be admitted in evidence only for drawing an inference of truth (See Law of Evidence, by M. Monir, fifteenth edition, Universal Law Publishing Co.). There is, therefore, no dispute whatsoever in our mind, that truth of an admission or a confession can not be evidenced, through the person to whom such admission/confession was made. The position, however, may be different if admissibility is sought under Sections 6 to 16 as a "fact in issue" or as a "relevant

fact" (which is the second question which we are called upon to deal with). The second question in the present case, we may clarify, would arise only if we answer the first question in the negative. For only then, we will have to determine whether these confessional statements are admissible in evidence, otherwise than, as admissions/confessions.

16. Therefore to the extent, that a confessional statement can be evidenced by the person before whom it is recorded, has been rightfully adjudicated by the High Court, by answering the same in the affirmative. The more important question however is, whether the same would be admissible through the witnesses at serial nos. 63 to 66 in Special Case no. 21 of 2006. Our aforesaid determination, commences from the following paragraph.

17. The scheme of the provisions pertaining to admissions/confessions under the Evidence Act (spelt out in Sections 17 to 31) makes admissions/confessions admissible (even though they are rebuttable) because the author of the statement acknowledges a fact to his own detriment. This is based on the simple logic (noticed above), that no individual would acknowledge his/her liability/culpability unless true. We shall determine the answer to the first question, by keeping in mind the basis on which, admissibility of admissions/ confessions is founded. And also, whether confessions in this case (made to the witnesses at serial nos. 64 to 66) have been expressly rendered inadmissible, by the provisions of the Evidence Act, as is the case set up by the appellant.

18. An examination of the provisions of the Evidence Act would reveal, that only such admissions/confessions are admissible as can be stated to have been made without any coercion, threat or promise. Reference in this regard may be made to Section 24 of the Evidence Act which provides, that a confession made by an accused person is irrelevant in a criminal proceeding, if such confession has been caused by

inducement, threat or promise. Section 24 aforesaid, is being reproduced below:-

> **"24. Confession by inducement, threat or promise when irrelevant in criminal proceeding -**
>
> A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise, having reference to the charge against the accused person, proceeding from a person in authority and sufficient, in the opinion of the Court, to give the accused person grounds, which would appear to him reasonable, for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceeding against him."

Sections 25 and 26 of the Evidence Act exclude, from the realm of admissibility, confessions made before a police officer or while in police custody. There can be no doubt, that the logic contained in the rule enunciated in Sections 25 and 26 is founded on the same basis/truth out of which Section 24 of the Evidence Act emerges. That a confession should be uninfluenced, voluntary and fair. And since it may not be possible to presume, that admissions/confessions are uninfluenced, voluntary and fair, i.e., without coercion, threat or promise, if made to a police officer, or while in police custody, the same are rendered inadmissible. Sections 25 and 26 aforesaid, are being reproduced below:-

> **"25. Confession to police officer not to be proved-**
>
> No confession made to police officer shall be proved as against a person accused of any offence.

26. Confession by accused while in custody of police not to be proved against him-

No confession made by any person whilst he is in the custody of a police-officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person.

Explanation - In this section "Magistrate" does not include the head of a village discharging magisterial functions in the Presidency of Fort St. George or elsewhere, unless such headman is a Magistrate exercising the powers of a Magistrate under the Code of Criminal Procedure, 1882 (10 of 1882)."

There is, therefore, a common thread in the scheme of admissibility of admissions/confessions under the Evidence Act, namely, that the admission/confession is admissible only as against the person who had made such admission/ confession. Naturally, it would be inappropriate to implicate a person on the basis of a statement made by another. Therefore, the next logical conclusion, that the person who has made the admission/confession (or at whose behest, or on whose behalf it is made), should be a party to the proceeding because that is the only way a confession can be used against him. Reference can be made to some provisions of the Evidence Act which fully support the above conclusions. Section 24 of the Evidence Act leads to such a conclusion. Under Section 24, a confession made "by an accused person", is rendered irrelevant "against the accused person", in the circumstances referred to above. Likewise, Section 25 of the Evidence Act contemplates, that a confession made to a police officer cannot be proved "as against a person accused of any offence". Leading to the inference, that a confession is permissible/ admissible only as against the person who has made it, unless the same is rendered inadmissible under some express provision. Under Section 26 of the Evidence Act, a confession

made by a person while in custody of the police, cannot "be proved as against such person" (unless it falls within the exception contemplated by the said Section itself). The gamut of the bar contemplated under Sections 25 and 26 of the Evidence Act, is however marginally limited by way of a proviso thereto, recorded in Section 27 of the Evidence Act. Thereunder, a confession has been made admissible, to the extent of facts "discovered" on the basis of such confession (this aspect, is not relevant for the present case). The scheme of the provisions pertaining to admissions/confessions depicts a one way traffic. Such statements are admissible only as against the author thereof.

19. It is, therefore clear, that an admission/confession can be used only as against the person who has made the same. The admissibility of the confessions made by Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah need to be viewed in terms of the deliberations recorded above. The admissibility of confessions which have been made by the accused (Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah, in Special Case no. 4 of 2009) who are not the accused in Special Case no. 21 of 2006, will lead to the clear conclusion, that they are inadmissible as admissions/confessions under the provisions of the Evidence Act. Had those persons who had made these confessions, been accused in Special Case no. 21 of 2006, certainly the witnesses at serial nos. 64 to 66 could have been produced to substantiate the same (subject to the same being otherwise permissible). Therefore, we have no doubt, that evidence of confessional statements recorded before the witnesses at serial nos. 64 to 66 would be impermissible, within the scheme of admissions/confessions contained in the Evidence Act.

20. The issue in hand can also be examined from another perspective, though on the same reasoning. Ordinarily, as already noticed hereinabove, a confessional statement is admissible only as against an accused who has made it. There

is only one exception to the aforesaid rule, wherein it is permissible to use a confessional statement, even against person(s) other than the one who had made it. The aforesaid exception has been provided for in Section 30 of the Evidence Act, which is being extracted hereunder:-

> **"30. Consideration of proved confession affecting person making it and others jointly under trial for same offence-**
>
> When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such confession as against such other person as well as against the person who makes such confession.
>
> **Illustrations**
>
> (a) A and B are jointly tried for the murder of C. It is proved that A said - "B and I murdered C". The Court may consider the effect of this confession as against B.
>
> (b) A is on his trial for the murder of C. There is evidence to show that C was murdered by A and B, and that B said, "A and I murdered C".
>
> This statement may not be taken into consideration by the Court against A, as B is not being jointly tried."

As is evident from a perusal of Section 30 extracted above, a confessional statement can be used even against a co-accused. For such admissibility it is imperative, that the person making the confession besides implicating himself, also implicates others who are being jointly tried with him. In that situation alone, such a confessional statement is relevant even

against the others implicated. Insofar as the present controversy is concerned, the substantive provision of Section 30 of the Evidence Act has clearly no applicability because Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah have not implicated any of the accused-respondents herein. The importance of Section 30 of the Evidence Act, insofar as the present controversy is concerned, emerges from illustration (b) thereunder, which substantiates to the hilt one of the conclusions already drawn by us above. Illustration (b) leaves no room for any doubt, that unless the person who has made a confessional statement is an accused in a case, the confessional statement made by him is not relevant. None of the accused in Special Case no. 4 of 2009 is an accused in Special Case no. 21 of 2006. As such, in terms of illustration (b) under Section 30 of the Evidence Act, we are of the view, that the confessional statement made by the accused in Special Case no. 4 of 2009, cannot be proved as a confessional statement, in Special Case no. 21 of 2006. This conclusion has been recorded by us, on the admitted position, that the accused in Special Case no. 4 of 2009 are different from the accused in Special Case no. 21 of 2006. And further because, Special Case no. 4 of 2009 is not being jointly tried with Special Case no. 21 of 2006. Therefore, even though Section 30 is not strictly relevant, insofar as the present controversy is concerned, yet the principle of admissibility, conclusively emerging from illustration (b) under Section 30 of the Evidence Act, persuades us to add the same to the underlying common thread, that finds place in the provisions of the Evidence Act, pertaining to admissions/confessions. That, an admission/confession is admissible only as against the person who has made it.

21. We have already recorded above, the basis for making a confessional statement admissible. Namely, human conduct per se restrains an individual from accepting any kind of liability or implication. When such liability and/or implication is acknowledged by the individual as against himself, the provisions of the Evidence Act make such confessional

statements admissible. Additionally, since a confessional statement is to be used principally as against the person making it, the maker of the confession will have an opportunity to contest the same under Section 31 of the Evidence Act, not only by producing independent evidence therefor, but also, because he will have an opportunity to contest the veracity of the said confessional statement, by effectively cross-examining the witness produced to substantiate the same. Such an opportunity, would also be available to all other co-accused who would be confronted with a confessional statement made by an accused against them (as in Section 30 of the Evidence Act), as they too would have an opportunity to contest the confessional statement made by the accused, in the same manner as the author of the confession. Illustration (b) under Section 30 of the Evidence Act contemplates a situation wherein the author of the confessional statement is not a co-accused. Illustration (b) renders such confessional statements inadmissible. There is, it may be noticed, no room for testing the veracity of the said confessional statement, either at the hands of the person who made it, or by the person against whom it is made. For adopting illustration (b) under Section 30 to the reasoning recorded above, the same be read as under:-

> "...This statement may not be taken into consideration by the court against A (the accused facing trial), as B (the person who made the confession) is not being jointly tried."

Illustration (b) makes such a confessional statement inadmissible for the sole reason, that the person who made the confession, is not a co-accused in the case. Again, the underlying principle brought out through illustration (b) under Section 30 of the Evidence Act is, that a confessional statement is relevant only and only, if the author of confessional statement himself is an accused in a case, where the confessional statement is being proved. In the present controversy, the authors of the confessional statements (Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah) are not

amongst the accused in Special Case no. 21 of 2006. The confessional statements made by them, would therefore be inadmissible (as admissions/confessions) in the present case (Special Case no. 21 of 2006), as the situation in the present case is exactly the same as has been sought to be explained through illustration (b) under Section 30 of the Evidence Act.

22. It is also possible, to determine the admissibility of the statements of the accused (Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah) made to the witnesses at serial nos. 64 to 66 independently of the conclusions drawn in the foregoing paragraphs. The instant determination is being recorded by us, again by placing reliance on Sections 25 and 26 of the Evidence Act. As already noticed hereinabove, Section 25 makes a confessional statement made to a police officer inadmissible against "a person accused of any offence". Likewise, a confessional statement made while in the custody of police cannot be proved as against "the person making such confession" under Section 26 of the Evidence Act. It is nobody's case, that the instant confessional statements made by the accused in Special Case no. 4 of 2009 are being proved to substantiate the "discovery" of facts emerging out of such confessional statements. In the aforesaid view of the matter, the exception to Sections 25 and 26 of the Evidence Act contemplated under Section 27 thereof, would also not come into play. Since admittedly the confessional statements, which are sought to be substantiated at the behest of the accused-respondents, were made by the accused (Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah) in Special Case no. 4 of 2009, to different "police officers" (all holding the rank of Deputy Commissioners of Police), we are satisfied, that the said confessional statements are inadmissible under Sections 25 and 26 of the Evidence Act.

23. The issue of admissibility of the confessional statements made by Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah before the witnesses at serial nos.

64 to 66, needs to be examined from yet another perspective. Learned counsel for the respondents were successful in persuading the High Court, that a confessional statement made by an accused in one case, could be used in another case as well. In this behalf, the respondents had placed reliance on the decision rendered by this Court in *State of Gujarat Vs. Mohammed Atik,* AIR 1998 SC 1686. In the aforesaid controversy, the following question, which was framed by the trial Court, had come up for consideration before this Court:-

> "The question therefore is whether the prosecution be permitted to introduce and prove the confessional statement of an accused, alleged to have been made during the investigation of another offence committed on a different date, during the trial of that accused in another crime."

While answering the question extracted above, this Court first examined whether the confession relied upon, had been recorded in accordance with the provisions of the Terrorist and Disruptive Activities (Prevention) Act, 1987 (hereinafter referred to as, the TADA). Having first determined, that the confessional statement under reference had been validly recorded under the TADA, this Court recorded the following conclusion in answer to the question framed by the trial Court:-

> "We have, therefore, absolutely no doubt that a confession, if usable under Section 15 of the TADA, would not become unusable merely because the case is different or the crime is different. If the confession covers that different crime it would be a relevant item of evidence in the case in which that crime is under trial and it would then become admissible in the case."

Based on the conclusion drawn in *State of Gujarat Vs. Mohammed Atik* (supra), the High Court accepted the prayer made by the respondents, that the confessional statements made by the accused in Special Case no. 4 of 2009, would

be admissible in Special Case no. 21 of 2006. The instant legal position is sought to be reiterated before us by the learned counsel representing the accused-respondents.

24. We have given our thoughtful consideration to the conclusions drawn by the High Court on the basis of the decision in *State of Gujarat Vs. Mohammed Atik* (supra). Before drawing any conclusion one way or the other, it would be relevant to notice, that in accepting the admissibility of the confessional statement in one case as permissible in another case, reliance was placed by this Court on Section 15 of the TADA. Section 15 of the TADA is being extracted hereunder:-

> "Section 15 - Certain confessions made to Police Officers to be taken into consideration-
>
> (1) Notwithstanding anything in the Code or in the Indian Evidence Act, 1872, but subject to the provisions of this section, a confession made by a person before a police officer not lower in rank than a Superintendent of police and recorded by such police officer either in writing or on any mechanical device like cassettes, tapes or sound tracks from out of which sounds or images can be reproduced, shall be admissible in the trial of such person or co-accused, abettor or conspirator for an offence under this Act or rules made thereunder:
>
> Provided that co-accused, abettor or conspirator is charged and tried in the same case together with the accused.
>
> (2) The police officer shall, before recording any confession under subsection (1), explain to the person making it that he is not bound to make a confession and that, if he does so, it may be used as evidence against him and such police officer shall not record any such confession unless upon

questioning the person making it, he has reason to believe that it is being made voluntarily."

There is no room for any doubt, that Section 15 of the TADA expressly makes such confessional statement made by a person admissible not only against the person who has made it, but also as against others implicated therein, subject to the condition, that the person who has made the confession, and the others implicated (the co-accused - abettor or conspirator) are being "...tried in the same case together...". Therefore, it is necessary for us first to specifically highlight, that the admissibility of the aforesaid confessional statements was determined not with reference to the Evidence Act, but under Section 15 of the TADA. What the High Court, as also the respondents before us have overlooked is, that the proviso under sub-Section (1) of Section 15 of the TADA expressly postulates, that a confessional statement made by an accused as against himself, as also a co-accused (abettor or conspirator) is admissible, provided that, the co-accused (abettor or conspirator) is being tried in the same case together with the accused who had made the confession. The proviso under sub-Section (1) of Section 15 of the TADA is founded on the same principle, which we have referred to hereinabove, while analyzing Section 30 of the Evidence Act. The link for determining admissibility is not case specific. A confessional statement may be admissible in any number of cases. Or none at all. To determine admissibility the test is, that the author of the confessional statement must be an accused, in the case (in which the confessional statement is admissible). And in case it is to be used against persons other than the author of the confessional statement, then besides the author, such other persons must all be co-accused in the case. It is therefore apparent, that the confessional statement made by an accused was held to be relevant in *State of Gujarat Vs. Mohammed Atik* (supra) under Section 15 of the TADA, on the fulfilment of the condition, that the same was recorded in consonance with the provisions of the said Act, as also, the satisfaction of the

ingredients contained in the proviso under sub-Section (1) of Section 15 of the TADA, namely, the person who had made the confession, and the others implicated were facing a joint trial. The judgment rendered by this Court in *State of Gujarat Vs. Mohammed Atik* (supra) has been incorrectly relied upon while applying the conclusions rendered in the same to the controversy in hand, as the confessional statements made by Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah do not implicate the accused-respondents in Special Case no. 21 of 2006, nor are the accused-respondents herein being jointly tried with the persons who had made the confessional statements. Reliance has not been placed by the accused-respondents, on any provision under the MCOCA, to claim admissibility of the witnesses at serial nos. 63 to 66 as defence witnesses. Nor have the learned counsel for the accused-respondents invited our attention to any other special statute applicable hereto, whereunder such a course of action, in the manner claimed by the respondents, would be admissible. We are, therefore, of the view that the High Court erred in relying on the judgment rendered by this Court in *State of Gujarat Vs. Mohammed Atik* (supra) while determining the controversy in hand.

25. We shall now endeavour to delve into the second question, whether the confessional statements recorded by the three accused (Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah), in Special Case no. 4 of 2009, before the witnesses at serial nos. 64 to 66, are admissible in Special Case no. 21 of 2006, by producing the persons before whom the confessional statements were made (the witnesses at serial nos. 64 to 66) as defence witnesses, under the Evidence Act. On the instant aspect of the matter, the submission of the accused-respondents has been, that the same satisfy the test of being "relevant facts" under Sections 6 and 11 of the Evidence Act. We shall now record our conclusions separately for each of the aforesaid provisions.

26. Are the statements made by the accused (Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah) in Special Case no. 4 of 2009, to the witnesses at serial nos. 64 to 66, admissible under Section 6 of the Evidence Act as "relevant facts"? The accused-respondents emphatically claim that they are. The contention of the learned counsel for the appellant is, however, that the evidence of three police officers (all holding the rank of Deputy Commissioners of Police) and the Additional Chief Secretary (Home Department) relating to confessions made by accused in Special Case No.4 of 2009 is hit by the "hearsay rule". In this behalf it is pointed out, that the blasts in question took place on 11.7.2006 while the confessions were recorded in October, 2008. It is therefore pointed out, that the confessional statements were recorded after two years of the occurrence of the fact in issue. Section 6 of the Evidence Act, according to learned counsel, partially lifts the ban on the "hearsay rule", if the evidence which is sought to be produced, can be said to be so connected to a "fact in issue" as to form a part of it. It is contended, that the "fact in issue", is the bomb blasts that took place in local trains of Mumbai Suburban Railways, on 11.7.2006. The confessional statements recorded after two years cannot be said to be a part of the said "fact in issue", so connected to it, as to form a part of it. The evidence of police officers about the confessions made by the accused in Special Case No.4 of 2009 is not, according to learned counsel, evidence relating to "facts in issue", but pertain to "collateral facts". This evidence of a collateral fact, it is contended, can be brought in as evidence only if it is "a relevant fact" under some provision of the Evidence Act. Such evidence of the police officers, according to learned counsel for the appellant, is not relevant under any provisions of the Evidence Act, certainly not under Section 6 thereof.

27. Such evidence, according to learned counsel, is barred by the "rule of hearsay". According to learned counsel, the ban on hearsay evidence does not extend to the rule of "res gestae". It is however submitted, that the rule of "res gestae" is not attracted in the present case, as there is no live link between the occurrence of bomb blasts on 11.7.2006, and the recording of confessional statements two years thereafter. If the accused persons had made such confessional statements immediately after the occurrence of the bomb blasts, as a natural reaction in immediate proximity of the occurrence, so as to constitute a part of the occurrence itself, there may have been a live link between the blasts and the confessional statements, and such confessional statements, may have been perceived as a part of the same, and therefore, may (in such eventuality) have been admissible under Section 6 of the Evidence Act. The statement of the accused in Special Case no. 4 of 2009, according to learned counsel, cannot for the reasons mentioned above, be treated as part of the same transaction, as the transaction of bomb blasts of 11.7.2006.

28. In order to substantiate his aforesaid contention, learned counsel for the appellant placed reliance on the decision rendered in *Venkateshan v. State,* 1997 Cr.LJ 3854, wherein Madras High Court held, that in a murder case where the accused who had assaulted the deceased, had made a statement about the assault to the brother of the deceased, within half an hour of the act, the evidence of the brother was held to be "res gestae", and therefore, admissible under Section 6 of the Evidence Act. It was submitted, that only such a fact as is so connected to a "fact in issue", so as to be treated as a part of it, would constitute "res gestae", and would not be excludable by the "rule of hearsay". Relevant observations from the aforesaid judgment, which were brought to our notice, are being extracted hereunder:

> "17. The above proposition of law has been laid down by the Apex Court and the same followed by other Courts. We have to see whether there is an interval or time lag between the act committed by the accused and the time of statement given to the

witnesses and was it a long one so as to give time or opportunity for fabrication. In the instant case the occurrence took place at 11.30 p.m., and the statement made by the appellant to P.W. 1 at 12 mid night i.e. half-an-hour later. In the light of the facts of this case, it cannot be stated that there is a long interval so as to given opportunity for any fabrication. After the occurrence was over, P.W. 2 and P.W. 3 informed to P.W. 1 and immediate4ly on receipt of the information rushed to the house of the appellant where the appellant was found standing near the victim. Therefore, as per illustration (a) to Section 6 of the Evidence Act-

> "Whatever was said by the accused to the witness shortly after the occurrence also would form part of the transaction and so it has to be considered to be the relevant facts and circumstances of the case."

18. Therefore we hold that the statement made by appellant to P.W. 1 immediately after the occurrence without any long time lag would be admissible under Section 6 of the Evidence Act."

Reliance was also placed on decision rendered in *Gentela Vijaya Vardhan Rao v. State of A.P.,* 1996 (6) SCC 241, wherein this Court held, that the principle of law embodied in Section 6 of the Evidence Act, is expressed as "res gestae". The rule of "res gestae", it was held, is an exception to the general rule, that hearsay evidence is not admissible. The rationale of making certain statements or facts admissible under Section 6 of the Evidence Act, it was pointed out, was on account of spontaneity and immediacy of such statement or fact, in relation to the "fact in issue". And thereafter, such facts or statements are treated as a part of the same transaction. In other words, to be relevant under Section 6 of the Evidence Act, such statement must have been made contemporaneously with

the fact in issue, or at least immediately thereupon, and in conjunction therewith. If there is an interval between the fact in issue, and the fact sought to be proved, then such statement cannot be described as falling in the "res gestae" concept. Reliance from the aforesaid judgment was placed on the following observations:

> "15. The principle or law embodied in Section 6 of the Evidence Act is usually known as the rule of res gestae recognized in English Law. The essence of the doctrine is that fact which, though not in issue, is so connected with the fact in issue "as to form part of the same transaction" becomes relevant by itself. This rule is, roughly speaking, an exception to the general rule that hearsay evidence is not admissible. The rationale in making certain statement or fact admissible under Section 6 of the Evidence Act is on account of the spontaneity and immediacy of such statement or fact in relation to the fact in issue. But it is necessary that such fact or statement must be part of the same transaction. In other words, such statement must have been made contemporaneous with the acts which constitute the offence or at least immediately thereafter. But if there was an interval, however slight it may be, which was sufficient enough for fabrication then the statement is not part of res gestae. In *R. v. Lillyman* (1896) 2 Q.B. 167 a statement made by a raped woman after the ravishment was held to be not part of the res gestae on account of some interval of time lapsing between the act of rape and the making of the statement. Privy Council while considering the extent upto which this rule of res gestae can be allowed as an exemption to the inhibition against near say evidence, has observed in *Teper v. R.* (1952) 2 All E.R. 447, thus :

> "The rule that in a criminal trial hearsay evidence is admissible if it forms part of the res gestae is based on the propositions that the human utterance is both a fact and a means of communication and that human action may be so interwoven with words that the significance of the action cannot be understood without the correlative words and the dissociation of the words from the action would impede the discovery of the truth. It is essential that the words sought to be proved by hearsay should be, if not absolutely contemporaneous with the action or event, at least so clearly associated with it that they are part of the thing being done, and so an item or part of the real evidence and not merely a reported statement."

The correct legal position stated above needs no further elucidation."

29. We have examined the issue of admissibility of the deposition of the witnesses at serial nos. 63 to 66 with reference to the reason for which they are desired to be summoned as defence witnesses. We may first extract Section 6 of the Evidence Act hereunder:

> **"6. Relevancy of facts forming part of same transaction -** Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant, whether they occurred at the same time and place or at different times and places.
>
> Illustrations
>
> (a) A is accused of the murder of B by beating him. Whatever was said or done by A or B or the by-standers at the beating, or so shortly before or after

> is as to from part of the transaction, is a relevant fact.
>
> (b) A is accused of waging war against the Government of India by taking part in an armed insurrection in which property is destroyed, troops are attacked and goals are broken open. The occurrence of these facts is relevant, as forming part of the general transaction, though A may not have been present at all of them.
>
> (c) A sues B for a libel contained in a letter forming part of a correspondence. Letters between the parties relating to the subject out of which the libel arose, and forming part of the correspondence in which it is contained, are relevant facts, though they do not contain the libel itself.
>
> (d) The question is whether certain goods ordered from B were delivered to A. the goods were delivered to several intermediate persons successively. Each delivery is a relevant fact."

In our considered view, the test to determine admissibility under the rule of "res gestae" is embodied in words "are so connected with a fact in issue as to form a part of the same transaction". It is therefore, that for describing the concept of "res gestae", one would need to examine, whether the fact is such as can be described by use of words/phrases such as, contemporaneously arising out of the occurrence, actions having a live link to the fact, acts perceived as a part of the occurrence, exclamations (of hurt, seeking help, of disbelief, of cautioning, and the like) arising out of the fact, spontaneous reactions to a fact, and the like. It is difficult for us to describe illustration (a) under Section 6 of the Evidence Act, specially in conjunction with the words "are so connected with a fact in issue as to form a part of the same transaction", in a manner differently from the approach characterized above. We are

satisfied, that the confessional statements recorded by the accused (Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah) in Special Case no. 4 of 2009 to the witnesses at serial nos. 63 to 66 do not satisfy the ingredients of the rule of "res gestae" incorporated in Section 6 of the Evidence Act. This is so because the statements made by Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah, cannot be said to have contemporaneously arisen along with the bomb blasts of 11.7.2006, which is the "fact in issue". The confessional statements of the accused (Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah) in Special Case no. 4 of 2009 cannot be perceived to be part of the said "fact in issue". The statements made by Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah are most certainly not, spontaneous reactions arising out of the bomb blasts of 11.7.2006. The statements under reference are not reactions of the kind referred to above. Our above inferences are fully substantiated, if examined in conjunction with the legislative illustrations incorporated under Section 6 of the Evidence Act.

30. It is not necessary for us to further examine, while dealing with the present controversy, whether a confessional statement of an occurrence could/would fall within the realm/ expanse of the rule of "res gestae", in a given exigency. We, therefore, refrain from recording any conclusions thereon, while dealing with the instant controversy, because such an issue does not arise herein.

31. We shall now endeavour to determine, whether the statements made by the accused (Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah) in Special Case no. 4 of 2009, to the witnesses at serial nos. 64 to 66 are admissible through the said witnesses (at serial nos. 64 to 66) under Section 11 of the Evidence Act. It is pointed out by learned counsel representing the appellant, that in law there is a clear distinction between the "existence of a fact", and "a

statement as to its existence". The evidence of the accused persons in Special Case no.4 of 2009 before the court admitting their guilt would be, according to learned counsel, evidence about "the existence of the fact" i.e., their culpability and/or responsibility for the bomb blasts of 11.7.2006. The evidence of the police officers, it was submitted, is not about the existence of such fact, but is about recording "a statement as to its existence". It is therefore clear, according to learned counsel, that the evidence of the police officers would not be permissible under Section 11 of the Evidence Act, because the evidence of the witnesses at serial nos. 63 to 66 fall in the latter category of "a statement about the existence of a fact". Moreover, it is contended, that it would be clearly hit by the "rule of hearsay".

32. The second contention advanced on behalf of the learned counsel for the petitioner was aimed at determining the relevance of the witnesses at serial nos. 63 to 66, with reference to Section 11 of the Evidence Act. According to the learned counsel for the appellant, Section 11 makes the "existence of facts" relevant and admissible, and not "a statement as to such existence". For this learned counsel for the appellant placed reliance on Munna Lal v. Kameshwari, AIR 1929 Oudh 113. In this case the question was, whether the defendant no.3 was a major when he executed the disputed mortgage deed. The evidence sought to be given comprised of two documents i.e., Exhibit A-10 and A-11. These documents were held to be inadmissible by the trial court. Exhibit A-10 was the certified copy, of a statement made by defendant no.3 in the Revenue Court on 16.2.1925; and Exhibit A-11 was the statement of the mother of defendant no. 3, before the Revenue Court, on the same day. In both the statements the age of defendant no. 3 was stated as 21 years. The High Court held, that these statements could not be admitted, as they were statements of living persons, who had not been examined as witnesses in the case. If they had been examined, their statements might have been admissible, under the Evidence Act (either in corroboration, or in contradiction of the statements

so made). Since neither defendant no. 3, nor the mother of defendant no. 3, were examined as witnesses, therefore, the statements were considered as not admissible. The High Court however further held, that both the persons being living persons, their statements recorded earlier (on 16.2.1925) could not have been considered admissible under Section 32(5) of the Evidence Act. The High Court also rejected the contention, that the aforesaid statements were admissible under Section 11 of the Evidence Act. The court held, that if the said statements could also not be admitted under Section 32, then they could also not be admitted under Section 11. Learned counsel for the appellant, placed reliance on the following observations recorded in the judgment:

> "It was contended that two documents which are Exs. A-10 and A-11 are admissible in evidence and should not have been rejected by the learned Additional District Judge as irrelevant and inadmissible in evidence. Ex.A-10 is a certified copy of a statement made by defendant 3, the father of the plaintiff-respondent, in the revenue Court on 16th February 1925. Ex.A-11 is the statement of the mother of defendant 3 also made in the revenue Court on the same date, i.e., 16th February, 1925. In both these statements the age of defendant 3 is stated to have been at the time of the statements 21 years. We do not see how any of these statements can be admitted in evidence since we are of the opinion that they are statements of living persons who have not been examined as witnesses in the case. If they had been examined as such the statements might have been admissible under the Evidence Act either in corroboration of the statement made by them in Court as witnesses or in contradiction of the statements so made. We, however, find that neither defendant 3 was put into the witness-box, nor was the mother of defendant 3 examined as a witness in the case. It was also admitted that both the persons being living persons their statements could not have been considered to have been admissible

> under S.32, Cl.(5), Evidence Act. It was, however, contended by the learned counsel for the appellant that these statements were admissible under S.11, Evidence Act. We are of opinion that before a fact can be considered to be relevant under S.11 of the Act it must be shown that it is admissible. It would be absurd to hold that every fact, which even if it be inadmissible and irrelevant, would be admissible under S.11. We are supported in this view by the observations of their Lordships of the Allahabad High Court in Bala Ram v. Mahabir Singh, (1912) 34 All.341. An attempt was made in that case, as has been done in this case, to admit in evidence the deposition made by a person who though deceased, did not fall within the provisions of S.32, Evidence Act, on the ground that the provisions of S.11 of the Act would make such evidence admissible. It was observed by their Lordships that this argument could not be accepted because if a particular deposition could not be admitted under the provisions of S.32, Evidence Act, it could not be held to be admissible under S.11 of the said Act. We are therefore of opinion that the learned Additional District Judge was correct in holding that Exs. A-10 and A-11 which are statements of living persons who have not been examined as witnesses in this case are inadmissible in evidence and cannot be relied upon in proof of the allegations of the defendants appellants that defendant 3 was a major at the time when he executed the deed."

In order to substantiate the same contention, reliance was also placed on the decision rendered by the Allahabad High Court in *Mt. Naima Khatun v. Basant Singh,* AIR 1934 Allahabad 406. It was submitted, that the High Court had concluded in the aforesaid judgment, that a statement which is not admissible under Section 32 of the Evidence Act, would also not be admissible under Section 11. And further, that Section 11 makes the "existence of fact" admissible, and not "a statement

as to its existence". Our attention was invited to the following observations recorded in the judgment relied upon:

> "The deed of adoption was executed by the defendant's adoptive mother, Rani Bishen Kuer, and bears her signature in Gurumukhi. The endorsement of the Sub-Registrar says that she was a purdanasin lady and admitted the execution and completion of the document from behind the purdah of a wooden door leaf. In this document she refers to the fact of having adopted the boy, and that he would be the owner of the entire property of her husband like the begotten son of her husband. She also states that she had performed the adoption ceremonies according to the custom prevailing in her husband's family, and further states "at present Basant Singh aforesaid is about one and a half years old." The lady is dead and cannot now be called. The condition required in the opening portion of Section 32, Evidence Act, which alone is relied upon for purposes of admissibility, is therefore fulfilled. The learned advocate for the respondent strongly argues that this document falls within Sub-section 5 of Section 32, and that the statement, inasmuch as it relates to the existence of relationship by blood and adoption, made by a person having a special means of knowledge and at a time when no question in dispute had arisen, was admissible in evidence. There can be no doubt that the rule of English Law is particularly strict, and the admission of hearsay evidence in pedigree cases is confined to the proof of pedigree and does not apply to proof of the facts which constitute a pedigree, such as birth, death and marriage, when they have to be proved for other purposes. In *Haines v. Guthrie* (1883) 13 Q.B.D. 818 an affidavit filed by the defendant's father stating the date of the defendant's birth in an action to which the plaintiff had not been a party was held inadmissible as evidence of the age of the defendant in support of his defence. In India we have Section 32, Evidence Act, which does not seem to be so

> strict. It is however clear that if a statement does not fall within Section 32, it could not be admissible under Section 11 of the Act: *Bela Ram v. Mahabir Singh* (1912) 34 All. 341 and *Munna Lal v. Kameshari Dat A.I.R.* 1929 Oudh 113. Obviously there is a difference between the existence of a fact and a statement as to its existence. Section 11 makes the existence of facts admissible, and not statements as to such existence, unless of course the fact of making that statement is itself a matter in issue."

Learned counsel for the appellant also placed reliance on *A.PL.S.V.L. Sevugan Chettiar v. Raja Srimathu Muthu Vijaya Raghunath,* AIR 1940 Madras 273, wherein it has been held, that Section 11 must be read subject to the other provisions of the Act, and that, a statement not satisfying the conditions laid down in Section 32 cannot be admitted under Section 11, merely on the ground, that if admitted it may probabilise or improbabilise a fact in issue or a relevant fact. Reference was made to the following observations noted therein:

> "11. We may here refer to one other set of documents relied on by the defendants which if admissible, will be very strong evidence in support of the defendants' case. Exs. 1, 1-a, 4, 5 and 6 are a group of documents relating to plots adjacent to the pond marked Neeranikuttai, just to the west of the point marked J-l in Ex. L. The bearing of these documents on the present controversy is that in all of them the property dealt with is described as situate in Iluppakkudi. If they are admissible, they will cearly show that Iluppakkudi limits extended even further south of the line fixed by the appellate survey officer. The learned Subordinate Judge has rejected these documents as irrelevant. Mr. Eajah Ayyar has strongly contested this view of the lower Court. He maintained that they must be held to be admissible under Sections 11 and 13, Evidence Act. The decisions referred to in para. 613 of Taylor on Evidence would support the view that they may be

admissible even under Clause 4 of Section 32, Evidence Act, as statements relating to a matter of public or general interest, namely village boundaries. But in view of the observations of their Lordships of the Judicial Committee in *Subramanya Somayajulu v. Sethayya* (1923) 10 A.I.R. Mad. 1 as to the scope of this clause, we do not feel ourselves at liberty to follow the English cases. Mr. Rajah Aiyar contended that the documents may fall under Clause 3 of Section 32. We are unable to accede to this contention. As regards Section 11, it seems to us that Section 11 must be read subject to the other provisions of the Act and that a statement not satisfying the conditions laid down in Section 32 cannot be admitted merely on the ground that, if admitted, it may probabilize or improbabilize a fact in issue or a relevant fact."

Our attention was also drawn to the decision rendered by the Bombay High Court in *R.D. Sethna v. Mirza Mahomed Shrazi* (No.4), (1907) 9 Bombay Law Reporter 1047, wherein it was held as under:

"….. There is a test, a simple and a sufficient test, which reasonably applied yields consistent and intelligible results. Section 32 imposes restrictions upon the admissibility of statements made by persons who cannot be brought before the Court to give their own evidence. The object of those restrictions and the reason for them are plain. The basic: principle of legal evidence being that the Court must always have the best, it follows that where persons can be, they must be brought before the Court to tell what they know at first hand. Their veracity can then be best tested by the art of cross-examination. Where however witnesses cannot be brought before the Court, their previous statements are at best indirect evidence of a kind that a Court would not, except under necessity, receive at all. The conditions which when compelled by necessity to take this evidence or none, are imposed upon its admissibility

plainly aim at affording some guarantee of its truth. As there is to be no chance of testing the man by cross-examination his statement will not be admitted unless it has been made under conditions which, looking to the ordinary course of human affairs, raise pretty strong presumptions that it was a true statement. Thus the whole scope and object of Section 32 centre upon securing the highest degree of truth possible in the circumstances for the statement. And it follows that where the person tendering such a statement is indifferent as to its truth or falsehood there is nothing to bring that section into play. Briefly the test whether the statement of a person who is dead or who cannot be found is relevant under Section 11 and admissible under that section, (presuming of course that it is in other respects within the intention of the section) although it would not be admissible under Section 32 is this. It is admissible under Section 11 when it is altogether immaterial whether what the dead man said was true or false, but highly material that he did say it. In these circumstances no amount of cross-examination could alter the fact, if it be a fact that he did say the thing and if nothing more is needed to bring the tiling said in under Section 11, then the case is outside Section 32. ….."

Likewise, while referring to the decision in *Nihar Bera v. Kadar Bux Mohammed,* AIR 1923 Calcutta 290, it was submitted, that recitals (statements made in a document) would not become a part of evidence, unless the person(s) making the recital(s) is/are brought before the Court when such a person is alive. In the present case also, it was submitted, that the accused in Special Case no.4 of 2009 who had made the confessional statements, are living persons, and unless they are examined, there is no question of accepting their confessional statement. In this behalf, learned counsel relied upon the following conclusions recorded in the aforesaid judgment :

"In the second place, it has been urged against the

judgment of the Subordinate Judge that he placed reliance upon recitals in a deed of release executed by Nanu (the son of Kanu and brother of the two plaintiffs) in favour of the defendant. No doubt the fact that Nanu executed a deed of release constitutes a transaction which is relevant for the purpose of investigation of the question in controversy. But the recitals in the document do not become a part of the evidence. They are assertions by a person who is alive and who might have been brought before the Court if either of the parties to the suit had so desired. This distinction is frequently overlooked and when a document has been admitted in evidence as evidence of a transaction the parties are often apt to refer to the recitals therein as relevant evidence."

33. Before dwelling on the issue in hand, it is necessary to extract herein Section 11 of the Evidence Act. The same is accordingly reproduced hereunder:-

"11. When facts not otherwise relevant become relevant - Facts not otherwise relevant, are relevant-

(1) if they are inconsistent with any fact in issue or relevant fact;

(2) if by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable.

Illustrations

(a) The question is, whether A committed a crime at Calcutta on a certain day.

The fact that, on that day, A was at Lahore is relevant.

The fact that, near the time when the crime was

committed, A was at a distance from the place where it was committed, which would render it highly improbable, though not impossible, that he committed it, is relevant.

(b) The question is, whether A committed a crime.

The circumstances are such that the crime must have been committed either by A, B, C or D. Every fact which shows that the crime could have been committed by no one else and that it was not committed by either B, C or D is relevant."

A perusal of Section 11 aforesaid reveals, that facts inconsistent with "facts in issue" are included in the realm of relevance. Likewise, facts which make the existence or non-existence of a "fact in issue" highly probable or improbable, have also been included in the realm of relevance. Insofar as the present controversy is concerned, it is the contention of the learned counsel for the accused-respondents, that the confessional statements made by the accused (Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah) in Special Case no. 4 of 2009, to the witnesses at serial nos. 64 to 66, would positively bring the said confessional statements within the realm of relevance, since the said confessions would be clearly inconsistent with the culpability of the accused in Special Case no. 21 of 2006. It was submitted at the behest of the accused-respondents, that even if there was some degree of variance in assuming the aforesaid inference, the confessional statements made by the accused (Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah) in Special Case no. 4 of 2009 would go a long way, to make the existence of culpability of the accused-respondents in Special Case no. 21 of 2006 highly improbable. Thus viewed, it was strongly canvassed at the hands of the learned counsel representing the accused-respondents, that the High Court was fully justified in allowing the accused-respondents to substantiate the confessional statements made by the accused

(Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah) in Special Case no. 4 of 2009 through the witnesses at serial nos. 63 to 66.

34. We have given our thoughtful consideration to the plea raised at the hands of the accused-respondents under Section 11 of the Evidence Act. There can certainly be no doubt about the relevance of the confessional statements made by the accused (Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah) in Special Case no. 4 of 2009, as they would clearly demonstrate the inconsistency of the case set up by the prosecution against the accused-respondents in Special Case no. 21 of 2006. In such an eventuality, there would also be no doubt, that the prosecution case would be rendered highly improbable. The only serious concern however, to our mind, is whether the said evidence is admissible, as is the case set up by the accused-respondents, through the witnesses at serial nos. 63 to 66. Insofar as the instant aspect of the matter is concerned, reference may be made to Section 60 of the Evidence Act, which is being extracted hereunder:-

> **"60. Oral Evidence must be direct -** Oral evidence must, in all cases, whatever, be direct; that is to say;
>
> If it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it;
>
> If it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it;
>
> If it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner;
>
> If it refers to an opinion or to the grounds in which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds:

> Provided that the opinion of experts expressed in any treatise commonly offered for sale, and the grounds on which such opinions are held, may be proved by the production of such treatise if the author is dead or cannot be found, or has become incapable of giving evidence, or cannot be called as a witness without an amount of delay or expense which the Court regards as unreasonable:
>
> Provided also that, if oral evidence refers to the existence or condition of any material thing other than a document, the Court may, if it thinks fit, require the production of such material thing for its inspection."

A perusal of Section 60 aforementioned leaves no room for any doubt, that oral evidence in respect of a fact, must be of a primary nature. It would be evidence of a primary nature, if it satisfies the state of facts described as "direct" in Section 60 extracted above. Illustrative instances of direct/primary evidence, are expressed in Section 60 itself. When it pertains to a fact which can be seen, it must be the statement of the person who has himself seen it; if when it refers to a fact which can be perceived, it must be the statement of the person who has perceived it; and when it pertains to an opinion (or the basis on which that opinion has been arrived at), it must be the statement of the person who has himself arrived at such opinion. Stated differently, oral evidence cannot be hearsay, for that would be indirect/secondary evidence of the fact in issue (or the relevant fact).

35. In order to determine the truthfulness of the confessional statements which are sought to be relied upon by the accused-respondents, it is inevitable in terms of the mandate of Section 60 of the Evidence Act, that the accused (Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah) in Special Case no. 4 of 2009, who had made the said confessional statements, must themselves depose before

a Court for effective reliance, consequent upon the relevance thereof having been affirmed by us under Section 11 of the Evidence Act. We affirm the fine distinction made by the learned counsel for the accused-respondents in pointing out that the confessional statements made by Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah, would only constitute "a statement as to the existence of such fact". That would not be direct/primary evidence. The same would clearly fall in the mischief of the "hearsay rule". In order to be relevant under Section 11 of the Evidence Act, such statement ought to be "a statement about the existence of a fact", and not "a statement as to its existence". In our considered view, therefore, whilst it is permissible to the accused-respondents to rely on the confessional statements made by Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah, it is open to them to do so only through the persons who had made the confessional statements. By following the mandate contained in Section 60 of the Evidence Act, it is not open to the accused-respondents, in view of the expressed bar contained in Section 60 of the Evidence Act, to prove the confessional statements through the witnesses at serial nos. 63 to 66. In the aforesaid view of the matter, it is not possible for us to accept the plea advanced at the hands of the learned counsel for the accused-respondents, that they should be permitted to prove the confessional statements through the witnesses at serial nos. 63 to 66.

36. It is necessary in connection with the conclusion drawn by us hereinabove, to deal with the submission advanced at the hands of the learned counsel for the accused-respondents, even on the touchstone of Section 32 of the Evidence Act. Section 32 aforesaid is being extracted hereunder:-

> **"32. Cases in which statement of relevant fact by person who is dead or cannot be found, etc., is relevant -** Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found,

> or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which, under the circumstances of the case, appears to the Court unreasonable, are themselves relevant facts in the following cases:-
>
> **(1) when it relates to cause of death -** When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.
>
> Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.
>
> **(2) or is made in course of business -** When the statement was made by such person in the ordinary course of business, and in particular when it consists of any entry or memorandum made by him in books kept in the ordinary course of business, or in the discharge of professional duty; or of an acknowledgement written or signed by him of the receipt of money, goods, securities or property of any kind; or of a document used in commerce written or signed by him; or of the date of a letter or other document usually dated, written or signed by him.
>
> **(3) or against interest of maker -** When the statement is against the pecuniary or proprietary interest of the person making it, or when, if true it would expose him or would have exposed him to criminal prosecution or to a suit for damages.

(4) or gives opinion as to public right or custom, or matters of general interest - When the statement gives the opinion of any such person, as to the existence of any public right or custom or matter of public or general interest, of the existence of which, if it existed, he would have been likely to be aware, and when such statement was made before any controversy as to such right, custom or matter had arisen.

(5) or relates to existence of relationship - When the statement relates to the existence of any relationship by blood, marriage or adoption between persons as to whose relationship by blood, marriage or adoption the person making the statement had special means of knowledge, and when the statement was made before the question in dispute was raised.

(6) or is made in will or deed relating to family affairs - When the statement relates to the existence of any relationship by blood, marriage or adoption between persons deceased, and is made in any will or deed relating to the affairs of the family to which any such deceased person belonged, or in any family pedigree, or upon any tombstone, family portrait, or other thing on which such statements are usually made, and when such statement was made before the question in dispute was raised.

(7) or in document relating to transaction mentioned in section 13, Clause (a). - When the statement is contained in any deed, will or other document which relates to any such transaction as is mentioned in Section 13, Clause (a).

(8) or is made by several persons and expresses

feelings relevant to matter in question - When the statement was made by a number of persons, and expressed feelings or impressions on their part relevant to the matter in question.

Illustrations

(a) The question is, whether A was murdered by B ; or

A dies of injuries received in a transaction in the course of which she was ravished. The question is, whether she was ravished by B; or

The question is, whether A was killed by B under such circumstances that a suit would lie against B by A's widow.

Statements made by A as to the cause of his or her death, referring respectively to the murder, the rape, and the actionable wrong under consideration, are relevant facts.

(b) The question is as to the date of A's birth.

An entry in the diary of a deceased surgeon, regularly kept in the course of business, stating that, on a given day he attended A's mother and delivered her of a son, is a relevant fact.

(c) The question is, whether A was in Calcutta on a given day.

A statement in the diary of a deceased solicitor, regularly kept in the course of business, that, on a given day, the solicitor attended A at a place mentioned, in Calcutta , for the purpose of conferring with him upon specified business, is a relevant fact.

(d) The question is, whether a ship sailed from Bombay harbour on a given day.

A letter written by a deceased member of a merchant's firm, by which she was chartered, to their correspondents in London to whom the cargo was consigned, stating that the ship sailed on a given day from Bombay harbour, is a relevant fact.

(e) The question is, whether rent was paid to A for certain land.

A letter from A's deceased agent to A, saying that he had received the rent on A's account and held it at A's orders, is a relevant fact.

(f) The question is, whether A and B were legally married.

The statement of a deceased clergyman that he married them under such circumstances that the celebration would be a crime, is relevant.

(g) The question is, whether A, a person who cannot be found, wrote a letter on a certain day. The fact that a letter written by him is dated on that day, is relevant.

(h) The question is, what was the cause of the wreck of a ship.

A protest made by the Captain, whose attendance cannot be procured, is a relevant fact.

(i) The question is, whether a given road is a public way.

A statement by A, a deceased headman of the village, that the road was public, is a relevant fact.

(j) The question is, what was the price of grain on a certain day in a particular market. A statement of

the price, made by a deceased banya in the ordinary course of his business is a relevant fact.

(k) The question is, whether A, who is dead, was the father of B.

A statement by A that B was his son, is a relevant fact.

(l) The question is, what was the date of the birth of A.

A letter from A's deceased father to a friend, announcing the birth of A on a given day, is a relevant fact.

(m) The question is, whether, and when, A and B were married.

An entry in a memorandum-book by C, the deceased father of B, of his daughter's marriage with A on a given date, is a relevant fact.

(n) A sues B for a libel expressed in a painted caricature exposed in a shop window. The question is as to the similarity of the caricature and its libellous character. The remarks of a crowd of spectators on these points may be proved."

According to the learned counsel for the accused-respondents, Section 32 expressly legitimises hearsay evidence pertaining to the cause of a person's death, or the circumstances of the transaction which resulted in a person's death. Whilst the aforesaid submission is correct, it is not possible for us to accept the same as extendable, to the present case.

37. A perusal of Section 32 reveals, that it is permissible, while leading evidence relating to the cause of a person's death or relating to the circumstances which resulted in his death, to

produce in evidence statements, written or verbal, made by a person who has since died, or by the persons who cannot be found, or by those who have become incapable of giving evidence, or by those whose attendance cannot be procured without an amount of delay. It is clear, that secondary evidence is permissible when the issue relates to the cause of a person's death, or the circumstances of a transaction which resulted in his death. But such permissibility, would extend only to the exigencies expressly enumerated in Section 32 of the Evidence Act. The situations wherein secondary evidence is permissible under Section 32 of the Evidence Act include statements made by persons who have since died, or statements made by persons who cannot be found, or statements made by persons who have become incapable of giving evidence, or statements made by persons who cannot be procured without an amount of delay or expense. Neither of these exigencies exists insofar as the present controversy is concerned. The authors of the confessional statements (Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah) in Special Case no. 4 of 2009, are very much available and their presence can be procured by the accused-respondents to be presented as defence witnesses on their behalf. In the aforesaid view of the matter, it is not possible for us to accept, that the accused-respondents can place reliance on Section 32 of the Evidence Act, in order to lead evidence in respect of the confessional statements (made by Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah), by recording evidence to the statements of the witnesses at serial nos. 63 to 66.

38. It is also essential to notice herein, that in order to render Section 32 of the Evidence Act, admissible for recording the statements of witnesses at serial nos. 63 to 66, in lieu of the confessional statements made by Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah, learned counsel for the accused-respondents had placed emphatic reliance on Article 20 of the Constitution of India. Article 20 aforementioned is reproduced hereunder:-

"20. Protection in respect of conviction for offences-

(1) No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the Act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.

(2) No person shall be prosecuted and punished for the same offence more than once.

(3) No person accused of any offence shall be compelled to be a witness against himself."

Relying on sub-Article (3) of Article 20, it was the contention of the learned counsel for the accused-respondents, that since no accused can be compelled to be a witness against himself, it would not be open to the accused-respondents to summon Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah, and thereby compel them to be witnesses against themselves. In that sense, it was submitted, that the authors of the confessional statements must be deemed to be persons incapable of giving evidence and/or persons whose attendance cannot be procured for deposition, during the trial of Special Case no. 21 of 2006.

39. The plea advanced at the hands of the learned counsel for the accused-respondents, as has been noticed in the foregoing paragraph, is clearly not available to the accused-respondents in view of the protection afforded to a witness who would find himself in such a peculiar situation under Section 132 of the Evidence Act. Section 132 of the Evidence Act is being extracted hereunder:-

"132. Witness not excused from answering on ground that answer will criminate - A witness shall not be excused from answering any question

as to any matter relevant to the matter in issue in any suit or in any civil or criminal proceeding, upon the ground that the answer to such question will criminate, or may tend directly or indirectly to criminate, such witness, or that it will expose, or tend directly or indirectly to expose, such witness to a penalty or forfeiture of any kind:

Proviso

Provided that no such answer, which a witness shall be compelled to give, shall subject him to any arrest or prosecution, or be proved against him in any criminal proceeding, except a prosecution for giving false evidence by such answer."

Without stating anything further, we are satisfied to record, that Section 132 of the Evidence Act clearly negates the basis of the submission, adopted by the learned counsel for the accused-respondents, for being permitted to lead secondary evidence to substantiate the confessional statements made by Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah. Accordingly, we hereby reiterate the conclusion drawn by us hereinabove, namely, that the confessional statements made by the accused (Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah) in Special Case no. 4 of 2009 cannot be proved in evidence, through the statements of the witnesses at serial nos. 63 to 66. Needless to mention, that the authors of the confessional statements (Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah) may be produced as defence witnesses by the accused-respondents, for their statements would fall in the realm of relevance under Section 11 of the Evidence Act. And in case Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah appear as defence witnesses in Special Case no. 21 of 2006, the protection available to a witness under Section 132 extracted above, would also extend to them, if they

are compelled to answer questions posed to them, while appearing as defence witnesses in Special Case no. 21 of 2006.

40. It is also necessary to examine the issue in hand with reference to the provisions of the MCOCA. The controversy pertaining to the relevance of the statement of witnesses at serial nos. 63 to 66, has to be understood with reference to Section 18 of the MCOCA. We shall now record our determination on the scope and effect of Section 18 of the MCOCA. Section 18 aforementioned is being extracted hereunder:

"Section 18 - Certain confessions made to police officer to be taken into consideration-- (1) Notwithstanding anything in the Code or in the Indian Evidence Act, 1872 (I of 1872), but subject to the provisions of this section, a confession made by a person before a police officer not below the rank of the Superintendent of Police and recorded by such police officer either in writing or on any mechanical devices like cassettes, tapes or sound tracks from which sounds or images can be reproduced, shall be admissible in the trial of such person or co-accused, abettor or conspirator:

Provided that, the co-accused, abettor or conspirator is charged and tried in the same case together with the accused.

(2) The confession shall be recorded in a free atmosphere in the same language in which the person is examined and as narrated by him.

(3) The police officer shall, before recording any confession under sub-section (1), explain to the person making it that he is not bound to make a confession and that, if he does so, it may be used as evidence against him and such police officer shall not record any such

confession unless upon questioning the person making it, he is satisfied that it is being made voluntarily. The concerned police officer shall, after recording such voluntary confession, certify in writing below the confession about his personal satisfaction of the voluntary character of such confession, putting the date and time of the same.

(4) Every confession recorded under sub-section (1) shall be sent forthwith to the Chief Metropolitan Magistrate or the Chief Judicial Magistrate having jurisdiction over the area in which such confession has been recorded and such Magistrate shall forward the recorded confession so received to the Special court which may take cognizance of the offence.

(5) The person whom a confession had been recorded under sub-section (1) shall also be produced before the Chief Metropolitan Magistrate or the Chief Judicial Magistrate to whom the confession is required to be sent under sub-section (4) alongwith the original statement of confession, written or recorded on mechanical device without unreasonable delay.

(6) The Chief Metropolitan Magistrate or the Chief Judicial Magistrate shall scrupulously record the statement, if any, made by the accused so produced and get his signature and in case of any complaint of torture, the person shall be directed to be produced for medical examination before a Medical Officer not lower in rank than of an Assistant Civil Surgeon."

Section 18 of the MCOCA through a non-obstante clause, overrides the mandate contained in Sections 25 and 26 of the Evidence Act, by rendering a confession as admissible, even if it is made to a police officer (not below the rank of Deputy Commissioner of Police). Therefore, even though Sections 25 and 26 of the Evidence Act render inadmissible confessional statements made to a police officer, or while in police custody,

Section 18 of the MCOCA overrides the said provisions and bestows admissibility to such confessional statements, as would fall within the purview of Section 18 of the MCOCA. It is however relevant to mention, that Section 18 of the MCOCA makes such confessional statements admissible, only for "the trial of such person, or co-accused, abettor or conspirator". Since Section 18 of the MCOCA is an exception to the rule laid down in Sections 25 and 26 of the Evidence Act, the same will have to be interpreted strictly, and for the limited purpose contemplated thereunder. The admissibility of a confessional statement would clearly be taken as overriding Sections 25 and 26 of the Evidence Act for purposes of admissibility, but must mandatorily be limited to the accused-confessor himself, and to a co-accused (abettor or conspirator). It is not the contention of the learned counsel for the accused-respondents that the persons who had made the confession (Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah) before witnesses at serial nos. 64 to 66 are the accused themselves along with the co-accused (abettor or conspirator) in Special Case no.21 of 2006. It is therefore apparent, that the ingredients which render a confessional statement admissible under Section 18 of the MCOCA are not satisfied in the facts of the present case. For that matter Section 18 of the MCOCA, has to be viewed in the same manner, as we have recorded our analysis of Section 15 of the TADA herein above. In the aforesaid view of the matter, it is imperative for us to conclude, that Section 18 of the MCOCA cannot constitute the basis of relevance of the confessional statements made by the accused (Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah) in Special Case no. 4 of 2009, to the case in hand. It is therefore not possible for us to accept the admissibility of the witnesses at serial nos. 63 to 66 in so far as Special Case no. 21 of 2006 is concerned.

41. One of the considerations which weighed heavily with the High Court in setting aside the order of the MCOCA Special Court dated 1.8.2012, whereby the request of the accused-

respondents to summon witnesses at serial nos. 63 to 66 as defence witnesses was declined, stands highlighted by the High Court in paragraph 29 (of the impugned order dated 26.11.2012). Relevant part of paragraph 29 aforementioned is being reproduced hereunder:

> "29. The absurdity of such reasoning does not end here. If that the concerned Dy. Commissioners of Police would not be in a position to state 'whether the facts stated in such confessions were true' is a proper ground to disallow their evidence, how can their evidence be given in MCOC Special Case No.4 of 2009? How can they, in that case would be in a position to state so? This problem will come in all the confessions, as the truth of the facts stated in the confession will be known to the confessor, and not to the person to whom it is made. Such person only gives evidence of the fact that a confession was made, and it is the court that decides whether the fact of confession having been made is true and also whether the facts stated in the confession are true. Confessions are treated as circumstantial evidence of the truth of the facts stated therein and it is the court that decides whether the facts stated in the confession should be believed or not in a given case. It is a matter of evaluation of evidence to be done by the Court after it is tendered. There is therefore, no substance in such contentions, which have, rightly been given up by the respondent-State, before this Court…."

In our deliberations in the preceding few paragraphs, we have brought out the scope of applicability of Section 18 of the MCOCA. It needs to be reiterated that Section 18 of the MCOCA is an exception to Sections 25 and 26 of the Evidence Act, only in a trial against an accused (or against a co-accused

- abettor or conspirator) who has made the confession. The said exemption has not been extended to other trials in which the person who had made the confession is not an accused. Since the vires of Section 18 of the MCOCA is not subject matter of challenge before us, it is imperative for us to interpret the effect of Section 18 of the MCOCA as it is.

42. Another submission advanced at the hands of the learned counsel for the accused-respondents which deserves notice was based on Sections 35 and 80 of the Evidence Act. Sections 35 and 80 aforementioned are being extracted hereunder:-

> **"35. Relevancy of entry in public record or an electronic record made in performance of duty -** An entry in any public or other official book, register or record or an electronic record, stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register, or record or an electronic record is kept, is itself a relevant fact."
>
> **80. Presumption as to documents produced as record of evidence -**
>
> Whenever any document is produced before any Court, purporting to be a record or memorandum of the evidence, or of any part of the evidence, given by a witness in a judicial proceeding or before any officer authorized by law to take such evidence, or to be statement or confession by any prisoner or accused person, taken in accordance with law, and purporting to be signed by any Judge or Magistrate, or by any such officer as aforesaid, the Court shall presume -

> that the document is genuine; that any statements as to the circumstances under which it was taken, purporting to be made by the person signing it, are true, and that such evidence, statement or confession was duly taken."

43. While endeavouring to determine the viability of the production of the witnesses at serial nos. 63 to 66 as defence witnesses, it is important to understand why the aforesaid witnesses are sought to be examined as defence witnesses. The instant aspect of the matter has been dealt with by the MCOCA Special Court in paragraph 5 (of its order dated 1.8.2012) wherein the submission of the counsel representing the accused-respondents was projected as under:

> "In the confession, there is a reference to the blasts in Mumbai after 2005. He gave example stating that in a case where it is alleged that 'A' has committed the blast and he is praying for documents of accused 'B' in some other trial to prove his innocence. 'B' has admitted his guilt in the other case and has also admitted that he has committed the b last in the case of 'A'. 'A' is innocent and he has not committed the blast. In these circumstances can 'A' be hanged? He submits that the confessions are the court documents and the accused want to rely on them."

Likewise, the High Court (in the impugned order dated 26.11.2012) had noticed the averments made at the behest of the appellants before it (the accused-respondents herein) in paragraph 30 as under:

> "Again, there exists a difference between the truth of the facts contained in a confession, and the fact that a confession exists. The fact that someone else has confessed about having committed the crime with which the appellants are charged is relevant in itself. In fact, it is difficult to understand as to how the court is supposed to

> decide whether the confession is truthful or not before the evidence of such confession is given. It is interesting to note that though some arguments were advanced by the learned Advocate General to the effect that 'the fact that someone else has confessed about the same crime for which the appellants are being charged, is by itself not relevant at all unless the truth of such confession is sought to be proved,' that was not the stand of the learned Special Public Prosecutor before the Trial Court. In fact, the impugned order itself records that the objection of the Special Public Prosecutor was that if the confessions of the accused in the MCOC Special Case No.4 of 2009 is brought on record of the case against the appellants, it would be inconsistent with the guilt of the accused (paragraph no.6 of the order). It was the specific contention of the Special Public Prosecutor before the Trial Court that the appellants wanted to bring the said confession on record in the present case, because such confessions would be inconsistent with the guilt of the appellants."

It clearly emerges from the submissions advanced at the behest of the accused-respondents, that the confessions made by the accused in Special Case no.4 of 2009 are sought to be adopted for establishing the fact, that it was not the accused-respondents herein who are responsible for the seven bomb blasts in seven different first class compartments of local trains of Mumbai Suburban Railways on 11.7.2006, but it was the accused (Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah) in Special Case no. 4 of 2009 who had already confessed to the same. It is therefore apparent, that the objective of the accused-respondents is not to rely on the factum of a confessional statement having been recorded. The objective is to achieve exculpation of blameworthiness on the basis of the truth of the confessional statements made before witnesses at serial nos. 63 to 66. It needs to be kept in mind that the witnesses sought to be produced in their defence by the accused-respondents (the witnesses at serial nos. 64 to 66),

cannot vouchsafe the truth or falsity of the confessional statements made by Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah. It is indeed the persons who had made such confessions who can do so. Since it is the truthfulness of the confessional statements made before the witnesses at serial nos. 63 to 66 which is the real purpose sought to be achieved, we are of the view that only those who had made the confessional statements (Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah) can vouchsafe for the same. This can only be done under the provisions of the Evidence Act. For that the accused-respondents, can only pin their hopes on the persons who had made the confessional statements. There is certainly no escape from the above course in view of the mandate of Section 60 of the Evidence Act. The effect of Section 60 aforesaid, has been highlighted and discussed above. This would also constitute one of the reasons for accepting the contention advanced before us on behalf of State of Maharashtra. In the background of the object sought to be achieved having been clarified by us, it is apparent, that Sections 35 and 80 would be of no avail to the accused-respondents in the facts and circumstances of this case, since we have already concluded hereinabove, that the witnesses at serial nos. 63 to 66 cannot be summoned, as their evidence before the trial Court would not fall within the realm of admissibility with reference to "facts in issue" or "relevant facts".

44. From different angles and perspectives based on the provisions of the Evidence Act and MCOCA examined on the basis of submissions advanced by the learned counsel representing the rival parties, it is inevitable for us to conclude, that the accused-respondents cannot be permitted to summon the witnesses at serial nos. 63 to 66 as defence witnesses, for the specific objective sought to be achieved by them.

45. For the reasons recorded hereinabove, we are satisfied, that the impugned order dated 26.11.2012 passed by the High Court deserves to be set aside. The same is

accordingly hereby set aside. It is held, that it is not open to the accused-respondents to produce the witnesses at serial nos. 63 to 66 in order to substantiate the confessional statements made by Sadiq Israr Shaikh, Arif Badruddin Shaikh and Ansar Ahmad Badshah (the accused in Special Case no. 4 of 2009), who are not accused/co-accused in Special Case no. 21 of 2006 (out of the proceedings whereof, the instant appeal has arisen).

46. Appeal stands allowed.

B.B.B

NIRMALA J. JHALA
v.
STATE OF GUJARAT & ANR.
(Civil Appeal No. 2668 of 2005)

MARCH 18, 2013

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

Judicial service – Complaint against judicial officer – By the accused whose case she was trying – Alleging demand of illegal gratification – Enquiry Officer finding her guilty – High Court on administrative side recommended the State Government imposition of punishment of compulsory retirement – Accordingly the delinquent officer given compulsory retirement – Challenged – Division Bench of High Court rejected the challenge – On appeal, held: Imposition of punishment of compulsory retirement on the delinquent officer is not correct – Complainant was disbelieved by the Enquiry Officer as well as the High Court on various issues – The court wrongly put the burden to prove those negative circumstances on the delinquent officer, while the onus was on the department to prove the charges – In the facts of the case it could be said that the complainant had ill-will and motive to make allegations against the delinquent officer – Hence the order of punishment is set aside and the delinquent officer is honourably exonerated of all the charges – Cost imposed on the State to the tune of Rs.5 lakhs to be paid to the delinquent officer – Evidence – Burden to prove.

Judiciary – Duty of higher judiciary to protect subordinate judiciary – Held: For functioning of democracy, an independent judiciary, to dispense justice without fear and favour, High Court need to protect the honest judicial officers.

Service Law:

Departmental Inquiry – Quasi Criminal/Quasi judicial in nature – Standard of proof – Held in such cases though doctrine of proof beyond reasonable doubt does not apply, but principle of probabilities would apply.

Departmental Inquiry – Evidence /material relied on in preliminary inquiry – Also relied on in regular inquiry – Held: In absence of information in the charge-sheet that evidence/ material in preliminary inquiry would be relied on, it was not permissible to rely on the same in regular inquiry – Reliance thereon is violative of principles of natural justice – Natural Justice.

Natural Justice – Applicability of – Held: Natural justice is an inbuilt and inseparable ingredient of fairness and reasonableness – It should be strictly adheared to whenever as a result of an order, civil consequences follow – In certain factual circumstances, even non-observance of the rule would itself result in prejudice.

Judicial Review – Scope of – Held: It is circumscribed and confined to correct errors of law or procedural error, resulting in manifest miscarriage of justice or violation of principles of natural justice – However, the Court should exercise its discretion with great caution keeping in mind the larger public interest.

The appellant-delinquent officer, as Chief Judicial Magistrate, when was trying CBI case of an accused for the offence of misappropriation and embezzlement of public money. The accused filed complaint with CBI against the appellant alleging that she had demanded a sum of Rs.20,000/- on 12.8.1993 as illegal gratification through his advocate 'G', to pass order in his favour. The complaint was referred to High Court. Pursuant thereto, preliminary enquiry was conducted wherein the statements of the complainant and his advocate 'G' was recorded. The appellant was suspended and regular

enquiry was directed. Charge-sheet contained 12 charges against the appellant, the main charge being the demand of illegal gratification by the complainant. Enquiry Officer found the appellant guilty of first charge and partially guilty of the second charge. The Enquiry Report was examined by High Court on administrative side, and by a resolution recommended to the State, imposition of punishment of Compulsory retirement on the appellant. The State accordingly issued Notification giving compulsory retirement to the appellant. The appellant challenged the order, and the same was rejected by the Division Bench of High Court. Hence the present appeal.

Allowing the appeal, the Court

HELD: 1. The disciplinary proceedings are not a criminal trial, and in spite of the fact that the same are quasi-judicial and quasi-criminal, doctrine of proof beyond reasonable doubt, does not apply in such cases, but the principle of preponderance of probabilities would apply. The court has to see whether there is evidence on record to reach the conclusion that the delinquent had committed a misconduct. However, the said conclusion should be reached on the basis of test of what a prudent person would have done. [Para 6 G]

M.V. Bijlani vs. Union of India and Ors. **AIR 2006 SC 3475: 2006 (3) SCR 896;** *Narinder Mohan Arya vs. United India Insurance Co. Ltd. and Ors.* **AIR 2006 SC 1748: 2006 (3) SCR 932;** *Noor Aga vs. State of Punjab and Anr.* **AIR 2009 SC (Supp) 852: 2008 (10) SCR 379;** *Roop Singh Negi vs. Punjab National Bank and Ors.* **AIR 2008 SC (Supp) 921: 2008 (17) SCR 1476;** *Krushnakant B. Parmar vs. Union of India and Anr*. **(2012) 3 SCC 178: 2012 (3) SCR 484;** *Union of India and Ors. vs. Naman Singh Sekhawat* **(2008) 4 SCC 1: 2008 (5) SCR 137;** *Vijay Singh vs. State of U.P. asnd Ors.* **AIR 2012 SC 2840: 2012 (2) SCR 875;** *M. S. Bindra vs.*

Union of India and Ors. **AIR 1998 SC 3058: 1998 (1) Suppl. SCR 232;** *High Court of Judicature at Bombay through its Registrar vs. Udaysingh and Ors.* **AIR 1997 SC 2286: 1997 (3) SCR 803 – relied on.**

Prahlad Saran Gupta vs. Bar Council of India and Anr. **AIR 1997 SC 1338: 1997 (2) SCR 499 – distinguished.**

Harish Chandra Tiwari v. Baiju **AIR 2002 SC 548: 2002 (1) SCR 83 – referred to.**

2. A subordinate judicial officer works mostly in a charged atmosphere. He is under a psychological pressure - contestants and lawyers breathing down his neck. If the fact that he renders a decision which is resented by a litigant or his lawyer were to expose him to such risk, it will sound the death knell of the institution. "Judge bashing" has become a favourite pastime of some people. There is growing tendency of maligning the reputation of judicial officers by disgruntled elements who fail to secure an order which they desire. For functioning of democracy, an independent judiciary, to dispense justice without fear and favour is paramount. Judiciary should not be reduced to the position of flies in the hands of wanton boys. In case the High Court does not protect the honest judicial officers, the survivor of the judicial system would itself be in danger. [Paras 6(c) and (d)]

Ishwar Chand Jain vs. High Court of Punjab and Haryana and Anr. **AIR 1988 SC 1395: 1988 (1) Suppl. SCR 396;** *Yoginath D. Bagde vs. State of Maharashtra and Anr.* **AIR 1999 SC 3734: 1999 (2) Suppl. SCR 490;** *L.D. Jaikwal vs. State of U.P* **AIR 1984 SC 1374: 1984 (3) SCR 833;** *K.P. Tiwari vs. State of Madhya Pradesh* **AIR 1994 SC 1031: 1993 (3) Suppl. SCR 497;** *Haridas Das vs. Smt. Usha Rani Banik and Ors. etc.* **AIR 2007 SC 2688: 2007 (8)**

SCR 365: *In Re: Ajay Kumar Pandey* **AIR 1998 SC 3299: 1998 (2) Suppl. SCR 87 – relied on.**

3.1. Judicial review is not akin to adjudication on merit by re-appreciating the evidence as an Appellate Authority. The only consideration, the Court/Tribunal has in its judicial review, is to consider whether the conclusion is based on evidence on record and supports the finding or whether the conclusion is based on no evidence. The adequacy or reliability of the evidence is not a matter which can be permitted to be canvassed before the Court in writ proceedings. [Para III(i)]

3.2. An administrative order can be set-aside if it is based on extraneous grounds, or when there are no grounds at all for passing it or when the grounds are such that, no one can reasonably arrive at the opinion. The Court does not sit as a Court of Appeal but, it merely reviews the manner in which the decision was made. The Court will not normally exercise its power of judicial review unless it is found that formation of belief by the statutory authority suffers from malafides, dishonest/ corrupt practice. The authority must act in good faith. Neither the question as to whether there was sufficient evidence before the authority can be raised/examined, nor the question of re-appreciating the evidence to examine the correctness of the order under challenge. If there are sufficient grounds for passing an order, then even if one of them is found to be correct, and on its basis the order impugned can be passed, there is no occasion for the Court to interfere. The jurisdiction is circumscribed and confined to correct errors of law or procedural error, if any, resulting in manifest miscarriage of justice or violation of principles of natural justice. This apart, even when some defect is found in the decision-making process, the Court must exercise its discretionary power with great caution keeping in mind the larger public

interest and only when it comes to the conclusion that overwhelming public interest requires interference, the Court should intervene. [Para 6 III]

State of T.N. and Anr vs. S. Subramaniam **AIR 1996 SC 1232: 1996 SCR 968;** *R.S. Saini vs. State of Punjab* **(1999) 8 SCC 90;** *Government of Andhra Pradesh and Ors. vs. Mohd. Nasrullah Khan* **AIR 2006 SC 1214: 2006 (1) SCR 911;** *Zora Singh vs. J.M. Tandon and Ors.* **AIR 1971 SC 1537 – relied on.**

4.1. The evidence recorded in preliminary inquiry cannot be used in regular inquiry as the delinquent is not associated with it, and opportunity to cross-examine the persons examined in such inquiry is not given. Using such evidence would be violative of the principles of natural justice. The preliminary enquiry may be useful only to take a *prima facie* view, as to whether there can be some substance in the allegation made against an employee which may warrant a regular enquiry. [Paras 23 and 25]

Amlendu Ghosh vs. District Traffic Superintendent, North-Eastern Railway, Katiyar **AIR 1960 SC 992;** *Chiman Lal Shah vs. Union of India* **AIR 1964 SC 1854: 1964 SCR 190 – followed.**

Government of India, Ministry of Home Affairs and Ors. vs. Tarak Nath Ghosh **AIR 1971 SC 823: 1971 (3) SCR 715;** *Naryan Dattatraya Ramteerathakhar vs. State of Maharashtra and Ors.* **AIR 1997 SC 2148: 1996 (8) Suppl. SCR 939;** *Ayaaubkhan Noorkhan Pathan vs. State of Maharashtra and Ors.* **AIR2013 SC 58: 2012 (10) SCR 994 – relied on.**

4.2. "A *prima facie* case, does not mean a case proved to the hilt, but a case which can be said to be established, if the evidence which is led in support of the case were to be believed. While determining whether a

***prima facie* case had been made out or not, the relevant consideration is whether on the evidence led, it was possible to arrive at the conclusion in question and not whether that was the only conclusion which could be arrived at on that evidence". [Para 26]**

Martin Burn Ltd. vs. R.N. Banerjee **AIR 1958 SC 79: 1958 SCR 514;** *The Management of the Bangalore Woollen Cotton and Silk Mills Co. Ltd. vs. B. Dasappa, M.T.* **AIR 1960 SC 1352;** *State (Delhi Admn.) vs. VS.C. Shukla and Anr.* **AIR 1980 SC 1382: 1980 SCR 500;** *Dalpat Kumar and Anr. vs. Prahlad Singh and Ors.* **AIR 1993 SC 276: 1991 (3) Suppl. SCR 472;** *Cholan Roadways Ltd. vs. G. Thirugnanasambandam* **AIR 2005 SC 570: 2004 (6) Suppl. SCR 1123 – relied on.**

4.3. Admittedly, the Enquiry Officer, the High Court on Administrative side as well on Judicial side, had placed a very heavy reliance on the statement made by Advocate 'G', the complainant and that of Advocate 'P', in the preliminary inquiry before the Vigilance Officer. The Enquiry Officer, the High Court on administrative side as well as on judicial side, committed a grave error in placing reliance on the statement of the complainant as well as of Advocate 'G', recorded in a preliminary enquiry. The preliminary enquiry and its report loses significance/ importance, once the regular enquiry is initiated by issuing chargesheet to the delinquent. Thus, it was all in violation of the principles of natural justice. [Paras 19 and 29(ii)]

4.4. There is nothing on record to show that either the preliminary enquiry report or the statements recorded therein, particularly, by the complainant/accused or advocate 'G', had been exhibited in regular inquiry. In absence of information in the chargesheet that such report/statements would be relied upon against the appellant, it was not permissible for the Enquiry Officer

or the High Court to rely upon the same. Natural justice is an inbuilt and inseparable ingredient of fairness and reasonableness. Strict adherence to the principle is required, whenever civil consequences follow up, as a result of the order passed. Natural justice is a universal justice. In certain factual circumstances even non-observance of the rule will itself result in prejudice. Thus, this principle is of supreme importance. [Para 28]

S.L. Kapoor vs. Jagmohan **AIR 1981 SC 136: 1981 (1) SCR 746;** *D.K. Yadav vs. JMA Industries Ltd.* **(1983) 3 SCC 259;** *Mohd. Yunus Khan vs. State of U.P. and Ors.* **(2010) 10 SCC 539: 2010 (12) SCR 448 – relied on.**

5. The High Court failed to appreciate that the appellant had not granted long adjournments to the accused-complainant as the appellant wanted to conclude the trial at the earliest. The case of accused-complainant which was taking its time, had suddenly gathered pace, thus, he would have naturally felt aggrieved by failing to notice it. The High Court erred in recording a finding that the complainant had no ill-will or motive to make any allegation against the appellant. [Para 29(i)]

6.1. The High Court has rightly disbelieved the statement of the complainant-accused that he could hear the conversation between the appellant and advocate 'G'. The said evidence was also discarded by the Enquiry Officer. Further allegation that the appellant had threatened the said complainant-accused to withdraw the complaint was also found to be false. The entry of advocate 'G' into the chamber of the appellant on 17.8.1993, was not corroborated by any other evidence. advocate 'G' himself had also denied the same. However, the High Court has reached the conclusion by shifting the burden of proof of negative circumstances upon the appellant. The High Court has erred by holding that in

respect of the incident dated 17.8.1993 i.e. demand of amount, it was the duty of the appellant to explain the said circumstance, and that instead of giving any satisfactory explanation in respect of entry of advocate 'G', she had completely disowned and denied any such occurrence. The onus was always on the department to prove the said circumstance. The court should have also taken note of the fact, that the matter was adjourned for 28.8.1993, and being a 4th Saturday, it was a holiday. The court further committed an error by holding, that the failure to challenge the most crucial element of the evidence, regarding the incident of 17.8.1993, in respect of a demand of bribe of Rs.20,000/- fully justified the findings of the Enquiry Officer. [Para 17]

6.2. The High Court erred in shifting the onus of proving various negative circumstances as referred to hereinabove, upon the appellant who was delinquent in the enquiry. The onus lies on the department to prove the charge and it failed to examine any of the employee of the court, i.e., Stenographer, Bench Secretary or Peon attached to the office of the appellant for proving the entry of Advocate 'G' in her chamber on 17.8.1993. [Paras 29 (iii) and (iv)]

7. There is nothing on record to show that the appellant whose defence has been disbelieved in toto, had ever been given any adverse entry in her ACRs, or punished earlier in any enquiry. While she has been punished solely on uncorroborated statement of an accused facing trial for misappropriation. The complainant has been disbelieved by the Enquiry Officer as well as the High Court on various issues, particularly on the point of his personal hearing, the conversation between the appellant and Advocate 'G' on 17.8.1993, when they met in the chamber. Similarly, the allegation of the complainant, that appellant had threatened him

through his wife, forcing him to withdraw the complaint against her, has been disbelieved. The complainant as well as Advocate 'G' had been talking about the appellant's husband having collecting the amount on behalf of the appellant, for deciding the cases, though at that point of time, she was unmarried. [Paras 29 (v, vi, vii and viii)]

8. The order of punishment imposed by the High Court in compulsorily retiring the appellant is set aside. However, as the appellant has already reached the age of superannuation long ago, it is not desirable under the facts and circumstances of the case, to grant her any substantive relief, except to exonerate her honourably of all the charges, and allow the appeal with costs, which is quantified to the tune of Rs.5 lacs. The State of Gujarat is directed to pay the said cost. [Para 30]

Municipal Committee, Bahadurgarh vs. Krishnan Bihari and Ors. **AIR 1996 SC 1249: 1996 (2) SCR 827;** *Divisional Controller N.E.K.R.T.C. vs. H. Amaresh* **AIR 2006 SC 2730: 2006 (3) Suppl. SCR 585;** *U.P.S.R.T.C. vs. Vinod Kumar* **(2008) 1 SCC 115: 2007 (12) SCR 1018;** *U.P. State Road Transport Corp. vs. Suresh Chand Sharma* **(2010) 6 SCC 555: 2010 (7) SCR 239 – referred to.**

Case Law Reference:

2006 (3) SCR 896	**relied on**	**Para 6-I (A)**
2006 (3) SCR 932	**relied on**	**Para 6-I (A)**
2008 (17) SCR 1476	**relied on**	**Para 6-I (A)**
2012 (3) SCR 484	**relied on**	**Para 6-I (A)**
1997 (2) SCR 499	**distinguished**	**Para 6 B**
2002 (1) SCR 83	**referred to**	**Para 6**

2008 (10) SCR 379	**relied on**	**Para 6**
2008 (17) SCR 1476	**relied on**	**Para 6**
2008 (5) SCR 137	**relied on**	**Para 6**
2012 (2) SCR 875	**relied on**	**Para 6**
1998 (1) Suppl. SCR 232	**relied on**	**Para 6**
1997 (3) SCR 803	**relied on**	**Para 6**
1988 (1) Suppl. SCR 396	**relied on**	**Para 6-II(a)**
1999 (2) Suppl. SCR 490	**relied on**	**Para 6-II (b)**
1984 (3) SCR 833	**relied on**	**Para 6-II(c)**
1993 (3) Suppl. SCR 497	**relied on**	**Para 6-II(c)**
2007 (8) SCR 365	**relied on**	**Para 6-II(c)**
1998 (2) Suppl. SCR 87	**relied on**	**Para 6-II(c)**
1996 SCR 968	**relied on**	**Para 6-III(i)**
(1999) 8 SCC 90	**relied on**	**Para 6-III(i)**
2006 (1) SCR 911	**relied on**	**Para 6-III(i)**
AIR 1971 SC 1537	**relied on**	**Para 6-III(ii)**
1996 (2) SCR 827	**referred to**	**Para 6(IV)**
2006 (3) Suppl. SCR 585	**referred to**	**Para 6(IV)**
2007 (12) SCR 1018	**referred to**	**Para 6(IV)**
2010 (7) SCR 239	**referred to**	**Para 6(IV)**
AIR 1960 SC 992	**followed**	**Para 20**
1964 SCR 190	**followed**	**Para 21**
1971 (3) SCR 715	**relied on**	**Para 22**
1996 (8) Suppl. SCR 939	**relied on**	**Para 23**

2012 (10) SCR 994	**relied on**	**Para 24**
1958 SCR 514	**relied on**	**Para 26**
AIR 1960 SC 1352	**relied on**	**Para 26**
1980 SCR 500	**relied on**	**Para 26**
1991 (3) Suppl. SCR 472	**relied on**	**Para 26**
2004 (6) Suppl. SCR 1123	**relied on**	**Para 26**
1981 (1) SCR 746	**relied on**	**Para 28**
(1983) 3 SCC 259	**relied on**	**Para 28**
2010 (12) SCR 448	**relied on**	**Para 28**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2668 of 2005.

From the Judgments & Orders dated 25.08.2004 of the High Court of Gujarat at Ahmedabad in Special Civil Application No. 5759 of 1999.

Mahalakshmi Pavani, G. Balaji Mukesh Kumar Singh, Mahalakshmi Balaji & Co. for the Appellant.

K. Enatoli Sema, Amit Kumar Singh, Hemantika Wahi for the Respondents.

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 25.8.2004, passed in Special Civil Application No.5759 of 1999, by way of which the challenge to punishment order of compulsory retirement of the appellant has been turned down.

2. Facts and circumstances giving rise to this appeal are:

A. That the appellant had joined the Gujarat State Judicial Service in 1978, and was promoted subsequently as Civil

Judge (Senior Division) in 1992. She was posted as Chief Judicial Magistrate (Rural) in Ahmedabad. In December 1991, she was trying one Gautam Ghanshyam Jani in CBI Case No.5 of 1991 for the offence of misappropriation and embezzlement of public money. The accused filed a complaint with the CBI on 19.8.1993, against the appellant alleging that she had demanded a sum of Rs.20,000/- on 17.8.1993 as illegal gratification, to pass order in his favour, through one C.B. Gajjar, Advocate. As it was not possible for the complainant to pay the said amount, the appellant had agreed to accept the same in installments, and in order to facilitate the said complainant's efforts to arrange the said amount in part, she had even granted adjournment.

B. The said complaint filed with the CBI was referred to the High Court and in pursuance thereof, a preliminary enquiry was conducted against the appellant in which statements of various persons including C.B. Gajjar and G.G. Jani were recorded. The Court then suspended the appellant vide order dated 21.1.1994, and directed a regular enquiry appointing Shri M.C. Patel, Additional Civil Judge, City Civil Court, Ahmedabad as the Enquiry Officer.

C. A chargesheet dated 6.8.1994, containing 12 charges was served upon the appellant. One of the main charges was, the demand of illegal gratification to the tune of Rs.20,000/- from G.G. Jani through C.B. Gajjar, Advocate in lieu of favouring the complainant/accused. Another relevant charge was that a person known as "Mama" amongst the litigants, would come to her residence, accompany her to court, and collect money from litigants on her behalf and thus, she had indulged in corrupt practices.

D. During the course of the enquiry, G.G. Jani, C.B. Gajjar, P.K. Pancholi and certain other witnesses were examined by the department and in her defence, the appellant examined herself denying all the allegations made against her. The Enquiry Officer submitted his report on 24.10.1997, holding the

appellant guilty of the first charge and partially guilty of the second charge, i.e. to the extent that one person named "Mama" used to visit her quite frequently. However, it could not be proved that he had ever misused his association with the appellant in any respect. All other charges were found unsubstantiated.

E. In pursuance of the report submitted by the Enquiry Officer, the matter was examined on the administrative side by the High Court, and after meeting various legal requirements i.e. issuing show cause notice to the appellant and considering her reply, the Court vide resolution dated 12.10.1998, made a recommendation to the State that the appellant was guilty of the first charge, and thus, punishment of compulsory retirement be imposed on her. The Government accepted the same and issued a notification giving compulsory retirement to the appellant on 11.12.1998.

F. Aggrieved, the appellant challenged the said order of punishment, by filing a Special Civil Application No.5759 of 1999 before the High Court on the ground that the findings of the Enquiry Officer were perverse and based on no evidence. However, the said civil application was dismissed by the High Court, vide impugned judgment and order dated 25.8.2004.

Hence, this appeal.

3. Ms. Mahalakshmi Pavani, learned counsel appearing for the appellant, has submitted that one Gautam Ghanshyam Bhai Jani, an officer of Oriental Insurance Company at Mehasana had been involved in a CBI case for the offence punishable under Sections 406, 467 and 471 of Indian Penal Code, 1860. After investigation, a chargesheet had been filed against him in the court of the Chief Judicial Magistrate, Mirzapur in case no.5 of 1991. Shri Bhatt, the then CJM had liberally granted long adjournments to the accused complainant. The case had started in 1991, but no progress was made till 1993, as the accused-complainant had only been seeking

adjournments. The appellant had joined in the said Court as CJM in 1993, and wanted to conclude the trial, thus, she granted short adjournments. The accused/complainant was being represented by Shri Pankaj Pancholi, Advocate. He had been granted adjournments one or two times, but later on, the appellant refused to accommodate him. She hence, began examining witnesses even in the absence of the complainant's advocate. The complainant was directed/ instructed to keep his advocate present, and in the event that Shri Pankaj Pancholi was not available, to make alternative arrangement. Shri Pankaj Pancholi introduced the accused-complainant to Shri C.B. Gajjar, Advocate practicing therein. Shri Pankaj Pancholi told Shri Gajjar that as the accused-complainant was his relative, he was not in a position to ask the accused to pay fees. Thus, Shri Gajjar should ask the accused-complainant to pay a sum of Rs.20,000/- to be paid to the appellant, in order to get a favourable order. The appellant did not meet Shri Gajjar in her chamber, nor did she put up any demand. The complaint, however, was motivated as the appellant was a very strict officer. This theory of demand/bribe and further, the readiness to accept the same in installments, was a cooked up story. The findings of fact recorded by the Enquiry Officer are perverse, as Shri Gajjar, Advocate has denied meeting the appellant in her chamber. The High Court did not appreciate the evidence in correct perspective and failed to protect a honest judicial officer, which was its obligation. The punishment imposed is too severe and disproportionate to the delinquency. Therefore, the appeal deserves to be allowed.

4. Per contra, Ms. Enatoli K. Sema, learned counsel for the respondents has opposed the appeal contending that the case of demand of bribe, and an agreement to accept the same in installments, stands fully proved. Rule 6 of the Gujarat Civil Services (Discipline & Appeal) Rules, 1971, provides for major penalties in the event that a charge is proved against the delinquent, which include reduction to a lower stage in the timescale of pay for a specified period; reduction to a lower

time scale of pay; compulsory retirement; removal from service and dismissal from service. The High Court was lenient and only imposed a punishment of compulsory retirement, otherwise it was a fit case where the appellant ought to have been dismissed from service. There is ample evidence on record to establish the charge of corruption against her, which has been properly appreciated by the Enquiry Officer, as well as by the High Court. Standard of proof required in a case of Departmental Enquiry is not that of "beyond reasonable doubt", as required in a criminal trial. Moreover, the scope of judicial review is limited in such a case. Thus, no interference is called for.

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

It may be pertinent to deal with the legal issues involved herein, before dealing with the case on merits.

6. **LEGAL ISSUES:**

I. Standard of proof in a Departmental Enquiry which is Quasi Criminal/Quasi Judicial in nature:

A. In *M.V. Bijlani v. Union of India and Ors.,* AIR 2006 SC 3475, this Court held :

" … Disciplinary proceedings, however, being quasi-criminal in nature, there should be some evidences to prove the charge. Although the charges in a departmental proceedings are not required to be proved like a criminal trial, i.e., beyond all reasonable doubts, we cannot lose sight of the fact that the Enquiry Officer performs a quasi-judicial function, who upon analysing the documents must arrive at a conclusion that there had been a preponderance of probability to prove the charges on the basis of materials on record. While doing so, he cannot take into consideration any irrelevant fact. He cannot

refuse to consider the relevant facts. He cannot shift the burden of proof. He cannot reject the relevant testimony of the witnesses only on the basis of surmises and conjectures." (Emphasis added)

(See also : *Narinder Mohan Arya v. United India Insurance Co. Ltd. & Ors,* AIR 2006 SC 1748; *Roop Singh Negi v. Punjab National Bank and Ors,* AIR 2008 SC (Supp) 921; and *Krushnakant B. Parmar v. Union of India & Anr.,* (2012) 3 SCC 178)

B. In *Prahlad Saran Gupta v. Bar Council of India & Anr.,* AIR 1997 SC 1338, this court observed that when the matter relates to a charge of professional mis-conduct which is quasi-criminal in nature, it requires proof beyond reasonable doubt. In that case the finding against the delinquent advocate was that he retained a sum of Rs. 15,000/- without sufficient justification from 4-4-1978 till 2-5-1978 and he deposited the amount in the Court on the latter date, without disbursing the same to his client. The said conduct was found by this Court as "not in consonance with the standards of professional ethics expected from a senior member of the profession". On the said fact-situation, this court imposed a punishment of reprimanding the advocate concerned.

C. In *Harish Chandra Tiwari v. Baiju,* AIR 2002 SC 548, this court made a distinction from the above judgment stating the facts in the aforesaid decisions would speak for themselves and the distinction from the facts of this case was so glaring that the misconduct of the appellant in the present case was of a far graver dimension. Hence, the said decision was not of any help to the appellant for mitigation of the quantum of punishment.

D. In *Noor Aga v. State of Punjab & Anr.,* AIR 2009 SC (Supp) 852 , it was held that the departmental proceeding being a quasi judicial one, the principles of natural justice are required to be complied with. The Court exercising power of judicial

review are entitled to consider as to whether while inferring commission of misconduct on the part of a delinquent officer relevant piece of evidence has been taken into consideration and irrelevant facts have been excluded there from. Inference on facts must be based on evidence which meet the requirements of legal principles. (See also: *Roop Singh Negi v. Punjab National Bank & Ors,* AIR 2008 SC (Supp) 921; *Union of India & Ors. v. Naman Singh Sekhawat.* (2008) 4 SCC 1; and *Vijay Singh v. State of U.P. & Ors.* AIR 2012 SC 2840)

E. In *M.S. Bindra v. Union of India & Ors.,* AIR 1998 SC 3058, it was held:

"While evaluating the materials the authority should not altogether ignore the reputation in which the officer was held till recently. The maxim "Nemo Firut Repente Turpissimus" (no one becomes dishonest all on a sudden) is not unexceptional but still it is salutary guideline to judge human conduct, particularly in the field of Administrative Law. The authorities should not keep the eyes totally closed towards the overall estimation in which the delinquent officer was held in the recent past by those who were supervising him earlier. To dunk an officer into the puddle of "doubtful integrity" it is not enough that the doubt fringes on a mere hunch. That doubt should be of such a nature as would reasonably and consciously be entertainable by a reasonable man on the given material. Mere possibility is hardly sufficient to assume that it would have happened. There must be preponderance of probability for the reasonable man to entertain doubt regarding that possibility. Only then there is justification to ram an officer with the label 'doubtful integrity'."

F. In High Court of Judicature at *Bombay through its Registrar v. Udaysingh & Ors.,* AIR 1997 SC 2286, this Court held :

"The doctrine of `proof beyond doubt' has no application. Preponderance of probabilities and some material on record would be necessary to reach a conclusion whether or not the delinquent has committed misconduct."

G. In view of the above, the law on the issue can be summarised to the effect that the disciplinary proceedings are not a criminal trial, and in spite of the fact that the same are quasi-judicial and quasi-criminal, doctrine of proof beyond reasonable doubt, does not apply in such cases, but the principle of preponderance of probabilities would apply. The court has to see whether there is evidence on record to reach the conclusion that the delinquent had committed a misconduct. However, the said conclusion should be reached on the basis of test of what a prudent person would have done. The ratio of the judgment in *Prahlad Saran Gupta* (supra) does not apply in this case as the said case was of professional misconduct, and not of a delinquency by the employee.

II. <u>Duty of Higher Judiciary to protect subordinate judicial officers:</u>

(a) In *Ishwar Chand Jain v. High Court of Punjab and Haryana & Anr.,* AIR 1988 SC 1395, it was held:

"14. Under the Constitution the High Court has control over the subordinate judiciary. While exercising that control it is under a, constitutional obligation to guide and protect, judicial officers. An honest strict judicial officer is likely to have adversaries in the mofussil courts. If complaints are entertained on trifling matters relating to judicial orders …… no judicial officer would feel protected and it would be difficult for him to discharge his duties in an honest and independent manner. An independent and honest judiciary is a sine qua non for Rule of law…….. It is therefore imperative that the High Court should also take steps to protect its honest officers by ignoring ill-

conceived or motivated complaints made by the unscrupulous lawyers and litigants."

(b) In *Yoginath D. Bagde v. State of Maharashtra & Anr.,* AIR 1999 SC 3734, it was held:

"The Presiding Officers of the Court cannot act as fugitives. They have also to face sometimes quarrelsome, unscrupulous and cantankerous litigants but they have to face them boldly without deviating from the right path. They are not expected to be overawed by such litigants or fall to their evil designs."

(c) A subordinate judicial officer works mostly in a charged atmosphere. He is under a psychological pressure - contestants and lawyers breathing down his neck. If the fact that he renders a decision which is resented by a litigant or his lawyer were to expose him to such risk, it will sound the death knell of the institution. "Judge bashing" has become a favourite pastime of some people. There is growing tendency of maligning the reputation of judicial officers by disgruntled elements who fail to secure an order which they desire. For functioning of democracy, an independent judiciary, to dispense justice without fear and favour is paramount. Judiciary should not be reduced to the position of flies in the hands of wanton boys. (Vide : *L.D. Jaikwal v. State of U.P,* AIR 1984 SC 1374; *K.P. Tiwari v. State of Madhya Pradesh,* AIR 1994 SC 1031; *Haridas Das v. Smt. Usha Rani Banik & Ors., etc.* AIR 2007 SC 2688; and In Re : *Ajay Kumar Pandey,* AIR 1998 SC 3299)

(d) The subordinate judiciary works in the supervision of the High Court and it faces problems at the hands of unscrupulous litigants and lawyers, and for them "Judge bashing" becomes a favourable pastime. In

case the High Court does not protect the honest judicial officers, the survivor of the judicial system would itself be in danger.

III. Scope of Judicial Review :

(i) It is settled legal proposition that judicial review is not akin to adjudication on merit by re-appreciating the evidence as an Appellate Authority. The only consideration the Court/Tribunal has in its judicial review, is to consider whether the conclusion is based on evidence on record and supports the finding or whether the conclusion is based on no evidence. The adequacy or reliability of the evidence is not a matter which can be permitted to be canvassed before the Court in writ proceedings. (Vide: *State of T.N. & Anr v. S. Subramaniam,* AIR 1996 SC 1232; *R.S. Saini v. State of Punjab,* (1999) 8 SCC 90; and *Government of Andhra Pradesh & Ors. v. Mohd. Nasrullah Khan,* AIR 2006 SC 1214)

(ii) In *Zora Singh v. J.M. Tandon & Ors.,* AIR 1971 SC 1537, this Court while dealing with the issue of scope of judicial review, held as under:

"The principle that if some of the reasons relied on by a Tribunal for its conclusion turn out to be extraneous or otherwise unsustainable, its decision would be vitiated, applies to cases in which the conclusion is arrived at not on assessment of objective facts or evidence, but on subjective satisfaction. The reason is that whereas in cases where the decision is based on subjective satisfaction if some of the reasons turn out to be irrelevant or invalid, it would be impossible for a superior Court to find out which of the reasons, relevant or irrelevant, valid or invalid, had brought about such satisfaction. But in a case where the conclusion is based on objective facts and evidence, such a difficulty would not arise. If it is found that there was legal evidence before

the Tribunal, even if some of it was irrelevant, a superior Court would not interfere if the finding can be sustained on the rest of the evidence. The reason is that in a writ petition for certiorari the superior Court does not sit in appeal, but exercises only supervisory jurisdiction, and therefore, does not enter into the question of sufficiency of evidence."

(Emphasis added)

(iii) The decisions referred to hereinabove highlights clearly, the parameter of the Court's power of judicial review of administrative action or decision. An order can be set-aside if it is based on extraneous grounds, or when there are no grounds at all for passing it or when the grounds are such that, no one can reasonably arrive at the opinion. The Court does not sit as a Court of Appeal but, it merely reviews the manner in which the decision was made. The Court will not normally exercise its power of judicial review unless it is found that formation of belief by the statutory authority suffers from malafides, dishonest/corrupt practice. In other words, the authority must act in good faith. Neither the question as to whether there was sufficient evidence before the authority can be raised/examined, nor the question of re-appreciating the evidence to examine the correctness of the order under challenge. If there are sufficient grounds for passing an order, then even if one of them is found to be correct, and on its basis the order impugned can be passed, there is no occasion for the Court to interfere. The jurisdiction is circumscribed and confined to correct errors of law or procedural error, if any, resulting in manifest miscarriage of justice or violation of principles of natural justice. This apart, even when some defect is found in the decision-making process, the Court must exercise its discretionary power with great caution keeping in mind the larger public interest and only when it comes to the conclusion that overwhelming public interest requires interference, the Court should intervene.

IV. Punishment in corruption cases:

In *Municipal Committee, Bahadurgarh v. Krishnan Bihari & Ors.,* AIR 1996 SC 1249, this Court held as under:

"In a case of such nature - indeed, in cases involving corruption - there cannot be any other punishment than dismissal. Any sympathy shown in such cases is totally uncalled for and opposed to public interest. The amount misappropriated may be small or large; it is the act of misappropriation that is relevant."

In *Divisional Controller N.E.K.R.T.C. v. H. Amaresh,* AIR 2006 SC 2730, this court held that the punishment should always be proportionate to the gravity of the misconduct. However, in a case of corruption, the only punishment is dismissal.

Similar view has been reiterated in *U.P.S.R.T.C. v. Vinod Kumar,* (2008) 1 SCC 115; and *U.P. State Road Transport Corp. v. Suresh Chand Sharma,* (2010) 6 SCC 555.

7. The case at hand is required to be considered in light of the aforesaid settled legal propositions.

8. In the instant case, after the preliminary enquiry, when the regular enquiry was conducted, three star witnesses were examined by the department.

9. Shri G.G. Jani, complainant-accused in his examination-in-chief has deposed that he had been an employee of the Oriental Insurance Co. at Mehasana, and at the relevant time, was facing a criminal case for mis-appropriation of money, and for producing up false documents. His case was initially tried by Shri Bhatt, the then Chief Judicial Magistrate in 1991 and he happened to give him long adjournments. Later when the appellant was hearing the case, only short adjournments were granted. Pankaj Pancholi, who was practicing as an advocate in the High Court, was engaged by him. Initially he had got the

case adjourned twice, but he could not attend on the subsequent dates. As a result the appellant started examining the witnesses even in his advocate's absence. The appellant had instructed the complainant-accused to keep his advocate present, or to make an alternative arrangement. The case was fixed for 13.8.1993, and on that date, on the instructions of Shri Pancholi, Shri C.B. Gajjar, advocate came to the court. He got the complainant-accused to sign his vakalatnama. Shri C.B. Gajjar had told him not to worry as he was having very good relations with the appellant, and he would be able to get adjournments. He sought adjournment and the appellant fixed the case for 20.8.1993. Shri C.B. Gajjar called the complainant on 17.8.1993 near the chamber of the appellant in court compound at about 4 to 4.30 p.m. On reaching there he had met Shri C.B. Gajjar, who had told him that he would talk to Madam to decide the case in his favour and went to her chamber at about 5.00 p.m. The complainant remained standing outside in the lobby. The appellant was in her chamber. Shri C.B. Gajjar had then came out, after 15 minutes and told the complainant that appellant had demanded Rs.20,000/- to deliver the judgment in his favour. The complainant told him that it was a very high amount and requested Shri C.B. Gajjar to negotiate for a reasonable amount. Thereafter, Shri C.B. Gajjar again went to her chamber. At that time, the complainant was standing outside the door of the chamber. Shri Gajjar discussed his case with the appellant in a slow voice. Shri C.B. Gajjar came out and told the complainant that the amount was reasonable and he had to pay the same on 19.8.1993. The witness requested Shri Gajjar to fix the payment in instalments. Thus, it was agreed to make payment of the first instalment of Rs.5,000/- on 20.8.1993. However, the arrangement of money could not be made. The accused - complainant went to the office of the CBI on 19.8.1993 and filed a complaint.

After receiving the complaint from the complainant, the CBI tried to collect some evidence in the matter, and Shri C.B. Gajjar was invited to Yamuna Hotel, where the panchas and the

CBI people went alongwith the complainant. Shri C.B. Gajjar came there, however, he got some doubt, therefore, he asked the complainant about the identification of the persons present there and left the place immediately. The complainant also deposed about some threat given to his wife at the behest of the appellant to withdraw the complaint.

In his cross-examination, the complainant admitted that there was a room adjacent to the chamber of the appellant for the use of Stenographer, and also admitted that he did not hear the conversation made between the appellant and Shri C.B. Gajjar, advocate. What he has deposed was based on as what Shri Gajjar had told him. He replied to suggestion made to him as under:

> "Question: I say that in the case of C.B.I. against you, as your advocate being your close relative, he was not able to take the fee from you and for that reason, Advocate Shri Gajjar was also not able to take fee from you. Therefore, with a view to obtain his fee from you, whether Shri Gajjar had demanded the same using the name of the magistrate?
>
> Answer: I do not want to say anything in this regard."

10. Shri C.B. Gajjar, advocate, deposed that Shri P.K. Pancholi, advocate had told him that the complainant-accused was brother of his brother-in-law, so he could not ask him to pay any fee. Thus, it was agreed that he should ask the complainant-accused to pay Rs.20,000/-, as the amount was to be given to the appellant as a bribe to get a favourable order. Thus, in view thereof, he had told the complainant-accused that he had to pay Rs.20,000/- to the appellant to get a favourable order. In his cross-examination, he deposed as under:

> "I went to Miss Jhala's court on 13.8.1993 in morning in Gautambhai Jani's case and after that never went there. I did not go into the Chamber of Miss Jhala on 17.8.1993.

> No talk has taken place with her for money at any time. …….Miss Jhala has not made any such demand."

Shri C.B. Gajjar further admitted that the appellant was unmarried. Further, he admitted that he was called by the Vigilance Officer and he made the statement before him. He admitted his signature on the said statement and stated that it was correct.

11. Shri Pankaj K. Pancholi, advocate, did not support the case of the department, and his evidence is of no use for determination of the issue as to whether the appellant had demanded a bribe for deciding the case in favour of the complainant-accused.

12. The appellant examined herself in defence and deposed that her court was of the size of 50ft. x 30 ft. and chamber admeasured 22ft. x 14ft., and adjacent thereto, there was a chamber for Stenographer measuring 10ft. x 10ft. A person from outside could enter her chamber only through the said stenographer's room. Therefore, nobody outside the room could hear any conversation which could be had in the Magistrate chamber. Shri C.B. Gajjar, had appeared in her court in the case of the complainant-accused on 13.8.1993 only and sought adjournment. As the witness brought by CBI was present, she had given a short adjournment, and fixed the matter for 20.8.1993. She had not discussed anything with Shri Gajjar, advocate in her chamber for CBI case No. 5/1991, or any other case. There could be no talk about the demand of money for this case or any other case. Shri C.B. Gajjar had come only into the court. She had not seen Shri Gajjar on any other day, or on 17.8.1993. She had never met him other than on that date in court either in chamber or any other place. She was unmarried. She was not granting long adjournments in any case, and instead asking the parties to keep their witnesses ready.

13. There was another witness examined by the

department, namely, Jethagir, Inspector working in the Income-Tax department in the Vigilance. He deposed that he had gone out at the request of the department and met complainant-accused. He was introduced to the complainant, and was taken to the court of the appellant on 20.8.1993, but the appellant did not come to the court.

14. On the basis of the aforesaid evidence, the Enquiry Officer prepared a report Ext. 121. So far as the charge 1 is concerned, he appreciated the evidence as under:

> "Now I turn to **Shri Jani's statement before the Vigilance Officer** which was recorded on 20.9.1993. In that statement he repeated the allegations made in his complaint dated 19.8.1993 to the CBI. He added that when Shri Gajjar went again into the chamber of Miss Jhala on 17.8.1993 to make a request for instalment, he stood in front of the door near the chamber so as to able to get an idea of the talk in the chamber. **According to him, when Shri Gajjar talked about instalment Miss Jhala initially refused but when Shri Gajjar made a request, she agreed to give instalment of Rs.5,000/-.** Shri Jani then gave the following account of what happened in Yamuna Restaurant on 28.8.1993.
>
> However, the gravest and clinching circumstance against Miss Jhala is the fact that Shri Gajjar called Shri Jani to meet him outside her chamber at 4.45 p.m. on 17.8.1993 and demanded Rs.20,000/- after a meeting with her in her chamber no doubt both Miss Jhala and Shri Gajjar had denied this allegation. However, the tenor of **Shri Gajjar's statement before the Vigilance Officer** shows that the meeting in the Yamuna Hotel on 20.8.1993 was in pursuance of the previous talk between Shri Jani and Shri Gajjar. On 13.8.1993, Shri Gajjar had left the court after getting the case adjourned and there was no talk about any payment at that time. The meeting, therefore, took place after 13.8.1993 and before 19.8.1993 when Shri Jani sent to the CBI Officer and made the complaint. In the circumstances, **there is no reason to disbelieve Shri Jani's account** of what happened on 17.8.1993 given in his complaint dated 19.8.1993.
>
> In the circumstances, the assertion of Miss Jhala and Shri Gajjar that there was no meeting between them cannot be accepted as true….It may be that **Shri Jani's claim to have been standing near the chamber so as to be able to hear the talk is a subsequent improvement but the** fact that there was a meeting between Miss Jhala and **Shri Gajjar cannot be doubted and in the absence of any explanation of the reason for the meeting, the only inference that can be drawn in that Miss Jhala demand illegal gratification and Shri Gajjar conveyed the demand to Shri Jani.** This inference is strengthened by the fact that on this own say Shri Gajjar gave an assurance to Shri Jani and Shri Gajjar in the Yamuna Hotel that the work would be done and there would be no cheating. Both Shri Jani and Shri Gajjar said in their statements before the **Vigilance Officer** that Shri Gajjar could accompany him to the residence of Miss Jhala though she would not accept payment in person. According to Shri Jani, Shri Gajjar said that the **dealing is made by her husband**. It is said that **Miss Jhala is** unmarried and hence there was no question of her husband being present. But **it is possible that the payment was to be accepted by some other person** when Shri Gajjar loosely described as Miss Jhala's husband. ….It **may be** that Shri Gajjar was to retain part of the amount but there is no doubt that Miss Jhala agreed to accept illegal gratification for doing in favour to Shri Jani and Shri Gajjar's demand was in pursuance of the meeting with Miss Jhala in her chamber on 17.8.1993." (Emphasis added)

And thus, he reached the conclusion as under:

"As a result of the above discussion, I come to the conclusion that Miss Jhala demanded or agreed to accept illegal gratification through advocate Shri C.B. Gajjar for doing favour to Shri Jani at her meeting with Shri Gajjar in her chamber on 17.8.1993. The charge no.1 is answered accordingly."

15. The said report was accepted by the High Court and recommendation for imposing the punishment of compulsory retirement was made which was accepted by the State. The appellant was given compulsory retirement. The High Court on Administrative side appreciated the same evidence, and came to the conclusion as under:

"The fact that Shri Jani and Shri Gajjar had a meeting outside the chamber of the petitioner on 17.8.1993 at about 5 o'clock in the evening and that Shri Gajjar had gone inside the chamber of the petitioner twice and demanded money on her behalf from Shri Jani to decide the case in his favour has been believed by the Enquiry Officer as well as by the High Court in its recommendations. There are number of reasons why the said conclusions appear to be eminently just. At no point of time, **the petitioner has alleged any animosity or ill-will between her and Shri Jani**. Neither in the cross-examination of Shri Jani, nor in her deposition before the Enquiry Officer, the petitioner has even **remotely suggested any ill-will between them** so as to falsely implicate the petitioner.

We have also recorded earlier that Shri Gajjar and Shri Jani had assembled outside the chamber of the petitioner on 17.8.1993 and Shri Gajjar had entered the chamber of the petitioner twice when the petitioner was in her chamber demanded an amount of Rs.20,000/- on behalf of the petitioner, there is absolutely no cross-examination of Shri Jani by the petitioner. Lack of challenge to this most crucial element of the evidence fully

justified the findings of the competent authority….

…….

…….When this is so, it was the duty of the petitioner to explain the said circumstance. The petitioner instead of satisfactorily explaining Shri Gajjar entering her chamber twice on 17.8.1993 has completely disowned and denied any such occurrence….. nor has the petitioner examined any witness to show that she was not in the chamber on the said day at 5 o'clock. Being court premises, surely there would have been number of witnesses readily available such as, her Bench Clerk, her Stenographer, etc. who would be sitting outside her chamber, her Peon and number of advocates who could watch for the fact that the petitioner was not inside her chamber at 5.00 p.m. on 17.8.1993. No such attempt was made by the petitioner to examine any witness. ……the petitioner's total denial of the incident and her unwillingness or inability to explain Shri Gajjar entering her chamber on two occasions and spending considerable time inside her chamber would, in our view, be extremely damaging. Shri Gajjar's entry in her chamber on 17.8.1993 on two occasions would assume further significance in view of the fact that Shri Jani's case was earlier fixed on 13.8.1993 and thereafter adjourned to 20.8.1993 and that there was no other case of Shri Gajjar on the board before the petitioner and that, therefore, Shri Gajjar had absolutely no occasion to meet the petitioner twice inside her chamber on 17.8.1993.

(Emphasis added)

16. The Division Bench of the High Court accepted the finding arrived at by the Enquiry Officer, though admitting that there were certain discrepancies in the evidence. The court held as under:

"We have noted that the **Enquiry Officer has not**

believed the say of **Shri Jani** when he suggested **that he could hear the conversation between the petitioner and Shri Gajjar** when he was standing outside the chamber of the petitioner on 17.8.1993. The Enquiry Officer has also **discarded the possibility of the petitioner having threatened Shri Jani.** This, however, by itself would not be sufficient for us to hold that the findings of the Enquiry Officer and that of the High Court in its recommendations were based on no evidence. …….there was ample justification for coming to the conclusion that the charge of having demanded illegal gratification was proved against the petitioner.

Shri Jani in his statement at one place had stated that his case before the petitioner was fixed on 13.8.1993 and thereafter adjourned to 20.8.1993 and on 20.8.1993, it was again adjourned to 28.8.1993. We, therefore, to verify the dates, called for the calendar of the year 1993. The calendar of 1993 showed that August 28 was a 4th Saturday, and therefore a non-working day for the court.

……..We also find that the size of the paper on which the rozkam for the dates prior to 13.8.1993 was different from the size of preceding and succeeding papers. Discolouration of this page also seen different from other pages and therefore raise suspicion."

17. The High Court has rightly disbelieved the statement of the complainant-accused that he could hear the conversation between the appellant and Shri Gajjar. The said evidence was also discarded by the Enquiry Officer. Further allegation that the appellant had threatened the said complainant-accused to withdraw the complaint was also found to be false. The entry of Shri C.B. Gajjar into the chamber of the appellant on 17.8.1993, was not corroborated by any other evidence. Shri C.B. Gajjar himself had also denied the same.

More so, the High Court has reached the conclusion by

shifting the burden of proof of negative circumstances upon the appellant. The High Court has erred by holding that in respect of the incident dated 17.8.1993 i.e. demand of amount, it was the duty of the appellant to explain the said circumstance, and that instead of giving any satisfactory explanation in respect of entry of Shri C.B. Gajjar, she had completely disowned and denied any such occurrence. The onus was always on the department to prove the said circumstance. The court should have also taken note of the fact, that the matter was adjourned for 28.8.1993, and being a 4th Saturday, it was a holiday. The court further committed an error by holding, that the failure to challenge the most crucial element of the evidence, regarding the incident of 17.8.1993, in respect of a demand of bribe of Rs.20,000/- fully justified the findings of the Enquiry Officer. Again, the High Court shifted the onus to prove a negative circumstance on the appellant.

18. The appellant had not married at that point of time, as per her statement. Even this fact has been admitted by Shri C.B. Gajjar, Advocate. Given the above set of facts, the complainant is seen talking about appellant's husband for collecting money on her behalf. The High Court had failed to notice the above fact and had been making attempts to keep aside all such relevant factors in a case, where there was no direct evidence.

19. In the aforesaid backdrop, we have to consider the most relevant issue involved in this case. Admittedly, the Enquiry Officer, the High Court on Administrative side as well on Judicial side, had placed a very heavy reliance on the statement made by Shri C.B. Gajjar, Advocate, Mr. G.G. Jani, complainant and that of Shri P.K. Pancholi, Advocate, in the preliminary inquiry before the Vigilance Officer. Therefore, the question does arise as to whether it was permissible for either of them to take into consideration their statements recorded in the preliminary inquiry, which had been held behind the back of the appellant, and for which she had no opportunity to cross-examine either of them.

20. A Constitution Bench of this Court in *Amlendu Ghosh v. District Traffic Superintendent, North-Eastern Railway, Katiyar,* AIR 1960 SC 992, held that the purpose of holding a preliminary inquiry in respect of a particular alleged misconduct is only for the purpose of finding a particular fact and prima facie, to know as to whether the alleged misconduct has been committed and on the basis of the findings recorded in preliminary inquiry, no order of punishment can be passed. It may be used only to take a view as to whether a regular disciplinary proceeding against the delinquent is required to be held.

21. Similarly in *Chiman Lal Shah v. Union of India,* AIR 1964 SC 1854, a Constitution Bench of this Court while taking a similar view held that preliminary inquiry should not be confused with regular inquiry. The preliminary inquiry is not governed by the provisions of Article 311(2) of the Constitution of India. Preliminary inquiry may be held ex-parte, for it is merely for the satisfaction of the government though usually for the sake of fairness, an explanation may be sought from the government servant even at such an inquiry. But at that stage, he has no right to be heard as the inquiry is merely for the satisfaction of the government as to whether a regular inquiry must be held. The Court further held as under:

> *".....There must, therefore, be no confusion between the two inquiries and it is only when the Government proceeds to hold a departmental enquiry for the purpose of inflicting on the government servant one of the three major punishment indicated in Article 311 that the government servant is entitled to the protection of that Article, nor prior to that."* (Emphasis added)

(See also: *Government of India, Ministry of Home Affairs & Ors. v. Tarak Nath Ghosh,* AIR 1971 SC 823).

22. In *Naryan Dattatraya Ramteerathakhar v. State of*

Maharashtra & Ors., AIR 1997 SC 2148, this Court dealt with the issue and held as under:

> *".....a preliminary inquiry has nothing to do with the enquiry conducted after issue of charge-sheet. The preliminary enquiry is only to find out whether disciplinary enquiry should be initiated against the delinquent. Once regular enquiry is held under the Rules, the preliminary enquiry loses its importance and, whether preliminary enquiry was held strictly in accordance with law or by observing principles of natural justice of nor, remains of no consequence.*
>
> (Emphasis added)

23. In view of above, it is evident that the evidence recorded in preliminary inquiry cannot be used in regular inquiry as the delinquent is not associated with it, and opportunity to cross-examine the persons examined in such inquiry is not given. Using such evidence would be violative of the principles of natural justice.

24. In *Ayaaubkhan Noorkhan Pathan v. State of Maharashtra & Ors.,* AIR 2013 SC 58, this Court while placing reliance upon a large number of earlier judgments held that cross-examination is an integral part of the principles of natural justice, and a statement recorded behind back of a person wherein the delinquent had no opportunity to cross-examine such persons, the same cannot be relied upon.

25. The preliminary enquiry may be useful only to take a prima facie view, as to whether there can be some substance in the allegation made against an employee which may warrant a regular enquiry.

26. "A prima facie case, does not mean a case proved to the hilt, but a case which can be said to be established, if the evidence which is led in support of the case were to be believed. While determining whether a prima facie case had

been made out or not, the relevant consideration is whether on the evidence led, it was possible to arrive at the conclusion in question and not whether that was the only conclusion which could be arrived at on that evidence". (Vide: *Martin Burn Ltd. v. R.N. Banerjee,* AIR 1958 SC 79)

(See also: *The Management of the Bangalore Woollen Cotton and Silk Mills Co. Ltd. v. B. Dasappa, M.T.* represented by the Binny Mills Labour Association, AIR 1960 SC 1352; *State (Delhi Admn.) v. V.C. Shukla & Anr.,* AIR 1980 SC 1382; *Dalpat Kumar & Anr. v. Prahlad Singh & Ors.,* AIR 1993 SC 276; and *Cholan Roadways Ltd. v. G. Thirugnanasambandam,* AIR 2005 SC 570).

27. The issue, as to whether in the instant case the material collected in preliminary enquiry could be used against the appellant, has to be considered by taking into account the facts and circumstances of the case. In the preliminary enquiry, the department placed reliance upon the statements made by the accused/complainant and Shri C.B. Gajjar, advocate. Shri C.B. Gajjar in his statement has given the same version as he has deposed in regular enquiry. Shri Gajjar did not utter a single word about the meeting with the appellant on 17.8.1993, as he had stated that he had asked the accused/complainant to pay Rs. 20,000/- as was agreed with by Shri P.K. Pancholi, advocate. Of course, Shri C.B. Gajjar , complainant, has definitely reiterated the stand he had taken in his complaint. The chargesheet served upon the appellant contained 12 charges. Only first charge related to the incident dated 17.8.1993 was in respect of the case of the complainant. The other charges related to various other civil and criminal cases. The same were for not deciding the application for interim reliefs etc.

28. The chargesheet was accompanied by the statement of imputation, list of witnesses and the list of documents. However, it did not say that so far as Charge No. 1 was concerned, the preliminary enquiry report or the evidence

collected therein, would be used/relied upon against the appellant.

There is nothing on record to show that either the preliminary enquiry report or the statements recorded therein, particularly, by the complainant/accused or Shri C.B. Gajjar, advocate, had been exhibited in regular inquiry. In absence of information in the chargesheet that such report/statements would be relied upon against the appellant, it was not permissible for the Enquiry Officer or the High Court to rely upon the same. Natural justice is an inbuilt and inseparable ingredient of fairness and reasonableness. Strict adherence to the principle is required, whenever civil consequences follow up, as a result of the order passed. Natural justice is a universal justice. In certain factual circumstances even non-observance of the rule will itself result in prejudice. Thus, this principle is of supreme importance. (Vide: *S.L. Kapoor v. Jagmohan,* AIR 1981 SC 136; *D.K. Yadav v. JMA Industries Ltd.,* (1983) 3 SCC 259; and *Mohd. Yunus Khan v. State of U.P. & Ors.,* (2010) 10 SCC 539)

29. In view of the above, we reach the following inescapable conclusions:-

(i) The High Court failed to appreciate that the appellant had not granted long adjournments to the accused-complainant as the appellant wanted to conclude the trial at the earliest. The case of accused-complainant which was taking its time, had suddenly gathered pace, thus, he would have naturally felt aggrieved by failing to notice it. The High Court erred in recording a finding that the complainant had no ill-will or motive to make any allegation against the appellant.

(ii) The Enquiry Officer, the High Court on administrative side as well as on judicial side, committed a grave error in placing reliance on the statement of the complainant as well as of Shri C.B. Gajjar, Advocate, recorded in a preliminary enquiry. The preliminary enquiry and its report loses

significance/importance, once the regular enquiry is initiated by issuing chargesheet to the delinquent. Thus, it was all in violation of the principles of natural justice.

iii) The High Court erred in shifting the onus of proving various negative circumstances as referred to hereinabove, upon the appellant who was delinquent in the enquiry.

iv) The onus lies on the department to prove the charge and it failed to examine any of the employee of the court, i.e., Stenographer, Bench Secretary or Peon attached to the office of the appellant for proving the entry of Shri Gajjar, Advocate in her chamber on 17.8.1993.

v) The complainant has been disbelieved by the Enquiry Officer as well as the High Court on various issues, particularly on the point of his personal hearing, the conversation between the appellant and Shri C.B. Gajjar, Advocate on 17.8.1993, when they met in the chamber.

vi) Similarly, the allegation of the complainant, that appellant had threatened him through his wife, forcing him to withdraw the complaint against her, has been disbelieved.

vii) The complainant as well as Shri C.B. Gajjar, Advocate had been talking about the appellant's husband having collecting the amount on behalf of the appellant, for deciding the cases, though at that point of time, she was unmarried.

viii) There is nothing on record to show that the appellant whose defence has been disbelieved in toto, had ever been given any adverse entry in her ACRs, or punished earlier in any enquiry. While she has been punished solely on uncorroborated statement of an accused facing trial for misappropriation.

30. In view of the above, we have no option except to allow the appeal. The appeal succeeds and is accordingly allowed. The order of punishment imposed by the High Court in compulsorily retiring the appellant is set aside. However, as the

appellant has already reached the age of superannuation long ago, it is not desirable under the facts and circumstances of the case, to grant her any substantive relief, except to exonerate her honourably of all the charges, and allow the appeal with costs, which is quantified to the tune of Rs.5 lacs. The State of Gujarat is directed to pay the said cost to the appellant within a period of 3 months from today.

K.K.T. Appeal allowed.

STATE OF UTTARAKHAND
v.
YOGENDRA NATH ARORA
(Criminal Appeal No. 459 of 2013)

MARCH 18, 2013

[CHANDRAMAULI KR. PRASAD AND V. GOPALA GOWDA, JJ.]

Prevention of Corruption Act, 1988 - s.19(1)(c) - Sanction for prosecution - Competent authority - Employee of an undertaking of the State of Uttar Pradesh - Consequently taken on deputation and posted in a undertaking of the State of Uttarakhand - While working there, case lodged against employee-respondent u/s.7 r/w s.13(1)(d) and 13(2) of the Act - Respondent repatriated on the same day to his parent organization by the State Government of Uttarakhand which also granted sanction for his prosecution - High Court quashed prosecution holding that the State Government of the Uttar Pradesh was competent to remove him and to grant necessary sanction, and not the State Government of Uttarakhand - Whether respondent being on deputation to an undertaking of the State Government of Uttarakhand, it had the power to repatriate him which would mean the power of removal from office by the State Government of Uttarakhand - Held, No - The power to repatriate does not embrace within itself the power of removal from office as envisaged u/s.19(1)(c) of the Act - The purport of taking the sanction from the authority competent to remove a corrupt government servant from his office is not only to remove him from his temporary office but to remove him from government service - It was the State Government of the Uttar Pradesh which was competent to remove the respondent and to grant necessary sanction.

Prevention of Corruption Act, 1988 - Office - Meaning of - Repatriation - Effect of - Words and Phrases.

The accused-respondent was earlier employed in an undertaking of the State of Uttar Pradesh. Consequent upon reorganization of the State of Uttar Pradesh, he was taken on deputation and posted in a Government undertaking of the State of Uttarakhand. While working there, he was arrested for accepting illegal gratification and a case was lodged under Section 7 read with Section 13(1)(d) and 13(2) of the Prevention of Corruption Act, 1988. The respondent was repatriated on the same day to his parent organization by the State Government of Uttarakhand which also granted sanction for his prosecution. By the impugned judgment, the High Court held that the respondent being an employee of an undertaking of the State Government of Uttar Pradesh and having been repatriated to his parent department, it was the State Government of the Uttar Pradesh which was competent to remove him and to grant necessary sanction, and not the State Government of Uttarakhand and accordingly, quashed the prosecution of the respondent for being without valid sanction.

The State of Uttarakhand contended before this Court that the respondent being on deputation to an undertaking of the State Government of Uttarakhand, it had the power to repatriate him which would mean the power of removal from office by the State Government of Uttarakhand.

The question which therefore arose for determination was whether removal from his office would mean dislodging from holding that office and shifting to another office or in other words, whether the power of the State Government of Uttarakhand to repatriate the respondent meant that it had the power to remove.

Dismissing the appeal, the Court

HELD: 1.1. Office means a position which requires the person holding it to perform certain duties and discharge certain obligations and removal from his office would mean to snap that permanently. By repatriation, the person holding the office on deputation may not be required to perform that duty and discharge the obligation of that office, but nonetheless he continues to hold office and by virtue thereof performs certain other duties and discharge certain other obligations. Therefore the power to repatriate does not embrace within itself the power of removal from office as envisaged under Section 19(1)(c) of the Prevention of Corruption Act, 1988. The term removal means the act of removing from office or putting an end to an employment. The purport of taking the sanction from the authority competent to remove a corrupt government servant from his office is not only to remove him from his temporary office but to remove him from government service. [Paras 11, 12]

1.2. It is common ground that without prejudice to the contention raised in the present appeal, the State Government of Uttarakhand has written to the State Government of Uttar Pradesh for granting sanction. Since the request of the State Government of Uttarakhand for sanction of prosecution of the accused-respondent is still pending before the State Government of Uttar Pradesh, hence, it is deemed expedient that the latter takes decision on the request so made, if already not taken. [Paras 6, 13, 14]

V.K. Sharma v. State (Delhi Admn.) **1975 (1) SCC 784: 1975 (3) SCR 922 -relied on.**

R.S. Nayak v. A.R. Antulay **(1984) 2 SCC 183: 1984 (2) SCR 495 - referred to.**

Case Law Reference:

1984 (2) SCR 495	**referred to**	**Para 8**
1975 (3) SCR 922	**relied on**	**Para 12**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 459 of 2013.

From the Judgment & Order dated 06.11.2006 of the High Court of Uttarakhand at Nainital in Criminal Misc. Application No. 740 of 2005.

Rachana Srivastava, Utkarsh Sharma for the Appellant.

R.G. Srivastava, Balraj Dewan, V.N. Raghupathy for the Respondent.

The Judgemnt of the Court was delivered by

CHANDRAMAULI KR. PRASAD, J. 1. Yogendra Nath Arora (hereinafter referred to as "the Accused") was earlier employed as Deputy General Manager in U.P. Industrial Consultants, an undertaking of the State of Uttar Pradesh. Consequent upon reorganization of the State of Uttar Pradesh, he was taken on deputation on 23rd January, 2003 and posted as Deputy General Manager of the State Industrial Development Corporation, (hereinafter referred to as "SIDCUL"), a Government undertaking of the State of Uttarakhand. While working as the Deputy General Manager of SIDCUL, a trap was laid on 30th of June, 2004 and he was arrested while accepting an illegal gratification of Rs.30,000/-. This led to lodging of Criminal Case No. 168 of 2004 at Police Station Dalanwala, District Dehradun under Section 7 read with Section 13(1)(d) and 13(2) of the Prevention of Corruption Act, 1988 (hereinafter referred to as "the Act"). The accused was repatriated on the same day to his parent organization by the State Government of Uttarakhand. It also granted sanction for his prosecution on 23rd of August, 2004 and the charge

sheet was submitted on 25th of August, 2004 in the Court of Special Judge, Anti-Corruption-II, Nainital. Accused prayed for discharge, inter alia contending that the materials on record are not sufficient for framing of the charge and further, in the absence of valid sanction from the competent authority, as required under Section 19(1)(c) of the Act, the trial can not legally proceed. The Special Judge, by his order dated 18th of August, 2005 rejected his contention, inter alia, observing that there is sufficient material on record for framing of the charge. As regard the plea of absence of sanction, the learned Judge observed as follows:

> "…the question of sanction being merely an incident to the trial of the case is not to be considered at this stage. It is undoubtedly true, that the accused was an employee of the State of Uttar Pradesh and was on deputation to the State of Uttaranchal and under the subordination and administrative control of the State of Uttaranchal. Thus, the question of sanction being incident to the trial of the case and on perusal of the record, there is a sufficient material on record to charge the accused, the accused shall be charged under Section 7 read with Section 13(a)(d) and 13(2) of the Prevention of Corruption Act, 1988."

Accordingly, the Special Judge rejected the prayer of the accused.

Aggrieved by the same, the accused preferred an application under Section 482 of the Criminal Procedure Code before the High Court challenging the aforesaid order. It was contended before the High Court that the accused being an employee of an undertaking of the State Government of Uttar Pradesh, the State Government of Uttarakhand is not competent to grant sanction. This submission found favour with the High Court. The High Court held that the accused being an employee of an undertaking of the State Government of Uttar Pradesh and having been repatriated to his parent department, it is the State Government of the Uttar Pradesh which is

competent to remove him and to grant necessary sanction. Accordingly, the High Court quashed the prosecution of the accused being without valid sanction and, while doing so, observed that the State Government of Uttarakhand shall be at liberty to prosecute the accused after obtaining valid sanction from the State Government of Uttar Pradesh.

Aggrieved by the aforesaid order, the State of Uttarakhand has filed the present special leave petition.

Leave granted.

It is common ground that without prejudice to the contention raised in the present appeal, the State Government of Uttarakhand has written to the State Government of Uttar Pradesh for granting sanction. But, till date no decision has been communicated.

Ms. Rachana Srivastava, learned counsel representing the State of Uttarakhand concedes that sanction by the competent State Government is necessary for prosecution of an accused for an offence punishable under Section 7 and 13 of the Act. She points out that the accused being on deputation to an undertaking of the State Government of Uttarakhand, it had the power to repatriate him which would mean the power of removal from office by the State Government of Uttarakhand. According to her, dislodging an accused from an office and repatriating him would mean removal from his office. Removal from office, according to her, would not mean the removal from service. She emphasizes that the expression used in Section 19(1)(c) is 'removal from his office' and not 'removal from service'. Section 19(1)(c) of the Act which is relevant for the purpose reads as follows:

> "19. **Previous sanction necessary for prosecution.**(1) No court shall take cognizance of an offence punishable under Sections 7,10,11,13 and 15 alleged to have been committed by a public servant, except with the previous

sanction,-…….

(a) xxx xxx xxx

(b) xxx xxx xxx

(c) in the case of any other person, of the authority competent to remove him from his office."

In support of the submission reliance has been placed to a Constitution Bench judgment of this Court in the case of *R.S. Nayak v. A.R. Antulay, (1984) 2 SCC 183* and our attention has been drawn to the following passage from paragraph 23 of the judgment which reads as follows:

"…Each of the three clauses of sub-section(1) of Section 6 uses the expression 'office' and the power to grant sanction is conferred on the authority competent to remove the public servant from his office and Section 6 requires a sanction before taking cognizance of offences committed by public servant. The offence would be committed by the public servant by misusing or abusing the power of office and it is from that office, the authority must be competent to remove him so as to be entitled to grant sanction. The removal would bring about cessation of interrelation between the office and abuse by the holder of the office. The link between power with opportunity to abuse and the holder of office would be severed by removal from office. Therefore, when a public servant is accused of an offence of taking gratification other than legal remuneration for doing or forbearing to do an official act (Section 161 IPC) or as a public servant abets offences punishable under Sections 161 and 163 (Section 164 IPC) or as public servant obtains a valuable thing without consideration from person concerned in any proceeding or business transacted by such public servant (Section 165 IPC) or commits criminal misconduct as defined in Section 5 of the 1947 Act, it is implicit in the

various offences that the public servant has misused or abused the power of office held by him as public servant. The expression 'office' in the three sub-clauses of Section 6(1) would clearly denote that office which the public servant misused or abused for corrupt motives for which he is to be prosecuted and in respect of which a sanction to prosecute him is necessary by the competent authority entitled to remove him from that office which he has abused. This interrelation between the office and its abuse if severed would render Section 6 devoid of any meaning. And this interrelation clearly provides a clue to the understanding of the provision in Section 6 providing for sanction by a competent authority who would be able to judge the action of the public servant before removing the bar, by granting sanction, to the taking of the cognizance of offences by the court against the public servant. Therefore, it unquestionably follows that the sanction to prosecute can be given by an authority competent to remove the public servant from the office which he has misused or abused because that authority alone would be able to know whether there has been a misuse or abuse of the office by the public servant and not some rank outsider."

In fairness to her, she concedes that power to remove the accused from service is with the State Government of Uttar Pradesh and if her contention that power to repatriate would mean the power to remove from service does not find favour, it shall be the State Government of Uttar Pradesh which would be competent to grant sanction.

Mr. R.G. Srivastava, learned counsel representing the accused, however, contends that the expression removal from office would mean termination from service and undisputably in the facts of the present case it was the State Government of Uttar Pradesh which was competent to terminate the service of the accused. According to him, removal from office would mean removal from permanent employment.

In view of the rival submissions, the question which falls for determination is as to whether the expression removal from his office would mean dislodging him from holding that office and shifting him to another office. In other words, the power of the State Government of Uttarakhand to repatriate the accused would mean that it has power to remove. In our opinion, office means a position which requires the person holding it to perform certain duties and discharge certain obligations and removal from his office would mean to snap that permanently. By repatriation, the person holding the office on deputation may not be required to perform that duty and discharge the obligation of that office, but nonetheless he continues to hold office and by virtue thereof performs certain other duties and discharge certain other obligations. Therefore the power to repatriate does not embrace within itself the power of removal from office as envisaged under Section 19(1)(c) of the Act. The term removal means the act of removing from office or putting an end to an employment. The distinction between dismissal and removal from service is that former ordinarily disqualifies from future employment but the latter does not. Hence, we reject this submission of Ms. Srivastava.

The view which we have taken finds support from the decision of this Court in the case of *V.K. Sharma v. State (Delhi Admn.), 1975 (1) SCC 784* in which it has been held as follows:

> "…..The purport of taking the sanction from the authority competent to remove a corrupt government servant from his office is not only to remove him from his temporary office but to remove him from government service."

We are told by Ms. Srivastava that the request of the State Government of Uttarakhand for sanction of prosecution of the accused is still pending before the State Government of Uttar Pradesh. Hence, we deem it expedient that the latter takes decision on the request so made, if already not taken, within 8 weeks from the date of communication of this order. It is made

clear that we are not expressing any opinion in regard to the merit of the request made by the State Government of Uttarakhand and it shall be decided by the State Government of Uttar Pradesh on its own merit in accordance with law.

Let a copy of this order be forwarded to the Chief Secretary of the State Government of Uttar Pradesh for appropriate action forthwith.

In the result, we do not find any merit in this appeal and it is dismissed accordingly with the aforesaid observation.

B.B.B.

SUSHIL K. CHAKRAVARTY (D) THR. LRS.
v.
M/S. TEJ PROPERTIES PVT. LTD.
(Civil Appeal Nos. 2600-2601 of 2013)

MARCH 19, 2013

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

Code of Civil Procedure, 1908 - Order XXII, rule 4(4) - Suit pending before High Court - Death of sole defendant during pendency of the suit - High Court proceeded with the matter ex-parte, as against the sole defendant, without impleading his legal representatives in his place - Justification - Held: On facts, the defendant had filed a written statement but had thereafter failed to appear and contest the suit - High Court had taken a conscious decision u/Order XXII Rule 4(4), to proceed with the matter ex-parte as against interests of such a defendant, without first requiring the plaintiff to implead the legal representatives of the deceased defendant - This was clearly permissible u/Order XXII Rule 4(4) - It was done on the High court's satisfaction, that it was a fit case to exempt the plaintiff from the necessity of impleading the legal representatives of the sole defendant - Determination of the High Court, with reference to Order XXII Rule 4(4), accordingly, upheld.

During pendency of a suit before a Single Judge of the High Court, the sole defendant died. The Single Judge continued the suit proceedings without impleading the legal heirs of the sole defendant as his legal representatives, and thereafter pronounced its judgment.

The question which arose for consideration in the instant appeals was whether it is imperative for a court to exempt the plaintiff from the necessity of substituting the legal representatives of a defendant, before

proceeding with the matter and in the absence of any such express exemption granted by the court, no benefit can be drawn by the plaintiff who has obtained a finding in his favour, without impleading the legal representatives in place of the deceased defendant.

Dismissing the appeals, the Court

HELD: 1. It is not a matter of dispute, that the defendant Sushil K.C. had died on 3.6.2003. It is also not a matter of dispute, that on 29.8.2003 the plaintiff Tej Properties had filed an interlocutory application, being IA no.9676 of 2003 under Order XXII Rule 4(4) CPC, for proceeding with CS (OS) no.2501 of 1997 ex-parte, by bringing to the notice of the Single Judge of the High Court, that Sushil K.C. had died on 3.6.2003. That being the acknowledged position, when the Single Judge allowed the proceedings in CS(OS) no.2501 of 1997 to progress further, it is imperative to infer, that the court had taken a conscious decision under Order XXII Rule 4(4) CPC, to proceed with the matter ex-parte as against interests of Sushil K.C., without first requiring Tej Properties to implead the legal representatives of the deceased defendant. It is therefore, that evidence was recorded on behalf of the plaintiff Tej Properties on 28.1.2005. In the aforesaid view of the matter, there is certainly no doubt, that being mindful of the death of Sushil K.C., which came to his knowledge through IA no.7696 of 2006, a conscious decision was taken by the Single Judge, to proceed with the matter ex-parte as against the interests of Sushil K.C. This position adopted by the Single Judge in CS (OS) no.2501 of 1997 was clearly permissible under Order XXII Rule 4(4) of CPC. A trial court can proceed with a suit under the aforementioned provision, without impleading the legal representatives of a defendant, who having filed a written statement has failed to appear and contest the suit, if the

court considers it fit to do so. All the ingredients of Order XXII Rule 4(4) CPC stood fully satisfied in the facts and circumstances of this case. The defendant Sushil K.C. having entered appearance in CS (OS) no. 2501 of 1997, had filed his written statement on 6.3.1998. Thereafter, the defendant Sushil K.C. stopped appearing in the said civil suit. Whereafter, he was not even represented through counsel. The order to proceed against Sushil K.C. ex-parte was passed on 1.8.2000. Even thereupon, no efforts were made by Sushil K.C. to participate in the proceedings of CS(OS) no.2501 of 1997, till his death on 3.6.2003. It is apparent, that the trial court was mindful of the factual position noticed above, and consciously allowed the suit to proceed further. When the suit was allowed to proceed further, without insisting on the impleadment of the legal representatives of Sushil K.C. it was done on the court's satisfaction, that it was a fit case to exempt the plaintiff (Tej Properties) from the necessity of impleading the legal representatives of the sole defendant Sushil K.C. This could only have been done, on the satisfaction that the parameters postulated under Order XXII Rule 4(4) CPC, stood complied. The Single Judge committed no error whatsoever in proceeding with the matter in CS (OS) no.2501 of 1997 ex-parte, as against the sole defendant Sushil K.C., without impleading his legal representatives in his place. Therefore, hereby, the determination of the Single Judge, with reference to Order XXII Rule 4(4) CPC, is upheld. [Para 26]

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 2600-2601 of 2013

from the Judgments & Orders dated 17.10.2011 of the High Court of Delhi at New Delhi in FAO (OS) No. 516 & 517 of 2009.

Shyam Divan, Pratap Venugopal, Surekha Raman, Anuj Sharma, Rakesh Sinha, Gaurav Nair (for K.J. John & Co.) for the Appellant.

Manoj Goel, Shuvodeep Roy, Gopal Verma, Viprma Gura for the Respondent.

The Judgment of Court was delivered by

JAGDISH SINGH KHEHAR, J. 1. Leave granted.

2. The impugned order herein dated 17.10.2011 was passed by a Division Bench of the Delhi High Court (hereinafter referred to as, the High Court), whereby, it dismissed, by a common order, FAO (OS) no. 516 of 2009 and FAO (OS) no. 517 of 2009. Both the aforesaid intra-court appeals had been filed by Sushil K. Chakravarty (hereinafter referred to as, Sushil K.C.) through his legal heirs Arun K. Chakravarty (hereinafter referred to as, Arun K.C.) and Sunil K. Chakravarty (hereinafter referred to as, Sunil K.C.) in respect of agricultural land measuring 8 bighas and 5 biswas with a farm house built thereon alongwith tubewell, electrcitiy connection etc. falling within the revenue estate of village Chhatarpur, Tehsil Mehrauli, New Delhi. This property has also been described as Maharani Rosary. It would be relevant to mention, that the instant impugned order arises out of two suits, one filed by M/s. Tej Properties Pvt. Ltd. (hereinafter referred to as, Tej Properties), bearing CS (OS) no. 2501 of 1997, against Sushil K.C. and the other filed by Sushil K.C., bearing CS (OS) no. 1348 of 1996, against Tej Properties. In order to effectively understand the controversy in hand, it will be necessary to briefly record the details of the litigation between the rival parties, arising out of the two suits referred to above, which eventually led to the passing of the common impugned order dated 17.10.2011.

CS (OS) no. 2501 of 1997

3. Tej Properties filed CS (OS) no. 2501 of 1997 on 13.11.1997 in the High Court, praying for specific performance of an agreement to sell, executed by the plaintiff Tej Properties

with the defendant Sushil K.C. on 17.3.1992. The aforesaid agreement was in respect of agricultural land owned by the defendant Sushil K.C., measuring 8 bighas and 5 biswas, with a farm house built thereon along with tubewell, electrcitiy connection etc., falling within the revenue estate of village Chhatarpur, Tehsil Mehrauli, New Delhi. The agreement to sell, is in respect of the same property, which bears the description - Maharani Rosary. The agreement dated 17.3.1992 contemplated a total consideration of Rs.60,00,000/-, out of which a sum of Rs.22,00,000/- was passed on to the defendant as earnest money. Of the said payment, Rs.20,00,000/- was passed on by cheque (comprising of two cheques of Rs.7,00,000/- each, and one cheque of Rs.6,00,000/-). The balance Rs.2,00,000/- was paid in cash. The grievance projected by the plaintiff Tej Properties in the instant suit was, that even though it had approached Sushil K.C. on a number of occasions, requiring him to complete the sale transaction, Sushil K.C. had failed to give effect to the agreement to sell dated 17.3.1992. The plaintiff Tej Properties asserted, that it was willing to perform its part of the contract, but the defendant Sushil K.C. failed to take any steps in complaince with the obligations vested in him, under the agreement to sell dated 17.3.1992.

4. According to the pleadings in CS (OS) no. 2501 of 1997, the necessity of filing the instant suit for specific performance arose after the plaintiff Tej Properties received a notice from the counsel representing the defendant Sushil K.C. informing him, that the defendant Sushil K.C. had filed a suit for declaration and recovery of immovable property, which was subject matter of consideration under the agreement to sell dated 17.3.1992.

5. The defendant Sushil K.C. entered appearance in CS (OS) no. 2501 of 1997 and filed a written statement on 6.3.1998. Thereafter, Sushil K.C. stopped appearing in the said civil suit. He was also not represented through counsel

thereafter. Sushil K.C. was accordingly proceeded against ex-parte in CS (OS) no. 2501 of 1997 on 1.8.2000. The plaintiff Tej Properties filed its affidavit of evidence on 9.12.2002. Sushil K.C. died on 3.6.2003, i.e., during the pendency of CS (OS) no. 2501 of 1997. It would be relevant to mention, that the defendant Sushil K.C. was not survived by any Class-I heir. He however, left behind two brothers (who are Class-II heirs), namely, Arun K.C. and Sunil K.C. On 29.8.2003, the plaintiff Tej Properties filed an interlocutory application being I.A. no. 9676 of 2003 under Order XXII Rule 4(4) of the Code of Civil Procedure for proceeding with CS (OS) no. 2501 of 1997 ex-parte. Thereafter, the said suit factually progressed ex-parte. Evidence was recorded on behalf of the plaintiff Tej Properties on 28.1.2005. On 9.8.2005, the High Court directed the plaintiff Tej Properties to place on the record of the civil suit, the original agreement to sell dated 17.3.1992. The High Court further directed the Punjab National Bank to produce its record pertaining to the property in respect whereof the plaintiff Tej Properties was seeking specific performance (based on the agreement to sell dated 17.3.1992). On 4.5.2006, the Punjab National Bank was represented before the High Court. Consequent upon a compromise between the plaintiff Tej Properties and the Punjab National bank, a sum of Rs.10,47,00,000/- came to be paid to the Punjab National Bank, leading to the redemption of the property (which was the subject matter of the agreement to sell dated 17.3.1992) which had been mortgaged with the said bank by Sushil K.C.. Thereupon, in compliance with an order passed by the High Court, the Punjab National Bank released the title papers of the property (which was subject matter of the agreement to sell dated 17.3.1992). On 25.7.2007, a learned Single Judge of the High Court decreed CS (OS) no. 2501 of 1997 by granting specific performance of the agreement to sell dated 17.3.1992 to the plaintiff Tej Properties. It would be relevant to mention, that while decreeing CS (OS) no. 2501 of 1997, the learned Single Judge of the High Court held, that no balance amount was payable by the plaintiff Tej Properties to the defendant

Sushil K.C. in lieu of the balance sale consideration, as the amount paid by the plaintiff Tej Properties to the Punjab National Bank was in excess of the balance sale consideration.

6. It is apparent, that the learned Single Judge of the High Court decided CS (OS) no. 2501 of 1997 without impleading the legal heirs/representatives of Sushil K.C. (Arun K.C. and Sunil K.C.) who had died on 3.6.2003. It seems, that the High Court had proceeded with the matter under Order XXII Rule 4(4) of the Code of Civil Procedure, whereunder, it is open to a court to exempt the plaintiff from the necessity of substituting the legal representatives of a deceased defendant, who having filed the written statement, has failed to appear and contest the suit. In such a case, a court may pronounce its judgment, notwithstanding the death of such defendant. Such judgment, would have the same force as it would have, if the same had been pronounced before the death of the defendant.

7. On 11.3.2008, Arun K.C. and Sunil K.C. filed an interlocutory application being I.A. no. 3391 of 2008 under Order IX Rule 13 of the Code of Civil Procedure, in their capacity as legal representatives of their deceased brother Sushil K.C., for recalling the ex-parte judgment and decree dated 25.7.2007 (vide which CS (OS) no. 2501 of 1997 had been decreed). For explaining the delay in moving the aforesaid interlocutory application, the explanation tendered by the applicants, who were brothers of Sushil K.C. was, that they had become aware of the suit property, as also, the suit filed by the plaintiff Tej Properties, and the judgment/decree rendered thereon on 25.7.2007, only in the third week of February, 2008. It was submitted by the applicants, that on acquiring such knowledge, they had immediately thereafter moved the High Court for obtaining certified copies. Having obtained certified copies on 26.2.2008, they had immediately filed I.A. no. 3391 of 2008 on 11.3.2008.

8. The non-applicant/plaintiff Tej Properties filed its reply to I.A. no. 3391 of 2008 on 14.11.2008. Thereupon, the learned

Single Judge of the High Court having considered the submissions advanced by the rival parties, dismissed I.A. no. 3391 of 2008 on 24.8.2009. Dissatisfied with the aforesaid order dated 24.8.2009, the applicants Arun K.C. and Sunil K.C. filed an intra-court appeal, i.e., FAO (OS) no. 516 of 2009. On 17.10.2011, a Division Bench of the High Court dismissed the aforesaid intra-court appeal. The order dated 17.10.2011 passed in FAO (OS) no. 516 of 2009 has been assailed through the instant appeals.

9. The plaintiff Tej Properties in CS (OS) no. 2501 of 1997 is the respondent in the instant appeals. The defendant Sushil K.C. in CS (OS) no. 2501 of 1997 through his legal representatives Arun K.C. and Sunil K.C., is the appellant in the instant appeals.

CS (OS) no. 1348 of 1996

10. On 23.5.1996, Sushil K.C. filed CS (OS) no. 1348 of 1996 before the High Court, praying for a declaration, that the agreement to sell dated 17.3.1992 (already referred to above) stood terminated. In this behalf, it would be pertinent to mention, that Sushil K.C. had issued a notice dated 5.8.1992, whereby he had informed the defendant Tej Properties of the termination of the agreement to sell dated 17.3.1992. He accordingly also sought possession of the property, which was subject matter of the agreement to sell dated 17.3.1992. Additionally, the plaintiff Sushil K.C. sought damages of Rs.40,00,000/-.

11. On 24.5.1996, a learned Single Judge of the High Court passed an interim order, restraining the defendant Tej Properties from alienating or parting with possession of the property, which was subject matter of the agreement to sell dated 17.3.1992. As already noticed above, the plaintiff Sushil K.C. died on 3.6.2003, i.e., during the pendency of CS (OS) no. 1348 of 1996. Since the plaintiff Sushil K.C. was not represented in CS (OS) no. 1348 of 1996 after 3.6.2003, the

said suit came to be dismissed in default for non-prosecution, on 14.10.2004.

12. As already noticed above, Sushil K.C. was not survived by any Class-I heir. He left behind two brothers, namely, Arun K.C. and Sunil K.C. (who are Class-II heirs). On 28.3.2008, Arun K.C. and Sunil K.C., in their capacity as legal representatives of their deceased brother Sushil K.C., filed an interlocutory application being I.A. no. 4531 of 2008 under Order IX Rule 9 of the Code of Civil Procedure, praying for the restoration of CS (OS) no. 1348 of 1996, which was dismissed in default for non-prosecution, on 14.10.2004. For explaining the delay in moving the aforesaid interlocutory application, the explanation tendered by Arun K.C. and Sunil K.C. was, that they became aware of the suit filed by their brother Sushil K.C., and the dismissal in default of the same (on 14.10.2004), only in the third week of February, 2008. The applicants allege, that they had immediately thereafter moved the High Court for obtaining the certified copies. It is their case, that having obtained certified copies, they immediately filed I.A. no. 4531 of 2008 on 28.3.2008.

13. The learned Single Judge of the High Court dismissed I.A. no. 4531 of 2008 on 24.8.2009. In fact, I.A. no. 3391 of 2008 (arising out of CS (OS) no. 2501 of 1997) and I.A. no. 4531 of 2008 (arising out of CS (OS) no. 1348 of 1996) were disposed of by the learned Single Judge of the High Court, by a common order dated 24.8.2009.

14. Dissatisfied with the order dated 24.8.2009, by which I.A. no. 4531 of 2009 was dismissed, the applicants (Arun K.C. and Sunil K.C.) filed an intra-court appeal, i.e. FAO (OS) no. 517 of 2009. By an order dated 17.10.2011, a Division Bench of the High Court dismissed the aforesaid intra-court appeal. In fact, FAO (OS) no. 516 of 2009 (arising out of I.A. no. 3391 of 2008 in CS (OS) no. 2501 of 1997), and FAO (OS) no. 517 of 2009 (arising out of I.A. no. 4531 of 2008 in CS (OS) no. 1348 of 1996), were disposed of by the Division Bench of the High Court, by a common order dated 17.10.2011.

15. The plaintiff Sushil K.C. in CS (OS) no. 1348 of 1996, through his legal representatives Arun K.C. and Sunil K.C., is the appellant in the instant appeals. The defendant Tej Properties in CS (OS) no. 1348 of 1996 is the respondent in the instant appeals.

First Common Order dated 24.8.2009 passed by the learned Single judge of the High Court

16. The first common order in the controversy in hand was passed by the learned Single Judge of the High Court on 24.8.2009, whereby two interlocutory applications filed by the legal representatives of the appellant Sushil K.C. came to be disposed of. By the aforesaid common order dated 24.8.2009, the High Court dismissed I.A. no. 3391 of 2008 (arising out of CS (OS) no. 2501 of 1997) filed under Order IX Rule 13 of the Code of Civil Procedure, for recalling the ex-parte judgment/decree dated 25.7.2007, whereby, CS (OS) no. 2501 of 1997 was decreed by the High Court. By the same order dated 24.8.2009, the High Court also dismissed I.A. no. 4531 of 2008 (arising out of CS (OS) no. 1348 of 1996) filed under Order IX Rule 9 of the Code of Civil Procedure, for restoration of CS (OS) no. 1348 of 1996 which had been dismissed in default for non-prosecution, on 14.10.2004.

17. It is apparent from the factual position noticed hereinabove, that even though CS (OS) no. 2501 of 1997 was decreed on 25.7.2007, I.A. no. 3391 of 2008 (for recalling the judgment/decree dated 25.7.2007) was filed on 11.3.2008. Likewise, even though CS (OS) no. 1348 of 1996 had been dismissed in default for non-prosecution on 14.10.2004, I.A. no. 4531 of 2008 (for the restoration of CS (OS) no. 1348 of 1996) was filed on 28.3.2008. The delay in filing the aforementioned interlocutory applications was sought to be explained by asserting, that Arun K.C. and Sunil K.C. (the legal heirs/

representatives of Sushil K.C., who had filed the aforesaid applications) had no knowledge of the property under reference, nor had they any knowledge of the pending litigation in connection therewith. Tej Properties seriously contested the applications by denying the aforesaid factual assertions, namely, that the aforesaid legal heirs were not aware of the property in question, as also, the pending litigation. The learned Single Judge of the High Court did not accept the factual assertions made by the applicants for explaining the delay in filing the interlocutory applications, by recording the following observations:-

> "25. This Court is not at all satisfied with the reasons given by the applicants for the delay in filing these applications. The ground that they were not aware of the pendency of these suits and they became aware only sometime in February, 2008, does not inspire confidence. The facts brought on record by the plaintiff (TPPL) show that the applicants were aware of these proceedings even during the earlier rounds of litigation involving late Sushil K. Chakravarty to which they were also parties. Therefore, reasons given for the delay in approaching the Court are not satisfactory."

18. On the issue whether CS (OS) no. 2501 of 1997 could be decreed without impleading the legal representatives of the defendant Sushil K.C. (namely, Arun K.C. and Sunil K.C.), who had admittedly died on 3.6.2003, the learned Single Judge of the High Court returned a finding in the affirmative, by observing as under:-

> "22. The only question remains to be considered is whether the Court erred in not first disposing of the said application IA No. 9676 of 2003 before decreeing the suit. In the considered view of this Court in para 11 of the judgment and decree dated 25th July, 2007, not only did the Court notice Order

> XXII Rule 4 CPC but formed a definite opinion that the said provision had to be invoked and the suit proceeded with notwithstanding the fact that the defendant (Sushil K. Chakravarty) had died. What appears to have weighed with this Court was that the provisions of Order XXII Rule 4(4) CPC suggests that the Court may exempt the plaintiff from the necessity of substituting the legal representatives of any such defendant who has failed to file a written statement or who having filed it, has failed to appear and contest the suit and the judgment in such a case may be pronounced, notwithstanding the death of the such defendant, and that such judgment shall have the same force as it would have, had it been pronounced before the death took place.

23. The judgment in *Ellsa vs. A. Dass,* AIR 1992 Mad. 159, reiterated that the order granting exemption in terms of Order XXII Rule 4(4) CPC has to precede the judgment. It was held that it was not necessary for the plaintiff to file a written application asking for such exemption. Given the sequence evident from the judgment and decree dated 24th July, 2007, there can be no manner of doubt that the Court first formed an opinion that the plaintiff should be exempted from substituting the deceased defendant in terms of Order XXII Rule 4(4) CPC and thereafter proceeded to decree the suit. The judgments in *Zahirul Islam vs. Mohd. Usman,* (2003) 1 SCC 476, and *T. Gnanvel vs. T.S. Kanagaraj,* JT 2009 (3) SC 196, do not hold anything to the contrary. They only reiterate the necessity for compliance with Order XXII Rule 4(4) CPC before the judgment is pronounced. In the considered view of this Court, the judgment and decree dated 24th July, 2007 passed by this Court

is fully compliant with the requirement of Order XXII Rule 4(4) CPC. There is accordingly no merit in this ground."

Second Common Order dated 17.10.2011 passed by the Division Bench of the High Court

19. Dissatisfied with the common order dated 24.8.2009 passed by the learned Single Judge of the High Court, Arun K.C. and Sunil K.C., the legal representatives of Sushil K.C. filed two intra-court appeals, being FAO (OS) no. 516 of 2009 and FAO (OS) no. 517 of 2009. From the narration recorded above, pertaining to the first common order dated 24.8.2009, it is apparent, that two specific issues had been determined, namely, whether the delay in filing the interlocutory applications under Order IX Rules 9 and 13 of the Code of Civil Procedure should be condoned. And secondly, whether the learned Single Judge was justified in proceeding with CS (OS) no. 2501 of 1997 after the death of the sole defendant Sushil K.C. (on 3.6.2003), without impleading his legal heirs (Arun K.C. and Sunil K.C.) as his legal representatives.

20. The second common order dated 17.10.2011 disposed of FAO (OS) no. 516 of 2009 and FAO (OS) no. 517 of 2009. A perusal thereof reveals, that the Division Bench of the High Court, while passing the common order dated 17.10.2011, dealt with only one issue, namely, whether the delay in filing the interlocutory applications under Order IX Rules 9 and 13 of the Code of Civil Procedure should be condoned. It needs to be expressly noticed, that the Division Bench of the High Court did not record any submission at the behest of the appellant Sushil K.C. (through his legal representatives Arun K.C. and Sunil K.C.) on the propriety of continuing with the proceedings in CS (OS) no. 2501 of 1997 without impleading the legal representatives of Sushil K.C. (who had admittedly died on 3.6.2003). We would therefore assume, that no submission was advanced at the hands of the appellant before the Division Bench of the High Court on the said issue.

21. We may now advert to the determination of the Division Bench of the High Court in the second common order dated 17.10.2011, whereby the prayer for condonation of delay (in I.A. nos. 3391 and 4531 of 2008) was declined. On the issue of delay, the Division Bench of the High Court observed as under:-

"12. As noted herein above, when applicant no. 2 Sh. Arun K. Chakravarty and his wife as also his brother-in-law learnt of the agreement to sell dated 17.3.1992, CCP no. 450/1993 and thereafter IA no. 10161/1997 in CS (OS) no. 1479A/1989 were filed by the wife and the brother-in-law of Sh. Arun K. Chakravarty, in which, as noted herein above, when reply was filed to IA no. 10161/1997 on 25.8.1998 by late Sh. Sushil K. Chakravarty, he disclosed about pendency of CS (OS) no. 1348/1996 and CS (OS) no. 2501/1997 between him and M/s. Tej Properties Pvt. Ltd. as also the fact that the subject matter of the two cross suits was the agreement to sell dated 17.3.1992 pertaining to the land comprising Maharani Rosary.

13. Now, the appellants i.e. the applicants before the learned Single Judge urge before us that from the fact that the wife and the brother-in-law of appellant no. 2/applicant no. 2 had knowledge of CS (OS) no. 1348/1996 and CS (OS) no. 2501/1997, it cannot be inferred that the applicants also had knowledge of the 2 suits.

14. It is not disputed that the wife of applicant no. 2 has cordial relations with him and resides with him. Thus, her knowledge being passed on to her husband on an issue of vital interest concerning her husband is a matter of fact which we do not believe that she did not pass on to her husband. But, we need not rest our decision on our belief which requires an inference to be drawn based on normal

human conduct i.e. of a matter of vital interest concerning a husband and a wife being within the knowledge of either spouse and passed on to the other, for the reason there exists a fact of vital importance which unequivocally shows the knowledge of applicant no. 2 qua the pendency of the two cross suits between late Sh. Sushil K. Chakravarty and M/s. Tej Properties Pvt. Ltd.

15. As noted by us herein above, applicant no. 2 Sh. Arun K. Chakravarty, alongwith his wife and brother-in-law had filed CS (OS) no. 1275/1990 seeking a declaration that the MoU dated 26.10.1986 pertaining to the partnership which they had entered into with late Shri Sushil K. Chakravarty be declared illegal and not binding on them and this suit was admittedly directed to be tagged on, though not consolidated, but listed with CS (OS) no. 1479A/1989. It is not in dispute that the 2 suits were being listed together, and thus from said fact one can safely conclude knowledge of Arun K. Chakravarty that his uncle (sic) late Sh. Sushil K. Chakravarty and M/s. Tej Properties Pvt. Ltd. were in litigation as cross plaintiffs and defendants in CS (OS) no. 1348/1996 and CS (OS) no. 2501/1997.

16. His claim that he learnt about the suits only in the month of February, 2008 is patently false.

... ...

21. Facts noted herein above would show that if not earlier, at least when late Sh. Sushil K. Chakravarty filed reply to IA no. 10161/1997 in CS (OS) no. 1479A/1989, reply being filed on 25.8.1998, the appellants acquired knowledge of the fact that pertaining to the agreement to sell dated 17.3.1992 their uncle (sic) late Sh. Sushil K. Chakravarty and

M/s. Tej Properties Pvt. Ltd. were in litigation and cross suits being CS (OS) no. 1348/1996 and CS (OS) no. 2501/1997 were pending. The 2 have not denied knowledge of their uncle (sic) having died on 3.6.2003. Thus, as Class-II heirs, a claim which they stake to inherit the properties of their uncle (sic), they ought to have taken steps to seek substitution to prosecute, as plaintiffs in CS (OS) no. 1348/1996, and defend as defendants CS (OS) no. 2501/1997, within the limitation period prescribed to do so. Having knowledge of the pendency of the 2 suits, the former being dismissed in default on 14.10.2004 and in the latter their uncle (sic) being proceeded ex-part on 1.8.2000 and the suit being decreed on 25.7.2007, it was too late in the day for the two to seek restoration of the former and setting aside of the ex-part decree in the latter by filing applications in February, 2008. Their claim that they had no knowledge of the two suits prior to first week of February, 2008, is a false stand and thus we agree with the view taken by the learned Single Judge that both of them failed to show sufficient cause entitling them to have the delay condoned in preferring IA no. 4531/2008 in CS (OS) no. 1348/1996 and IA no. 3391/2008 in CS (OS) no. 2501/1997, and thus we dismiss both appeals imposing costs (one set) in sum of Rs.20,000/- against the appellants and in favour of the respondent."

Challenge to the two common orders dated 24.8.2009 and 17.10.2011 passed by the High Court

22. Before us, the only challenge sustainable, consequent upon the passing of the second common order dated 17.10.2011, has to be limited to the determination by the High Court, that delay in filing I.A. nos. 3391 and 4531 of 2008

cannot be condoned on the basis of the explanation tendered by the applicants (Arun K.C. and Sunil K.C.). On the parameters laid down by this Court, there would be absolutely no difficulty in summarily rejecting the claim for condonation of delay, raised at the behest of the appellant. Firstly, the issue in hand has been concurrently decided against the appellant by the learned Single Judge of the High Court on 24.8.2009 followed by the Division Bench on 17.10.2011. It is not the case of the appellant, that the High Court did not take into consideration certain facts which it ought to have taken into consideration. It is also not the case of the appellant, that the High Court wrongly or incorrectly relied upon certain facts, even though the truthful position was otherwise. In the instant fact situation, there would be hardly anything for us to determine, except the inevitable rejection of such a claim based on the parameters laid down by this Court in view of the admitted factual position noted above.

23. Despite our aforesaid determination, since the issue was hotly contested at the hands of the learned counsel representing the rival parties, we would venture to reexamine the same shorn of the conclusions drawn by the High Court. In the instant determination, it is first necessary to notice the stance adopted by the appellant (through legal representatives Arun K.C. and Sunil K.C.) For condonation of delay, it was pleaded at the behest of the appellant, that Arun K.C. and Sunil K.C. (the legal heirs/representatives of Sushil K.C.), who had filed I.A. nos. 3391 and 4531 of 2008, had no knowledge of the property under reference, nor had they any knowledge of the pending litigation in connection therewith. The learned Single Judge, while passing the common order dated 24.8.2009, as also, the Division Bench of the High Court, while passing the common order dated 17.10.2011, delineated the stance of the appellant for condonation of delay. The aforesaid stance is in consonance with the pleadings filed on behalf of Arun K.C. and Sunil K.C. It is their case, that they were not aware of the pendency of the litigation relating to agricultural

land owned by Sushil K.C. measuring 8 bighas and 5 biswas with a farm house built thereon alongwith tubewell, electrcitiy connection etc. falling within the revenue estate of village Chhatarpur, Tehsil Mehrauli, New Delhi, (also described as Maharani Rosary) and they became aware of the same only in the third week of February, 2008. Having become aware of the same, it is their case, that they immediately moved the High Court for obtaining certified copies. Having obtained the certified copies in the last week of February, 2008, without any delay whatsoever, they filed I.A. no. 3391 of 2008 on 11.3.2008, and I.A. no. 4531 of 2008 on 28.3.2008. If the factual position projected at the hands of the applicants (Arun K.C. and Sunil K.C.), who had filed the aforesaid two interlocutory applications, had been correct, there would have been no difficulty whatsoever, to accept their prayer for condonation of delay. The fact of the matter however is, that there is ample record to demonstrate, that the aforesaid factual position is false. In this behalf, it is relevant to notice, that during the course of the proceedings in CS (OS) no. 1275 of 1990, filed by one of the legal heirs who has jointly filed the two interlocutory applications (I.A. nos. 3391 and 4531 of 2008) with his brother, a prayer was made that Memorandum of Understanding dated 28.10.1996 depicting the partnership of the plaintiff with Sushil K.C., be declared illegal. During the course of hearing before us, the aforesaid CS (OS) no. 1275 of 1990 was ordered to be tagged with CS (OS) no. 1479A of 1989, wherefrom the factum of the pending litigation between Sushil K.C. and Tej Properties would have naturally come to the knowledge and notice of one of the legal heirs/representatives. The finding recorded in the common order dated 17.10.2011 passed by the Division Bench of the High Court to the effect, that knowledge pertaining to the agreement to sell dated 17.3.1992 came to be acquired by the applicants in the two interlocutory applications (I.A. nos. 3391 and 4531 of 2008) from the reply filed by Sushil K.C. to I.A. no. 10161 of 1997 in CS (OS) no. 1479A of 1989 on 25.8.1998, has not been disputed. Likewise, the fact, that Sushil K.C. had disclosed in the aforesaid reply

to I.A. no. 10161 of 1997 in CS (OS) no. 1479A of 1989, the pendency of CS (OS) no. 1348 of 1996 and CS (OS) no. 2501 of 1997 between himself (Sushil K.C.) and Tej Properties, and the further fact that the subject matter of the aforesaid two cross-suits was the agreement to sell dated 17.3.1992 pertaining to the land which is subject matter of the present controversy, has also not been disputed. We would therefore conclude that Arun K.C. and Sunil K.C., had knowledge about the property of Sushil K.C. which was subject matter of consideration in CS (OS) no.2501 of 1997 as far back as on 25.8.1998. We would therefore also conclude, that Arun K.C. and Sunil K.C. had knowledge of the pending litigation between Sushil K.C. and Tej Properties as far back as on 25.8.1998. The aforesaid factual position leaves no room for any doubt in our mind, that the applicants Arun K.C. and Sunil K.C. (in I.A. nos. 3391 and 4531 of 2008) had full knowledge about the property which is subject matter of consideration herein, as also the pending litigation connected therewith, well before the death of Sushil K.C. on 3.6.2003. There can therefore be no valid justification for them, to have delayed their participation as legal heirs/representatives in both the aforementioned suits immediately after the death of Sushil K.C. (on 3.6.2003). Their efforts to participate in the two suits commenced on 11.3.2008 (by filing IA no.3391 of 2008 - in CS (OS) no.2501 of 1997), and on 28.3.2008 (by filing IA no.4531 of 2008 - in CS (OS) no.1348 of 1996). It is therefore apparent, that the explanation tendered by the legal heirs/representatives (Arun K.C. and Sunil K.C.) of the deceased Sushil K.C. in the interlocutory applications (I.A. nos. 3391 and 4531 of 2008) filed by them for condonation of delay, was false to their knowledge. Having so concluded, it is apparent, that the applicants had not approached the High Court for judicial redress with clean hands. Based on our aforesaid determination, we are satisfied, that the learned Single Judge (vide order dated 24.8.2009) and the Division Bench (vide order dated 17.10.2011) were fully justified in not accepting the prayer made by the legal heirs/representatives of Sushil K.C. for condoning delay in filing the two interlocutory

applications (I.A. nos. 3391 and 4531 of 2008). The impugned orders passed by the High Court are, therefore, hereby affirmed.

24. Our aforesaid determination leaves no room for the adjudication of the controversy on merits. We may, however record, that during the course of hearing before us, the only submission advanced at the hands of the learned counsel for the appellant on the merits of the controversy was based on a challenge raised by the appellant for continuing the proceedings in CS (OS) no. 2501 of 1997 even after the death of Sushil K.C. on 3.6.2003 without impleading the legal heirs of the deceased Sushil K.C. (Arun K.C. and Sunil K.C.) as his legal representatives. In view of the vehemence with which the submission was advanced, we shall render our determination thereon, as well. Lest, the appellant feels that his submissions have not been fully dealt with.

25. Undoubtedly, the issue canvassed on merits has to be examined with reference to Order XXII Rule 4 of the Code of Civil Procedure. Order XXII Rule 4 is accordingly reproduced hereunder:-

> **"4. Procedure in case of death of one of several defendants or of sole defendant -**
>
> (1) Where one of two or more defendants dies and the right to sue does not survive against the surviving defendant or defendants alone, or a sole defendant or sole surviving defendant dies and the right to sue survives, the Court, on an application made in that behalf, shall cause the legal representative of the deceased defendant to be made a party and shall proceed with the suit.
>
> (2) Any person so made a party may make any defence appropriate to his character as legal representative of the deceased defendant.

(3) Where within the time limited by law no application is made under sub-rule (1), the suit shall abate as against the deceased defendant.

(4) The Court whenever it thinks fit, may exempt the plaintiff from the necessity of substituting the legal representatives of any such defendant who has failed to file a written statement or who, having filed it, has failed to appear and contest the suit at the hearing; and judgment may, in such case, be pronounced against the said defendant notwithstanding the death of such defendant and shall have the same force and effect as if it has been pronounced before death took place.

(5) Where-

(a) the plaintiff was ignorant of the death of a defendant, and could not, for that reason, make an application for the substitution of the legal representative of the defendant under this rule within the period specified in the Limitation Act, 1963 (36 of 1963) and the suit has, in consequence, abated, and

(b) the plaintiff applies after the expiry of the period specified therefor in the Limitation Act, 1963 (36 of 1963), for setting aside the abatement and also for the admission of that application under section 5 of that Act on the ground that he had, by reason of such ignorance, sufficient cause for not making the application within the period specified in the said Act,

the Court shall, in considering the application under the said section 5, have due regard to the fact of such ignorance, if proved."

It is the vehement contention of the learned counsel for the appellant, that it is imperative for a court to exempt the plaintiff from the necessity of substituting the legal representatives of a defendant, before proceeding with the matter. In the absence of any such express exemption granted by the court, no benefit can be drawn by the plaintiff who has obtained a finding in his favour, without impleading the legal representatives in place of the deceased defendant.

26. We have given our thoughtful consideration to the submissions advanced at the hands of the learned counsel for the appellant. The real issue which needs to be determined with reference to the contention advanced at the hands of the learned counsel for the appellant under Order XXII Rule 4(4) of the Code of Civil Procedure is whether the learned Single Judge while proceeding with the trial of CS (OS) no.2501 of 1997 was aware of the death of the plaintiff Sushil K.C. (the appellant herein). And further, whether the learned Single Judge of the High Court had thereafter, taken a conscious decision to proceed with the suit without insisting on the impleadment of the legal representatives of the deceased defendant Sushil K.C. It is possible for us, in the facts of this case, to record an answer to the question posed above. We shall now endeavour to do so. It is not a matter of dispute, that Sushil K.C. had died on 3.6.2003. It is also not a matter of dispute, that on 29.8.2003 the plaintiff Tej Properties (the respondent herein) had filed an interlocutory application, being IA no.9676 of 2003 under Order XXII Rule 4(4) of the Code of Civil Procedure, for proceeding with CS (OS) no.2501 of 1997 ex-parte, by bringing to the notice of the learned Single Judge, that Sushil K.C. had died on 3.6.2003. That being the acknowledged position, when the learned Single Judge allowed the proceedings in CS(OS) no.2501 of 1997 to progress further, it is imperative to infer, that the court had taken a conscious decision under Order XXII Rule 4(4) of the Code of Civil Procedure, to proceed with the matter ex-parte as against interests of Sushil K.C., (the defendant therein), without first requiring Tej Properties (the

plaintiff therein) to be impleaded the legal representatives of the deceased defendant. It is therefore, that evidence was recorded on behalf of the plaintiff therein, i.e., Tej Properties (the respondent herein) on 28.1.2005. In the aforesaid view of the matter, there is certainly no doubt in our mind, that being mindful of the death of Sushil K.C., which came to his knowledge through IA no.7696 of 2006, a conscious decision was taken by the learned Single Judge, to proceed with the matter ex-parte as against the interests of Sushil K.C. This position adopted by the learned Single Judge in CS (OS) no.2501 of 1997 was clearly permissible under Order XXII Rule 4(4) of the Code of Civil Procedure. A trial court can proceed with a suit under the aforementioned provision, without impleading the legal representatives of a defendant, who having filed a written statement has failed to appear and contest the suit, if the court considers it fit to do so. All the ingredients of Order XXII Rule 4(4) of the Code of Civil Procedure stood fully satisfied in the facts and circumstances of this case. In this behalf all that needs to be noticed is, that the defendant Sushil K.C. having entered appearance in CS (OS) no. 2501 of 1997, had filed his written statement on 6.3.1998. Thereafter, the defendant Sushil K.C. stopped appearing in the said civil suit. Whereafter, he was not even represented through counsel. The order to proceed against Sushil K.C. ex-parte was passed on 1.8.2000. Even thereupon, no efforts were made by Sushil K.C. to participate in the proceedings of CS(OS) no.2501 of 1997, till his death on 3.6.2003. It is apparent, that the trial court was mindful of the factual position noticed above, and consciously allowed the suit to proceed further. When the suit was allowed to proceed further, without insisting on the impleadment of the legal representatives of Sushil K.C. it was done on the court's satisfaction, that it was a fit case to exempt the plaintiff (Tej Properties) from the necessity of impleading the legal representatives of the sole defendant Sushil K.C. (the appellant herein). This could only have been done, on the satisfaction that the parameters postulated under Order XXII Rule 4(4) of the

Code of Civil Procedure, stood complied. The fact that the aforesaid satisfaction was justified, has already been affirmatively concluded by us, hereinabove. We are therefore of the considered view, that the learned Single Judge committed no error whatsoever in proceeding with the matter in CS (OS) no.2501 of 1997 ex-parte, as against the sole defendant Sushil K.C., without impleading his legal representatives in his place. We therefore, hereby, uphold the determination of the learned Single Judge, with reference to Order XXII Rule 4(4) of the Code of Civil Procedure.

27. For the reasons recorded hereinabove, we find no merit in the instant appeals and the same are accordingly dismissed.

B.B.B. Appeals dismissed.

SHIVDEV KAUR (D) BY LRS. & ORS.
v.
R.S. GREWAL
(Civil Appeal Nos. 5063-5065 of 2005)

MARCH 20, 2013.

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

Hindu Succession Act, 1956 – s.14(2) – 'Life interest' created in favour of a Hindu female – Under a 'Will' executed prior to commencement of the Act – Held: After commencement of the Act, the 'life interest' would not stand converted to 'absolute title'.

Words and Phrases – Expression 'destitute' – Meaning of, in the context of Succession.

The question for consideration in the instant appeals was whether a 'life interest' created in favour of a Hindu female through a 'Will' prior to commencement of Hindu Succession Act, 1956, would stand converted into 'absolute right' on commencement of the 1956 Act.

Dismissing the appeals, the Court

HELD: 1. Section 14 of Hindu Succession Act, 1956 provides for conversion of life interest into absolute title on commencement of the 1956 Act. However, sub-section (2) carves out an exception to the same, as it provides that such right would not be conferred where a property is acquired by a Hindu female by way of 'Gift' or under a 'Will' or any other instrument prescribing a restricted estate in that property. Therefore, if a Hindu female has been given only a 'life interest', through 'Will' or 'Gift' or any other document referred to in Section 14

of the 1956 Act, the said rights would not stand crystallised into the absolute ownership. Interpreting the provisions to the effect that she would acquire absolute ownership/title into the property by virtue of the provisions of Section 14(1) of the 1956 Act, would render the provisions of Sections 14(2) and 30 of the 1956 Act otiose. Thus the property acquired by a Hindu female by a 'Will' or 'Gift', giving her only a "life interest", would remain the same even after commencement of the 1956 Act, and such a Hindu female cannot acquire absolute title. [Paras 9, 13 and 14]

Mst. Karmi v. Amru and Ors. **AIR 1971 SC 745;** *Navneet Lal @ Rangi v. Gokul and Ors.* **AIR 1976 SC 794: 1976 (2) SCR 924;** *Jagan Singh (Dead) Through LRs. v. Dhanwanti and Anr.* **(2012) 2 SCC 628: 2012 (2) SCR 303;** *Sadhu Singh v. Gurdwara Sahib Narike and Ors.* **AIR 2006 SC 3282: 2006 (5) Suppl. SCR 799;** *Balwant Kaur and Anr. v. Chanan Singh and Ors.* **AIR 2000 SC 1908: 2000 (3) SCR 61 – relied on.**

2. Whether person is destitute or not, is a question of fact. The expression 'destitute' has not been defined under the 1956 Act or under the Code of Criminal Procedure, 1973, or Code of Civil Procedure, 1908. The dictionary meaning is "without resources, in want of necessaries". A person can be held destitute when no one is to support him and is found wandering without any settled place of abode and without visible means of subsistence. [Para 14]

Case Law Reference:

AIR 1971 SC 745	**relied on**	**Para 10**
1976 (2) SCR 924	**relied on**	**Para 10**
2012 (2) SCR 303	**relied on**	**Para 10**

2006 (5) Suppl. SCR 799 relied on Para 11

2000 (3) SCR 61 relied on Para 12

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 5063-5065 of 2005.

From the Judgment & Orders dated 02.07.2004 of the High Court of Punjab & Haryana at Chandigarh in Regular Second Appeal Nos. 257 & 608 of 1982 and Cross Objections No. 14-C of 1982.

Devender, Minakshi for the Appellants.

R.K. Dhawan, Kanika Greval, Sheweeta Joshi, M.A. Chinnasamy for the Respondent.

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 2.7.2004 passed by the High Court of Punjab & Haryana at Chandigarh in Regular Second Appeal No. 257 of 1982 and Regular Second Appeal No. 608 of 1982 and Cross Objection No. 14-C of 1982 by which the High Court has affirmed the judgment of the first appellate court as well as the trial court so far as the nature of the rights of the appellant in the suit property are concerned.

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

A. One Dr. Hira Singh had acquired a huge property in his life time. He executed various deeds creating certain rights in favour of his sole son Dr. Shivdev Singh Grewal and two daughters, namely, Smt. Dayawant Kaur and Dr. Shivdev Kaur including the Will dated 16.9.1944, creating certain rights in favour of the appellant. Dr. Hira Singh died on 11.4.1945.

B. Shri Shivdev Singh Grewal and Smt. Dayawant Kaur

died leaving behind their children. Dr. Shivdev Kaur claimed certain rights on the basis of the Will dated 16.9.1944, and for the same she filed Suit No. 161/399/74 on 4.10.1974 against her nephew for mandatory injunction seeking his eviction from the suit premises claiming absolute right/ownership over the same in view of the provisions of Section 14 of the Hindu Succession Act, 1956 (hereinafter referred to as the 'Act 1956'). The respondent/defendant contested the suit denying such a right.

C. During the pendency of the said suit, the respondent/defendant also filed Suit No. 80 of 1976, against the appellant/plaintiff for permanent injunction restraining her from transferring/alienating the suit property. The trial court vide judgment and decree dated 28.4.1978 decided the Suit No. 161/399/74, holding that appellant/plaintiff had no absolute right/ownership over the suit property. The trial court vide judgment and decree dated 4.6.1979 passed in Suit No. 80/1976, held to the effect that the appellant would not interfere in any manner in respect of the agricultural lands etc., however, she would not be dispossessed from the suit premises and it would be subject to the final decision of the another suit.

D. Aggrieved, both parties filed appeals and cross-objections. The appellate court dismissed the appeal filed by the respondent on 22.10.1981. On the same day, appeal filed by the appellant was allowed to certain extent. However, so far as the issue relating to conversion of the life interest into absolute title was decided against the appellant.

E. Aggrieved, respondent filed RSA Nos. 257 and 608 of 1982, and appellant filed RSA No. 608/1982 and cross-objection bearing No. 14-C/1982.

F. The appellant executed a Will dated 28.2.1991 in respect of the suit property creating a trust in the name of her father and appointing Shri Sudarshan Singh Deol and Brig Inderjeet Singh Dhillon as the trustees. She further made

Codicil dated 25.8.1995. The appellant died on 15.2.1998 and thus executors of her Will got impleaded.

G. The High Court allowed both the RSAs filed by the respondent and dismissed the claim of the appellant.

Hence, these appeals.

3. Shri Devender Mohan Verma, learned counsel appearing on behalf of the appellant, has argued that the appellant had become a widow at a very young age. She was maintained by her in laws, thus, her father took pity on her and as she was a destitute, brought her back and created a "life interest" in her favour in respect of the suit property by executing a Will dated 16.9.1944. She started residing in the suit property. Her father died in 1945. After commencement of the Act 1956, right of "life interest" stood crystallised into absolute right and title. Therefore, the courts below erred in deciding the issue against her. Thus, the appeals deserve to be allowed.

4. Per contra, Shri R.K. Dhawan, learned counsel appearing on behalf of the respondent, has opposed the appeals contending that the appellant cannot be permitted to introduce a new case that the appellant was a destitute. She was a well qualified person and MBBS doctor. She had acquired large properties from the family of her late husband. More so, father of the appellant had created only "life interest" in her favour in the suit property by executing the Will. Section 14(2) of the Act 1956 does not provide that such "life interest" would stand converted into absolute ownership on commencement of the said Act. There are concurrent findings of facts on this issue and, thus, the appeals lack merit and are liable to be dismissed.

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

6. The document creating a limited right, "life interest" in favour of the appellant i.e. Will dated 16.9.1944 so far as the

relevant part is concerned reads as under:

> "I give this Kothi situated at Iqbal Road to my daughter Bibi Shivdev Kaur subject to the rights of Bibi Shiv Charan Kaur, mentioned above, for life time, who after my death will remain abad in this Kothi and get benefit thereof. If she wishes, she can get the benefit of its rent also as per necessity and can use the income of rent. But these rights are only for her life time. She can not alienate this kothi or the site relating thereto, in any way, or create any charge thereon, nor she can mortgage gift, sell or transfer it. My son Shibdev Singh aforesaid shall also be the sole owner of this Kothi subject to the above mentioned rights."

7. It is evident from the aforesaid part of the Will that only a life interest had been created in favour of the appellant by that Will. Therefore, the sole question for our consideration remains as to whether such limited right got converted into absolute right on commencement of the Act 1956.

8. Section 14 of the Act 1956 reads as under:

> "**14. Property of a female Hindu to be her absolute property.**
>
> (1) Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner.
>
> (2) Nothing contained in sub- section (1) shall apply to any property acquired by way of gift or under a will or any other instrument or under a decree or order of a civil court or under an award **where the terms of the** gift, **will** or other instrument or the decree, order or award **prescribe a restricted estate in such property."** (Emphasis added)

9. The aforesaid statutory provisions provide for

conversion of life interest into absolute title on commencement of the Act 1956, however, sub-section (2) carves out an exception to the same as it provides that such right would not be conferred where a property is acquired by a Hindu female by way of gift or **under a Will** or any other instrument **prescribing a restricted estate** in that property.

10. In *Mst. Karmi v. Amru & Ors.,* AIR 1971 SC 745, a similar issue was considered by this Court and after examining the contents of the Will came to the conclusion that where a woman succeeded some property on the strength of a Will, she cannot claim any right in those properties over and above what was given to her under that Will. The life estate given to her under the Will would not become an absolute estate under the provisions of the Act 1956 and, thus, such a Hindu female cannot claim any title to the suit property on the basis of the Will executed in her favour. (See also: *Navneet Lal @ Rangi v. Gokul & Ors.,* AIR 1976 SC 794; and *Jagan Singh (Dead) Through LRs. v. Dhanwanti & Anr.,* (2012) 2 SCC 628).

11. In *Sadhu Singh v. Gurdwara Sahib Narike & Ors.,* AIR 2006 SC 3282, this Court again considered the issue, held as under:

> ***"****When he thus validly disposes of his property by providing for a* ***limited estate*** *to his heir, the wife or widow has to take it as the estate falls. This restriction on her right so provided, is really respected by the Act. It provides in Section 14(2) of the Act, that in such a case,* ***the widow is bound by the limitation on her right and she cannot claim any higher right by invoking Section 14(1) of the Act.*** *In other words, conferment of a limited estate which is otherwise valid in law is reinforced by this Act by the introduction of Section 14(2) of the Act and excluding the operation of Section 14(1) of the Act, even if that provision is held to be attracted in the case of a succession under the Act. Invocation of Section 14(1) of the Act in the case of a testamentary disposition taking effect after the Act,*

> *would make Sections 30 and 14(2) redundant or otiose. It will also make redundant, the expression "property possessed by a female Hindu" occurring in Section 14(1) of the Act. An interpretation that leads to such a result cannot certainly be accepted. Surely, there is nothing in the Act compelling such an interpretation. Sections 14 and 30 both have play. Section 14(1) applies in a case where the female had received the property prior to the Act being entitled to it as a matter of right, even if the right be to a limited estate under the Mitakshara law or the right to maintenance. (Emphasis added)*

12. Shri Verma, learned counsel for the appellant placed a very heavy reliance on the judgment of this Court in *Balwant Kaur & Anr. v. Chanan Singh & Ors.,* AIR 2000 SC 1908, contending that a destitute Hindu daughter if acquires such a right, it would stand crystallised in absolute title. There is a complete fallacy in his argument. In the said case, this Court held that all the clauses of the Will must be read together to find out the intention of the testator. The court held:

> *"…This is obviously on the principle that the last clause represents the latest intention of the testator. It is true that in the earlier part of the Will, the testator has stated that his daughter Balwant Kaur shall be the* ***heir, owner and title-holder*** *of his entire remaining moveable and immovable property but in the later part of the same Will he has clearly stated that* ***on the death of Balwant Kaur, the brothers of the testator shall be the heirs of the property.*** *This clearly shows that the recitals in the later part of the Will would operate and make Appellant 1 only a limited estate-holder in the property bequeathed to her."*
>
> (Emphasis added)

13. Thus, in view of the above, the law on the issue can be summarised to the effect that if a Hindu female has been given only a "life interest", through Will or gift or any other

document referred to in Section 14 of the Act 1956, the said rights would not stand crystallised into the absolute ownership as interpreting the provisions to the effect that she would acquire absolute ownership/title into the property by virtue of the provisions of Section 14(1) of the Act 1956, the provisions of Sections 14(2) and 30 of the Act 1956 would become otios.

Section 14(2) carves out an exception to rule provided in sub-section (1) thereof, which clearly provides that if a property has been acquired by a Hindu female by a Will or gift, giving her only a "life interest", it would remain the same even after commencement of the Act 1956, and such a Hindu female cannot acquire absolute title.

14. Whether person is destitute or not, is a question of fact. The expression 'destitute' has not been defined under the Act 1956 or under the Code of Criminal Procedure, 1973, or Code of Civil Procedure, 1908. The dictionary meaning is "without resources, in want of necessaries". A person can be held destitute when no one is to support him and is found wandering without any settled place of abode and without visible means of subsistence. In the instant case, no factual foundation has ever been laid by the appellant before the courts below in this regard. In such a fact-situation, the issue does not require consideration.

15. All the courts have taken a consistent view rejecting the claim of the appellant of having acquired an absolute title. We do not see any cogent reason to interfere with the concurrent findings of facts. Appeals lack merit and are accordingly dismissed.

K.K.T. Appeals dismissed.

M/S. GHCL EMPLOYEES STOCK OPTION TRUST

v.

M/S INDIA INFOLINE LIMITED

(Criminal Appeal No. 488 of 2013)

MARCH 22, 2013

[P. SATHASIVAM AND M.Y. EQBAL, JJ.]

Code of Criminal Procedure, 1973 – s.482 – Complaint case – Issuance of summons – Quashing of – Respondent no.1-company dealt with securities and were registered stock brokers and agents – Appellant opened a Demat Account with respondent no.1-company – Respondent nos.2 to 7 were Managing Director, Company Secretary and Directors of respondent no.1-company – Complaint filed by appellant alleging that the respondents committed criminal breach of trust and cheating, inasmuch as they sold off 8,76,668 shares of the appellant and misappropriated the entire sale proceeds – Metropolitan Magistrate summoned the respondents to face trial under ss.415, 409, 34, 120B – Criminal proceedings initiated against respondent nos.2 to 7 – Quashed by High Court – Justification – Held: Justified – Order of Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto – Magistrate has to record his satisfaction with regard to the existence of a prima facie case on the basis of specific allegations made in the complaint supported by satisfactory evidence and other material on record – On facts, the order passed by the Magistrate reveals that two witnesses were examined by the complainant but none of them specifically stated as to which of the accused committed breach of trust or cheated the complainant except general and bald allegations made therein – In the order issuing summons, the Magistrate did not record his satisfaction about the prima facie case as against respondent Nos.2 to 7 and the role played

by them in the capacity of Managing Director, Company Secretary or Directors of the company which is sine qua non for initiating criminal action against them – Issuance of summons against respondent Nos.2 to 7 was therefore illegal and amounted to abuse of the process of law – Penal Code, 1860 – ss. 415, 409, 34 and 120B.

Respondent no.1-company dealt with securities and were registered stock brokers and agents. The appellant opened a Demat Account with respondent no.1-company, and placed orders from time to time for purchase of shares and also made payments against its running account with the Company. Respondent nos.2 to 7 were Managing Director, Company Secretary and Directors of respondent no.1-company. Subsequently, the appellant filed a complaint alleging that the respondents committed criminal breach of trust and cheating, inasmuch as they sold off 8,76,668 shares of the appellant and misappropriated the entire sale proceeds. The Metropolitan Magistrate summoned the respondents to face trial under Sections 415, 409, 34, 120B of IPC. Challenging the order passed by the Metropolitan Magistrate, seven Criminal Miscellaneous Cases under Section 482 CrPC were separately filed on behalf of respondent no.1-company, and respondent nos. 2 to 7.

The High Court by the impugned order held that issuance of summons against respondents Nos. 2 to 7 cannot be sustained. So far as respondent No.1-company is concerned, the High Court held that issuance of summons as against the Company under Section 415 IPC also cannot be sustained. The Magistrate was directed to proceed with the trial against respondent No. 1 under other Sections of IPC.

In the instant appeals, the appellant contended that the High Court gravely erred in law in taking into

consideration probable defence of the accused-respondents, which was tendered at the time of the hearing of the petitions under Section 482 Cr.P.C. questioning the legality of the summoning order passed by the Magistrate; and that the High Court failed to appreciate that the allegations against respondent nos. 2 to 7 were not based on any vicarious liability but on the specific allegations of their having conspired together to cheat and commit breach of trust, which is supported by documentary evidence.

Dismissing the appeals, the Court

HELD:1.1. From bare perusal of the complaint and the allegations made therein, it is clear that the complainant-appellant has not made specific allegations against respondent Nos.2 to 7. In paragraph 2 of the complaint, it is alleged that respondent Nos.2 to 6 are looking after the day-to-day affairs of the Company. With whom the complainant or its authorized representative interacted has also not been specified. Although in paragraph 11 of the complaint it is alleged that the complainant on numerous occasions met accused Nos.2 to 7 and requested to refund the amount, but again the complainant has not made specific allegation about the date of meeting and whether it was an individual meeting or collective meeting. Similarly, in paragraph 17 of the complaint, there is no allegation that a particular Director or Managing Director fabricated debit note. In the entire complaint there are bald and vague allegations against respondent Nos.2 to 7. [Para 12]

1.2. Summoning of accused in a criminal case is a serious matter. Hence, criminal law cannot be set into motion as a matter of course. The order of Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable

thereto. The Magistrate has to record his satisfaction with regard to the existence of a *prima facie* case on the basis of specific allegations made in the complaint supported by satisfactory evidence and other material on record. [Para 14]

1.3. In the instant case, the order passed by the Magistrate reveals that two witnesses were examined by the complainant-appellant but none of them specifically stated as to which of the accused committed breach of trust or cheated the complainant except general and bald allegations made therein. In the order issuing summons, the Magistrate has not recorded his satisfaction about the *prima facie* case as against respondent Nos.2 to 7 and the role played by them in the capacity of Managing Director, Company Secretary or Directors which is *sine qua non* for initiating criminal action against them. The High Court has correctly noted that issuance of summons against respondent Nos.2 to 7 is illegal and amounts to abuse of the process of law. [Paras 18, 19 and 21]

Madhav Rao Jiwaji Rao Scindia & Ors. vs. Sambhajirao Chandrojirao Angre & Ors. **(1988) 1 SCC 692: 1988 (2) SCR 930;** *Punjab National Bank and Others vs. Surendra Prasad Sinha* **AIR 1992 SC 1815: 1992 (2) SCR 528;** *Maksud Saiyed vs. State of Gujarat and Others* **(2008) 5 SCC 668: 2007 (9) SCR 1113 and** *M/s.Thermax Ltd. & Ors. vs. K.M. Johny & Ors.* **2011 (11) SCALE 128 – referred to.**

S.K. Alagh vs. State of Uttar Pradesh & Ors. **(2008) 5 SCC 662: 2008 (2) SCR 1088 and** *Standard Chartered Bank and Ors. Etc. vs. Directorate of Enforcement & Ors.* **AIR 2005 SC 2622: 2005 (1) Suppl. SCR 49 – cited.**

Case Law Reference:

1988 (2) SCR 930	**referred to**	**Paras 8, 9, 15**
2008 (2) SCR 1088	**cited**	**Para 8**

2005 (1) Suppl. SCR 49	**cited**	**Para 9**
1992 (2) SCR 528	**referred to**	**Para 16**
2007 (9) SCR 1113	**referred to**	**Para 17**
2011 (11) SCALE 128	**referred to**	**Paras 9, 19**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 488 of 2013.

From the Judgment & Order dated 14.12.2009 of the High Court of Delhi at New Delhi in CRLM No. 1892 of 2009.

WITH

Criminal Appeal Nos. 489-494 of 2013.

Rakesh Tiku, Manjusha Wadha and M.A. Venkata Subramanian for the Appellant.

A.M. Singhvi and Jayant Bhushan, Ajay Bhargava, Vanita Bhargava, Ankur Khandelwal, Vinam Gupta, Khaitan and Co., for the Respondent.

The Judgment of the Court was delivered by

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

2. Since these seven appeals arose out of the common order passed by the Delhi High Court in seven Criminal Miscellaneous Cases filed by the respondents, the same have been heard and disposed of by this common judgment.

3. The aforesaid seven Criminal Miscellaneous Cases were filed in the High Court challenging the order dated 27th September, 2008 passed by the Metropolitan Magistrate, New Delhi whereby he had summoned the respondents to face trial under Sections 415, 409, 34, 120B of the Indian Penal Code (IPC) on a complaint filed by the appellant. These Criminal Miscellaneous Cases were filed separately in the High Court

on behalf of the Company, namely, India Infoline Limited, and by the Managing Director, Company Secretary and other Directors of the said Company.

4. The appellant had filed a complaint before the Metropolitan Magistrate alleging commission of offences under the aforementioned Sections of IPC. The brief facts of the case as set out in the complaint are as follows: The complainant opened a Demat Account with respondent No. 1 Company, namely, India Infoline Limited in 2007 and placed orders from time to time for purchase of shares and also made payments against its running account with the Company. The Company allegedly claimed outstanding debit of Rs.10.48 crores against the complainant in its Demat Account with it. The said Company was having a lien on 20,46,195 shares purchased by the complainant in that account. The respondent- Company being accused No. 1 informed the complainant about the aforesaid debit. The complainant cleared the amount outstanding against it by making payment of Rs.10.48 crores by a cheque. Later on, it transpired that the correct debit against the complainant was Rs.10,22,77,522/-. It was alleged that the respondent-Company dishonestly received a sum of Rs.25,22,477.53 from the complainant by making false demand. It was further alleged by the complainant that on receipt of the amount of Rs.10.48 crores the respondent- accused were under legal obligation to transfer the shares purchased by the complainant from the Pool Account to its Demat Account but instead of doing that and refunding the excess amount of Rs.25,22,477.53, they, vide letter dated 14th May, 2008 asked the complainant to clear the debit of 5 companies, namely, (i) Carissa Investments Pvt. Ltd. (ii) Altar Investments Pvt. Ltd. (iii) Oval Investments Pvt. Ltd. (iv) Dalmia Housing Finance Ltd. (v) Dear Investment Pvt. Ltd. in terms of its letter dated 1st March, 2008 failing which they would regularize the aforementioned 5 accounts by selling the stock of the complainant. The complainant alleged that since no letter dated 1st March, 2008 had been written by the complainant to the accused, it denied the averments made in their letter dated

14th May, 2008. The complainant further alleged that they met respondents Nos. 2 to 7, namely, the Managing Director, the Company Secretary and the Directors of respondent No. 1 Company and requested to refund the excess amount and transfer its shares to Demat Account but nothing was done. The complainant, therefore, alleged that the respondents have committed criminal breach of trust and cheating, inasmuch as they have sold off 8,76,668 shares of the complainant on 23rd June, 2008 and misappropriated the entire sale proceeds.

5. The Metropolitan Magistrate after considering the allegations made in the complaint, documents placed on the record and the evidence led by the witnesses, and after being satisfied that a prima facie case is made out, directed issuance of summons against the respondents to face trial under the aforementioned Sections of IPC.

6. Aggrieved by the said order passed by the Metropolitan Magistrate, New Delhi, the respondents filed separate petitions before the Delhi High Court challenging the issuance of summons against the Company, the Managing Director, the Company Secretary and the Directors of the Company. The High Court by the impugned order held that issuance of summons against respondents Nos. 2 to 7, namely, the Managing Director, the Company Secretary and the Directors of the Company cannot be sustained and the same are liable to be set aside. So far as respondent No. 1 Company is concerned, the High Court held that issuance of summons as against the Company under Section 415 IPC also cannot be sustained. The learned Magistrate has been directed to proceed with the trial against respondent No. 1 M/s. India Infoline Limited under other Sections of IPC.

7. Dissatisfied with the aforesaid order passed by the High Court, the complainant has preferred these appeals by special leave.

8. Mr. Rakesh Tiku, learned senior counsel appearing for

the appellant assailed the impugned order passed by the High Court as being illegal and wholly without jurisdiction. Learned counsel first contended that the High Court has gravely erred in law in taking into consideration probable defence of the accused, which was tendered at the time of the hearing of the petitions under Section 482 Cr.P.C. questioning the legality of the summoning order passed by the learned Magistrate. Learned counsel submitted that the High Court has failed to appreciate that the allegations against the Managing Director, Company Secretary and other Directors of the Company (accused Nos. 2 to 7) in the original complaint were not based on any vicarious liability but on the specific allegations of their having conspired together to cheat and commit breach of trust, which is supported by documentary evidence. According to the learned senor counsel, the High Court exceeded its jurisdiction under Section 482 Cr.P.C. by entering into the merits of the case observing that there were no material against the accused so as to proceed against them under Sections 406, 409, 420, 477A, 34 and 120B of I.P.C. Learned counsel submitted that the appellant is a registered Trust created by M/s. G.H.C.L., a Company registered under the Companies Act, for the benefit of eligible employees of the Company for transfer of Company's equity shares. It was contended that accused Nos. 2 to 7, who were Managing Director, Company Secretary and Directors of the Company are involved in the day-to-day activities of the Company and responsible for the conduct and business of the said Company. Lastly, it was submitted that there is a specific allegation and averment in the complaint that the complainant had been interacting with the Directors of the Company and, therefore, there was sufficient material for issuance of summons against them. Learned counsel put reliance on the decisions of this Court in *Madhav Rao Jiwaji Rao Scindia & Ors. vs. Sambhajirao Chandrojirao Angre & Ors.* (1988) 1 SCC 692 and *S.K. Alagh vs. State of Uttar Pradesh & Ors.* (2008) 5 SCC 662.

9. Per contra, Dr. Abhishek Manu Singhvi, learned senior

counsel appearing for the respondents in all the cases at the very outset submitted that the High Court has correctly quashed the criminal proceedings initiated against the Managing Director, the Company Secretary and other Directors of the Company holding that there cannot be vicarious liability; and moreover, the complainant needs to specifically allege the act/complaint of/against the individual Director and what role such individual Director had played. Learned counsel submitted that the complainant made a general averment that respondent Nos. 2 to 7 were responsible for day-to-day affairs of the Company without specifying the exact role played by them in the transaction. It was contended that the appellant-complainant is seeking to make new allegations supplemented by new documents to show that the order passed by the Magistrate summoning the respondents was justified. Nowhere in the complaint, the appellant-complainant mentioned the details of the alleged meeting and discussion with respondents Nos. 2 to 7 or even alleged that which of the appellant's authorized representative met the Managing Director or Directors of the Company and vague allegations have been made stating that on numerous occasions the appellant's representative met accused Nos. 2 to 7 which is not sufficient for summoning them in a criminal proceedings. Dr. Singhvi then contended that at the outset the alleged letter dated 1st March, 2008 has been treated by the High Court for all practical purposes in favour of the respondents which is grossly incorrect when the High Court by arriving at its decision has proceeded on the assumption that the letter dated 1st March, 2008 was not written by Shri Bhuwneswar Mishra to the respondent Company. Referring various decisions of this Court, Dr. Singhvi submitted that a mere bald statement that respondents Nos. 2 to 7 were in charge of the Company and responsible for day-to-day affairs of the Company is not sufficient, but the complaint must contain specific averments and allegations against each and every Director of the Company. Lastly, it was contended that the dispute raised by the complainant is purely a civil dispute. Further, the parties have already put their disputes before the

Arbitrator and the arbitration proceedings are pending for hearing. Under these circumstances, according to Dr. Singhvi, the criminal proceedings are nothing but an abuse of the process of court. Learned counsel put reliance on the decisions of this Court in the cases of *Madhav Rao Jiwaji Rao Scindia & Ors. vs. Sambhajirao Chandrojirao Angre & Ors.* (1988) 1 SCC 692, *S.K. Alagh vs. State of Uttar Pradesh & Ors.* (2008) 5 SCC 662, *M/s. Thermax Ltd. & Ors. vs. K.M. Johny & Ors.* 2011 (11) SCALE 128 and *Standard Chartered Bank and Ors. Etc. vs. Directorate of Enforcement & Ors.* AIR 2005 SC 2622.

10. We have carefully considered the submissions of the learned counsel on either side. The various decisions relied upon by the learned counsel appearing on either side have been considered by us. It is not necessary to quote extensively various passages from several judgments except a few which are relevant and touching the issue directly on the point raised in these appeals.

11. In order to appreciate the rival contentions made by the learned counsel, we would like to refer hereinbelow some of the relevant paragraphs of the complaint in order to find out as to whether those averments constitute offences under Sections 406/409/420/477A/34/120B, IPC:

> "2) That the Accused No. 1 is the Company registered under the Companies Act, 1956. The accused deal in securities and are the registered stock brokers and agents with the National Stock Exchange India Ltd. and also with Bombay Stock Exchange Ltd. It also has their branch office in Delhi. That the Accused Nos. 2 to 6 are the Directors of the accused company and accused No. 7 is Secretary of the accused No. 1 Company and are looking after day to day affairs of the company and are/were responsible for conduct and business of the accused No. 1 and at some or the other time interacted with the complaint. The employees of accused No. 1 act as per the direction given by the accused Nos. 2 to 7 from time to

> time. They in connivance with each other in order to fulfill the malafide intention and in order to make illegal gain has cheated the petitioner company and in breach of trust also sold the shares worth Rs. Nine crores approximately.
>
> (3) That the trustees of the Complainant at the request of the GHCL opened a Demat Account No. (DP ID and Client ID is IN302269- 120107581) with accused No. 1 on 11.9.2007 and transferred the shares acquired in the said account after entering into Broker- Client Agreement.
>
> (4) That after opening the Demat account, the complainant kept on placing orders for purchase of share on the accused and made payments against the running account from time to time.
>
> (5) That the Accused No. 1 vide letter dated 30.4.2008 informed the complainant that there is an outstanding debit of Rs.10.48 crores against the complainant and the 20,46,195 quantity of GHCL shares acquired by the Complainant shall be free from lien after clearing the debit in their account. The relevant portion of the letter is reproduced as under:-
>
> "It is hereby informed that your trading account with client code EMPTRUST is having an outstanding debit of Rs.10.48 crores. Further, the 20,46,195 quantity of GHCL share bought by you shall be free from lien after clearing the debit in the account."
>
> xxx xxx xxx
>
> (9) That instead of transferring the share to the Demat account of the complainant and refunding the excess amount of Rs.25,22,477.53, the Accused vide a letter dated 14.5.2008 to the complainant asked to clear the debit of the following companies:
>
> (a) Carissa Investments Pvt. Ltd.

(b) Altar Investments Pvt. Ltd.

(c) Oval Investments Pvt. Ltd.

(d) Dalmia Housing Finance Ltd.

(e) Dear Investment Pvt. Ltd.

The aforesaid letter by the Accused though dated 14.5.2008 was received by the complainant on 28.5.2008. In fact, the above said letter was predated as evident from the postal stamp on the envelop which bears the date posting as 21.5.2008.

xxx xxx xxx

(11) That the complainant on numerous occasions met the Accused Nos. 2 to 7 and requested to refund the excess amount and to transfer its share to Demat Account, however the meetings as well as various communications with the accused failed to bring any result. The complainant also requested to the Accused to withdraw the fictitious claim/adjustment as desired by it in their letter dated 14.5.2008. However, instead the accused vide its letter dated 9.6.2008 again intimated the complainants to regularize the accounts of the aforesaid companies by selling the stocks in the Complainant's accounts as instructed vide letter dated 1.3.2008 alleged to be signed by one of the trustees of the complainant Mr. Bhuwneshwar Mishra.

xxx xxx xxx

(14) That all the accused not only received the excess amount but misappropriated the same, which they invariably refused to refund and instead constantly started intimidating the complainant to discharge the liabilities of the aforesaid companies mentioned in their letters dated 14.5.2008 and 9.6.2008 whereas the complainant was

under no such legal obligation to clear the debits of these companies for the reason that these five companies are separate legal entities and there is no relation whatsoever with the complainant. All the accused were fully aware that complainant is under no obligation to pay any amount alleged to be payable from the other companies.

xxx xxx xxx

(16) That it has now been learned that the accused despite having no legal right, has illegally, without any authorization, and in order to cheat the complainant sold off 876668 shares on 23.6.2008 of the Complainant trust in the open market. The Complainant received SMS on 24.6.2008 about the said sale. The trust has suffered a huge monetary loss on account of this illegal disposal of stocks of the complainant by the accused. The shares were lying/kept with the accused for the purpose of DEMATINC, to account of complainant and as evident from their own letter dated 30.4.2008 they had no lien once the payment was made and thus accused in connivance with each other committed breach of trust and caused unlawful loss to the complainant and this also offence of cheating.

(17) That accused by raising the false and fabricated debit note induced the complainant to deposit a huge amount of Rs.10.48 crores, which as per their own admission i.e. statement of account is excess to the tune of Rs.25,22,477.53. The accused have thereby rendered themselves liable to be prosecuted by this Hon'ble Court under Section 477A of the Indian Penal Code.

(18) That the accused in connivance with each other have further dishonestly transferred/misappropriated funds obtained on the pretext of some unaccounted debit and further the accused despite having no legal right has illegally without any authorization, sold off 876668 shares on 23.6.2008 of the Complainant trust in the open market

without any prior intimation to the complainant and has misappropriated the sale proceeds for wrongful gain since the shares never kept with them in trust. By disposing of the said shares without any prior consent or intimation clearly reflects that the accused dishonestly misappropriated the shares in trust with the Accused and thus liable to be prosecuted under the provisions of section 406 of the Indian Penal Code, 1860."

12. From bare perusal of the complaint and the allegations made therein, we do not find in any of the paragraphs that the complainant has made specific allegations against respondent Nos.2 to 7. In paragraph 2 of the complaint, it is alleged that respondent Nos.2 to 6 are looking after the day-to-day affairs of the Company. With whom the complainant or its authorized representative interacted has also not been specified. Although in paragraph 11 of the complaint it is alleged that the complainant on numerous occasions met accused Nos.2 to 7 and requested to refund the amount, but again the complainant has not made specific allegation about the date of meeting and whether it was an individual meeting or collective meeting. Similarly, in paragraph 17 of the complaint, there is no allegation that a particular Director or Managing Director fabricated debit note. In the entire complaint there are bald and vague allegations against respondent Nos.2 to 7.

13. There is no dispute with regard to the legal proposition that the case of breach of trust or cheating are both a civil wrong and a criminal offence, but under certain situations where the act alleged would predominantly be a civil wrong, such an act does not constitute a criminal offence.

14. Be that as it may, as held by this Court, summoning of accused in a criminal case is a serious matter. Hence, criminal law cannot be set into motion as a matter of course. The order of Magistrate summoning the accused must reflect that he has applied his mind to the facts of the case and the law applicable thereto. The Magistrate has to record his

satisfaction with regard to the existence of a prima facie case on the basis of specific allegations made in the complaint supported by satisfactory evidence and other material on record.

15. In the case of *Madhavrao Jiwaji Rao Scindia and Another Etc. vs. Sambhajirao Chandrojirao Angre and Others Etc.* AIR 1988 SC 709, this Court held as under:

"7. The legal position is well-settled that when a prosecution at the initial stage is asked to be quashed, the test to be applied by the court is as to whether the uncontroverted allegations as made prima facie establish the offence. It is also for the court to take into consideration any special features which appear in a particular case to consider whether it is expedient and in the interest of justice to permit a prosecution to continue. This is so on the basis that the court cannot be utilised for any oblique purpose and where in the opinion of the court chances of an ultimate conviction is bleak and, therefore, no useful purpose is likely to be served by allowing a criminal prosecution to continue, the court may while taking into consideration the special facts of a case also quash the proceeding even though it may be at a preliminary stage."

16. In the case of *Punjab National Bank and Others vs. Surendra Prasad Sinha,* AIR 1992 SC 1815, a complaint was lodged by the complainant for prosecution under Sections 409, 109 and 114, IPC against the Chairman, the Managing Director of the Bank and a host of officers alleging, inter alia, that as against the loan granted to one Sriman Narain Dubey the complainant and his wife stood as guarantors and executed Security Bond and handed over Fixed Deposit Receipt. Since the principal debtor defaulted in payment of debt, the Branch Manager of the Bank on maturity of the said fixed deposit adjusted a part of the amount against the said loan. The complainant alleged that the debt became barred by limitation and, therefore, the liability of the guarantors also stood

extinguished. It was, therefore, alleged that the officers of the Bank criminally embezzled the said amount with dishonest intention to save themselves from financial obligation. The Magistrate without adverting whether the allegations in the complaint prime facie make out an offence charged for, in a mechanical manner, issued the process against all the accused persons. The High Court refused to quash the complaint and the matter finally came to this Court. Allowing the appeal and quashing the complaint, this Court held as under:

> "5. It is also salutary to note that judicial process should not be an instrument of oppression or needless harassment. The complaint was laid impleading the Chairman, the Managing Director of the Bank by name and a host of officers. There lies responsibility and duty on the Magistracy to find whether the concerned accused should be legally responsible for the offence charged for. Only on satisfying that the law casts liability or creates offence against the juristic person or the persons impleaded then only process would be issued. At that stage the court would be circumspect and judicious in exercising discretion and should take all the relevant facts and circumstances into consideration before issuing process lest it would be an instrument in the hands of the private complainant as vendetta to harass the persons needlessly. Vindication of majesty of justice and maintenance of law and order in the society are the prime objects of criminal justice but it would not be the means to wreak personal vengeance. Considered from any angle we find that the respondent had abused the process and laid complaint against all the appellants without any prima facie case to harass them for vendetta."

17. In the case of *Maksud Saiyed vs. State of Gujarat and Others* (2008) 5 SCC 668, this Court while discussing vicarious liability observed as under :-

> "13. Where a jurisdiction is exercised on a complaint petition filed in terms of Section 156(3) or Section 200 of the Code of Criminal Procedure, the Magistrate is required to apply his mind. The Penal Code does not contain any provision for attaching vicarious liability on the part of the Managing Director or the Directors of the Company when the accused is the Company. The learned Magistrate failed to pose unto himself the correct question viz., as to whether the complaint petition, even if given face value and taken to be correct in its entirety, would lead to the conclusion that the respondents herein were personally liable for any offence. The Bank is a body corporate. Vicarious liability of the Managing Director and Director would arise provided any provision exists in that behalf in the statute. Statutes indisputably must contain provision fixing such vicarious liabilities. Even for the said purpose, it is obligatory on the part of the complainant to make requisite allegations which would attract the provisions constituting vicarious liability."

18. From bare perusal of the order passed by the Magistrate, it reveals that two witnesses including one of the trustees were examined by the complainant but none of them specifically stated as to which of the accused committed breach of trust or cheated the complainant except general and bald allegations made therein. While ordering issuance of summons, the learned Magistrate concluded as under :-

> "The complainant has submitted that the accused Nos.2 to 6 are the directors of the company and accused No.7 is the secretary of the company and were looking after the day to day affairs of the company and were also responsible for conduct and business of the accused No.1 and some time or the other have interacted with the complainant.
>
> I have heard arguments on behalf of the complainant and perused the record. From the allegations raised, documents placed on record and the evidence led by the

witnesses, prima facie an offence u/s 415, 409/34/120B is made out. Let all the accused hence be summoned to face trial under the aforesaid sections on PF/RC/Speed Post/courier for 2.12.2008."

19. In the order issuing summons, the learned Magistrate has not recorded his satisfaction about the prima facie case as against respondent Nos.2 to 7 and the role played by them in the capacity of Managing Director, Company Secretary or Directors which is sine qua non for initiating criminal action against them. Recently, in the case of *M/s.Thermax Ltd. & Ors. vs. K.M. Johny & Ors*. 2011 (11) SCALE 128, & ors. while dealing with a similar case, this Court held as under :-

"20. Though Respondent No.1 has roped all the appellants in a criminal case without their specific role or participation in the alleged offence with the sole purpose of settling his dispute with appellant-Company by initiating the criminal prosecution, it is pointed out that appellant Nos. 2 to 8 are the Ex-Chairperson, Ex-Directors and Senior Managerial Personnel of appellant No.1 – Company, who do not have any personal role in the allegations and claims of Respondent No.1. There is also no specific allegation with regard to their role

21. Apart from the fact that the complaint lacks necessary ingredients of Sections 405, 406, 420 read with Section 34 IPC, it is to be noted that the concept of 'vicarious liability' is unknown to criminal law. As observed earlier, there is no specific allegation made against any person but the members of the Board and senior executives are joined as the persons looking after the management and business of the appellant-Company."

20. As stated above, the decisions relied upon by the counsel for the appellant and the respondents need not be discussed as the law has been well settled by those decisions

as to the power and duty of the Magistrate while issuing summons in a complaint case.

21. In the instant case the High Court has correctly noted that issuance of summons against respondent Nos.2 to 7 is illegal and amounts to abuse of the process of law. The order of the High Court, therefore, needs no interference by this Court.

22. For the aforesaid reasons, we find no merit in these appeals, which are accordingly dismissed.

B.B.B. Appeals dismissed.