RUKMINI AMMA & ORS.
v.
RAJESWARY (DEAD) THROUGH LRS. & ORS.
(Civil Appeal Nos. 1475-1476 of 2005)

MARCH 22, 2013

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

Mortgage – Redemption – Permissibility – Land mortgaged – During subsistence of the mortgage, the land sold in auction by Revenue authorities for appropriation of agricultural income tax liabilities of the mortgagor – The land was purchased by the mortgagee – After about 30 years, mortgagor filing suit for redemption – Suit dismissed by trial court, but decreed by first appellate court and High Court – On appeal, held: Mortgagor not entitled to redemption – The sale of land in auction by Revenue authorities to the mortgagee has extinguished the redemption rights of the mortgagor – Under the contractual terms of the mortgage deeds, there was no obligation on the part of the mortgagee to clear the tax liability of the mortgagor – Obligation of the mortgagee to pay Government dues, can only be relatable to the dues, arising against the land mortgaged and not against the person of the mortgagor – Even under s.76(c) of the Transfer of Property Act, the liabilities contemplated to be cleared by the mortgagee, will not include the Income tax liability of an assessee – Transfer of Property Act, 1872 – s. 76(c) – Trust Act 1882 – s.90.

Predecessor-in-interest of the respondents created usufructury mortgage in favour of predecessor-in-interest of the appellants, initially in 1958 (Exbt B-1) and then in 1959 and 1961 (Exbts B-2 and A-1 respectively) for further sums. While the mortgage was subsisting, the property

in question was attached under the Revenue Recovery Act for appropriation of agricultural income tax liabilities of the mortgagor. The property was sold in public auction and the same was purchased by the son of the mortgagee, being the highest bidder in the auction.

The mortgagor-respondents, after a lapse of 30 years, filed the present suit for redemption of the mortgage. Trial Court dismissed the suit. The first appellate court decreed the same, holding that the mortgagee was entitled to redeem the property in question because as per terms of the mortgage deeds (Exbts A1, B-1 and B-2), the liability to pay the revenue dues and other does to the Government was on the mortgagee; also in view of s.76(c) of Transfer of Property Act, it was the duty of the mortgagee to pay the Government dues towards the agricultural income; and also because the revenue sale was fraudulently brought out by the mortgagee to defeat the right of the mortgagor. The judgment of the first appellate court was upheld by the High Court. Hence the present appeals.

Allowing the appeals, the Court

HELD: 1.1. The sale effected under Exhibit B5 to meet the agricultural income tax liability of the mortgagor has extinguished the mortgagors' right and consequently the suit was liable to be dismissed. [Para 27] [603-D]

1.2. The levy of income tax on the agricultural income would be based on whatever the mortgagor derived from the produce of the lands owned by him including the mortgaged lands and, therefore, such liability towards agricultural income tax cannot be held to be Government dues *simpliciter* in order to fasten the liability on the mortgagee. [Para 15] [595-C-D]

S.S. Rajalinga Raja vs. State of Madras **1967 (1) SCR**

950 – relied on.

Plakkad Estate (P) Ltd. and Ors. vs. Agricultural Income Tax Officer and Ors. **(1980) 125 ITR 564 (Ker);** *R. Vaidyanatha Mudaliar vs. State of Madras* **(1976) 104 ITR 444 (Mad) – referred to.**

1.3. An Agricultural income tax levied and demanded against an assessee can never be held to be a liability *qua* the land but can only be held to be a liability *qua* the land owner or the one who was responsible for the cultivation of such lands and the income derived from the produce so cultivated. [Para 16] [596-H; 597-A-B]

1.4. The agricultural income tax payable by the mortgagor cannot be held to be an assessment of tax made with reference to the extent of land mortgaged by him. What was assessed by way of agricultural income tax was based on the total agricultural income derived by the land holder from and out of the entirety of the land held by him which may also include the lands mortgaged. It cannot, therefore, be held that merely because, what was sought to be recovered was Agricultural Income Tax, such liability should be held to be linked to the property mortgaged. [Para 19] [598-G-H; 599-A-B]

1.5. A clear distinction, therefore, has to be drawn between a statutory tax liability pertaining to the land simpliciter vis-à-vis the land owner and the other liability by way of income tax to be borne by the same land owner as an assessee to income tax on the agricultural income earned by him. Therefore, when it came to the question of meeting the tax liability of the land owner, such liability might have accrued based on the commodity generated from whatever extent of land held by the land owner which cannot be spelt out or linked in exactitude to any particular land, inasmuch as the assessment of such tax liability is on the total income generated by the assessee

from the overall sale of commodity or produce generated from whatever land held and possessed by the assessee. The said agricultural income tax payable by the mortgagor, as against any statutory due relatable to the land in question which is subject matter of mortgage is, therefore, clearly distinguishable. [Para 20] [599-C-E]

1.6. The agreed terms under the mortgage deeds, namely, B1, B2 and A1 to the effect that it was the obligation of the mortgagee to pay the Government dues, can only be relatable to such of those statutory dues, which would have arisen against the land mortgaged, and not against the person of the mortgagor. Therefore, the emergence of Exhibit B5 sale certificate, based on the revenue recovery proceedings, to meet the agricultural income tax liability of the mortgagor cannot be held to be a factor for which the entire responsibility can be thrown upon the mortgagee. If the mortgaged properties were, thus, brought to sale to meet the agricultural income tax liability of the mortgagor, it was upon the mortgagor himself to have met that liability in order to ensure that the property was kept intact, free from any encumbrance even at the hands of the mortgagee. Therefore, the purchase made by the son of the mortgagee cannot be held to be a fraudulent sale or a deceptive one in the absence of any specific allegation to that effect at the instance of the mortgagor. In the plaint, except alleging fraud on the mortgagee, by stating that it was a collusive sale, there was nothing brought out in evidence either oral or documentary to support the said stand. [Para 21] [599-G-H; 600-A-D]

The Commissioner of Income-tax, West Bengal, Calcutta vs. Raja Benoy Kumar Sahas Roy **(1958) SCR 102;** *Commissioner of Income-tax vs. State of U.P.* **(1965) 3 SCR 700;** *Tata Tea Limited vs. State of West Bengal* **(1988) 3 SCR 961;** *Karimatharuvi Tea Estates Ltd. vs. State of Kerala and*

Ors. **(1963) 1 SCR 823;** *Anglo American Co. vs. C.A.I.T.* **(1968) 2 SCR 749 – relied on.**

1.6. Under the contractual terms under Exhibits B1, B2 and A1, there was no obligation on the part of the mortgagee to clear the agricultural income tax liability of the mortgagor. Even going by Section 76(c) of the Transfer of Property Act it can be visualized that what is noted as Government dues are charges of a public nature, rent accruing during the period of possession of the land in question including arrears, if any, default of which may result in bringing the property for sale. Certainly such liabilities noted and contemplated to be cleared by the mortgagee cannot and will not include the income tax liability of an assessee which is purely personal and not of a public nature. Therefore, Section 76(c) can have limited application to the specific Government dues of public nature as well as those which are referable to the land and not to the personal statutory dues of the owner of the land. For the very same reason, Section 90 of the Indian Trust Act will also have no application. [Para 26] [602-E-F-H; 603-A-C]

2. Some payments made towards either sales tax or agricultural income tax by the mortgagee in the years 1957-58 to 1961-62 cannot be held to have estopped the mortgagees from raising a plea purely based on legal and statutory construction. The First Appellate Court as well as the High Court failed to appreciate the issue involved in the proper perspective. [Para 25] [602-C-D]

3. The, respondents were aware of the sale, prior to filing of the suit in the year 1993. In Exhibit B8 while replying to the legal notice issued on behalf of the mortgagee on 23.01.1971, it was specifically pointed out that the property was sold in public auction to meet the agricultural income tax liability of the mortgagor, but yet, the respondents neither took any steps to set aside the

said sale in the manner known to law nor was any document placed before the Court to show that the said statement contained in Exhibit B8 was not true or was not known to the respondents earlier. In the above said background the factum of the filing of the suit nearly after 30 years of the mortgage is very relevant. If really the respondents were serious about the consequences which flowed from the public auction sale or were really aggrieved of the sale effected under Exhibit B5, the respondents should have been prompt in taking any steps for redressal of their grievance in order to save the property mortgaged. Having failed to evince any such keen interest in protecting their property, it is too late in the day for the respondents to have approached the Court at their own sweet will (i.e.) after nearly 30 long years of the mortgage and file a simple suit for redemption without taking any steps to question a sale which was effected by way of public auction and that too by invoking the provisions of the Revenue Recovery Act which sale once effected would enure to the benefits of the purchaser free from all encumbrance as provided in Section 44 of the Travancore Revenue Recovery Act, 1951 which was the relevant statute applicable at that point of time. [Paras 22 and 23] [600-E-H; 601-A-D]

Mritunjoy Pani and Anr. vs. Narmada Bala Sasmal and Anr. **1962 (1) SCR 290;** *Namdev Shripati Nale vs. Bapu Ganapati Jagtap and Anr.* **(1997) 5 SCC 185: 1997 (2) SCR 980;** *M.R. Satwaji Rao (Dead) by LRs. vs. B. Shama Rao (Dead) by LRs. and Ors.* **(2008) 5 SCC 124: 2008 (6) SCR 90 – referred to.**

Case law Reference

1967 (1) SCR 950	**relied on**	**Para 14**
1962 (1) SCR 290	**referred to**	**Para 9**
1997 (2) SCR 980	**referred to**	**Para 9**

2008 (6) SCR 90	**referred to**	**Para 9**
(1976) 104 ITR 444 (Mad)	**referred to**	**Para 15**
(1980) 125 ITR 564 (Ker)	**referred to**	**Para 16**
(1958) SCR 102	**relied on**	**Para 24**
(1965) 3 SCR 700	**relied on**	**Para 24**
(1965) 3 SCR 700	**relied on**	**Para 24**
(1988) 3 SCR 961	**relied on**	**Para 24**
(1963) 1 SCR 823	**relied on**	**Para 24**
(1968) 2 SCR 749	**relied on**	**Para 24**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 1475-1476 of 2005.

From the Judgments & Orders dated 07.08.2002 of the High Court of Kerala at Ernakulam in CMA No. 91 of 2002 and order dated 10.12.2002 in Review Petition No. 746 of 2002 in CMA No. 91 of 2002.

K.V. Viswanathan, B. Raghunath, T. Sakthikumaran, K.V. Vijayakumar for the Appellants.

Santosh Paul, Ashu Gupta, M.J. Paul, R. Nedumaran for the Respondents.

The Judgment of the Court was delivered by

FAKKIR MOHAMED IBRAHIM KALIFULLA, J. 1. The defendants are the appellants. The challenge is to the judgment of the High Court of Kerala at Ernakulam dated 10.12.2002 passed in R.P.746/2002 in C.M.A.91/2002. The respondents No.1 to 7 are the legal heirs of one Varadaraja Naicker. The said Varadaraja Naicker created a usufructury mortgage relating to plaint scheduled properties in favour of predecessor-in-interest of the appellants initially for a sum of Rs.10,000/- on

17.11.1958. The suit properties were mortgaged for a further sum of Rs.6000/- with the same mortgagee on 29.10.1959. Again on 08.02.1961 an additional mortgage was executed in respect of the suit scheduled properties for a further sum of Rs.5000/-. While the mortgage was subsisting, for the recovery of arrears of income tax payable by the mortgagor Mr. Varadaraja Naicker, the suit scheduled properties were attached under the Revenue Recovery Act. After following the due process, the property was sold in public auction and the son of mortgagee by name P. Duraisingam made a highest bid in the auction, pursuant to which he made the payment and the sale deed Exhibit B5 dated 04.12.1964 came to be executed in his favour. Thus, P. Duraisingam became the owner of the suit property vide sale deed No.179 dated 04.12.1964. The arrears of agricultural income tax was in a sum of Rs.2722.99. The highest bid amount of P. Duraisingam was Rs.2820/-. After a lapse of more than 30 years, after the mortgage, the successor-in-interest of the mortgagor, namely, respondent Nos.1 to 7 filed the suit in the year 1993 in O.S. No.289/93 on the file of the Sub-Court, Thodupuzha. The suit was for redemption of the mortgage and the suit scheduled properties by directing the defendants to put the plaintiffs in possession on receiving the mortgage amount. The other prayers were for direction to the defendants to surrender the mortgage deeds and execute necessary conveyances or other documents to dispel the cloud on defendants' title to the suit property.

2. The suit was resisted at the instance of the appellants, inter alia, contending that the suit was barred by limitation, hit by Order II Rule 2, Code of Civil Procedure (in short 'CPC') by virtue of an earlier suit filed by the mortgagor, that the mortgagor lost possession of B and C scheduled properties as early as in the year 1964 pursuant to revenue recovery proceedings for appropriation of agricultural income tax liabilities of the mortgagor and hence there was no right in the plaintiffs to seek for redemption. It was further contended that since B and C scheduled properties were sold in public auction towards

agricultural income tax arrears of the mortgagor by way of revenue recovery proceedings, the mortgagee suffered a loss of income which the plaintiffs were liable to compensate.

3. The Trial Court framed as many as seven issues for consideration, which included maintainability of the suit, question of limitation and impediment under Order II Rule 2 CPC. The vital issues were issue Nos.4, 5 and 6 which read as under:

> "(4) Whether the defendants have effected any improvements in the mortgaged properties, if so what is the quantum?
>
> (5) Whether the plaintiffs have lost their rights or redemption of plaint B and C schedule properties by virtue of the revenue sale?
>
> (6) Whether the defendants are entitled to claim tax and levies allegedly paid by them?"

4. In the suit Exhibits A1 and A1(a), certified copy of the mortgage deed No.86/1961 and its translation, were filed while on behalf of the defendants as many as 52 documents were marked. One V. Sethuram was examined as P.W.1 and one R. Rajasekharan was examined as D.W.1. The Trial Court by relying upon Exhibit B5, the sale certificate, issued in favour of Duraisingam by the Sub-Collector, Devicolum dated 04.12.1964, as well as, Exhibit B6, issued notice to the mortgagee at the instance of the plaintiffs and Exhibit B8, copy of the reply notice issued on behalf of the mortgagee to the plaintiffs, held, in its judgment dated 26.11.1997, that the mortgagor(s) rights got extinguished by Exhibit B5 revenue sale. The Trial Court, however, held that the suit was not barred by limitation and was also not hit by Order II Rule 2 CPC. Ultimately, the Trial Court held that in view of its findings on issue No.5, namely, that mortgagors right got extinguished by Exhibit B5, nothing survive on issue Nos.4 and 6 which related to the question as to whether any improvements made by the

mortgagee and their entitlement to claim tax and levies allegedly paid by them. The Trial Court, ultimately, concluded that the plaintiffs were not entitled to get the decree as prayed for.

5. The plaintiffs took it upon in appeal vide A.S. No.25/98 before the District Judge, Thodupuzha. The First Appellate Court also dealt with the issues on limitation, Order II Rule 2 CPC and the vital issue, namely, whether the plaintiffs lost their right of redemption of the plaint B and C scheduled properties by virtue of the revenue sale. The First Appellate Court after noticing Exhibit B5, sale certificate, which disclosed the purchase of the suit scheduled property by the son of the mortgagee and after analyzing the oral evidence of P.W.1 wherein it was alleged that the revenue sale was a fraudulent one as pleaded in the plaint, held, in its judgment dated 21.12.2001, that as per the terms of Exhibits A1, B1 and B2, the liability to pay the revenue dues and other dues to the Government was on the mortgagee in the absence of any other contract to the contrary. It was also held that by virtue of Section 76(c) of the Transfer of Property Act, it was the responsibility of the mortgagee to have paid the Government dues to the agricultural income tax and saved the property from public auction sale. The First Appellate Court, ultimately, concluded that the revenue sale was fraudulently brought out by the mortgagee to defeat the rights of the plaintiffs and consequently the rights of the plaintiffs to redeem B and C scheduled properties cannot be defeated. The First Appellate Court consequently allowed the appeal, set aside the judgment and decree of the Trial Court and decreed the suit. The suit was remanded back to the Trial Court for passing a preliminary decree for redemption in accordance with law with a further direction to the parties to appear before the Court on 21.01.2002.

6. As against the above order of remand by the First Appellate Court the appellants herein preferred C.M.A. No.91/2002. The High Court by its judgment dated 07.08.2002

dismissed the same. Thereafter, the appellants preferred Review Petition No.746/2002 in C.M.A. No.91/2002 which came to be dismissed again by the High Court by its order dated 10.12.2002.

7. We heard Mr. K.V. Viswanathan, learned Senior Counsel for the Appellants and Mr. Santosh Paul, learned counsel for the Respondents.

8. The learned senior counsel mainly concentrated on the merits of the suit prayer for redemption and was not keen on the issues relating to limitation or the one raised under Order II Rule 2 CPC. Even, in the impugned judgments, both passed in the main appeal as well as in the review petition, we do not find any submission made on the issue of limitation, as well as, on Order II Rule 2 CPC. Therefore, the only question to be examined is as to whether the suit prayer for redemption as propounded by the Respondents and their predecessors is valid in law. Learned senior counsel in his submissions contended that the present suit came to be filed after 30 years of the mortgage which disclose that on behalf of the mortgagee a feeble attempt was made for redemption of the suit B and C scheduled properties when the property was already brought to sale as early as in the year 1964 for the satisfaction of agricultural income tax dues payable by the mortgagor which was his personal liability. The learned Senior Counsel in support of the above submission contended that the sale took place on 04.12.1964 which was never challenged by the respondents either immediately after the sale or till this date and, therefore, the consequences which flowed from such sale which occurred by way of revenue recovery proceedings extinguished the rights of the respondents vis-à-vis the suit scheduled property. In support of the said submission, learned senior counsel relied upon the decision of this Court in *S.S. Rajalinga Raja Vs. State of Madras* - 1967 (1) SCR 950. According to learned senior counsel Section 76(C) of the Transfer of Property Act and Section 90 of the Trust Act have

no application to the case on hand. Learned senior counsel also relied upon Section 44 of the Revenue Recovery Act which specified that once the sale is effected by way of revenue recovery proceedings such sale would entitle the purchaser to own the property free from all encumbrances. The learned senior counsel, therefore, contended that the judgment of the Trial Court in having held that the revenue sale brought about under Exhibit B5 extinguished whatever right possessed by the mortgagor vis-à-vis the mortgaged property was well justified. The learned senior counsel, therefore, contended that the order of the First Appellate Court and the confirmation of the same by the High Court in the main appeal as well as in the review petition are liable to be set aside.

9. As against the above submissions, Mr. Santosh Paul, learned counsel for the contesting respondents/mortgagor contended that admittedly as per the mortgage deeds, namely, the one dated 17.11.1958, 29.10.1959 and 08.02.1961 there was a clear stipulation to the effect that the mortgagee is bound to meet all State dues which would include payment of agricultural income tax payable by the mortgagor. The learned counsel, therefore, contended that by virtue of the contractual terms agreed between the mortgagor and mortgagee it was the responsibility of the mortgagee to have cleared the dues towards agricultural income tax and saved the property from any public auction by way of sale towards Government dues and, therefore, the plea of the appellants in attempting to take umbrage under the decision of this Court as well as Section 44 of the Revenue Recovery Act cannot be countenanced. The learned counsel further contended that even as per Exhibit B8, the appellants themselves admitted to have paid sales tax dues as well as on one occasion agricultural income tax to the tune of Rs.502.25 for the period 1956-57 to 1959-60 and, therefore, the appellants cannot now be permitted to turn around and state that it was not the responsibility of the mortgagee to have cleared the State dues. The learned counsel further contended that the mortgagee having understood the terms of the mortgage

agreement and acted upon the same, failed in his duty in not clearing the agricultural dues and thereby fraudulently brought the property for sale in public auction. The learned counsel pointed out that the purchase made in the public auction by the son of the mortgagee whose successor-in-interest are the appellants in this Court sufficiently demonstrated that the mortgagee fraudulently brought the property for sale by allowing his son to raise a bid for a sum which was more or less equal to the sum due by way of agricultural income tax. In such circumstances, according to learned counsel, since the sale under Exhibit B5 was maneuvered by the appellants themselves there was total lack of bone fide in their stand and, therefore, the redemption prayed for by the respondents, as granted by the First Appellate Court and confirmed by the High Court, does not call for interference. Learned counsel placed reliance upon *Mritunjoy Pani and another Vs. Narmada Bala Sasmal and another* - 1962 (1) SCR 290, *Namdev Shripati Nale Vs. Bapu Ganapati Jagtap and another* - (1997) 5 SCC 185 and *M.R. Satwaji Rao (Dead) by LRs. Vs. B. Shama Rao (Dead) by LRs. and others* - (2008) 5 SCC 124 in support of his submissions.

10. Having heard learned counsel for the respective parties and having bestowed our serious consideration to the judgments of the Trial Court, the First Appellate Court as well as the orders impugned in these appeals, we find that, as rightly contended by learned senior counsel for the appellants, the sole question that arise for consideration in these appeals is whether the sale of the suit scheduled property covered by Exhibit B5 through revenue recovery proceedings for recovery of agricultural income tax extinguished the rights of the mortgagor.

11. In order to appreciate the point raised in these appeals the relevant facts which are required to be noted are, the terms of the mortgage deeds, namely, Exhibit B1 dated 17.11.1958, Exhibit B2 dated 29.10.1959 and Exhibit A1 dated 08.02.1961. In all the three documents it is specifically stated "pay the

Government kist". Such condition was imposed on the mortgagee which was also accepted by the mortgagee. The other relevant document would be Exhibit B8 reply to the legal notice issued on behalf of the mortgagee dated 23.01.1971 wherein it was tacitly admitted that when the property was in the possession of the mortgagor he was liable to pay sales tax and agricultural tax dues to the Government for that period and that in order to avoid sale of the property the mortgagor made such payments in a sum of Rs.388.26 by way of sales tax for 1958-59, Rs.560.25 as sales tax for 1957-58, Rs.903.97 as tax dues for 1959-60–1961-62 apart from a sum of Rs.502.25 towards agricultural income tax due for the period 1956-57–1959-60. It was also mentioned therein that in all a sum of Rs.2254.73 was paid on that account by the mortgagee and that a suit was also filed in Devicolum Munsif Court for recovery of the said sum. It was, however, stated that the said suit was dismissed on the footing that the question of payment of those amounts would arise at the time of redemption. Exhibit B8 also disclose that the subsequent sale effected for the recovery of agricultural income tax though was known to the mortgagor, he failed to take any steps to avoid the sale and in the circumstances the mortgagee cannot be held responsible for the sale effected under Exhibit B5. The other relevant document is Exhibit B5, the sale certificate, dated 04.12.1964 issued by the Sub-Collector, Devicolum in favour of Duraisingam son of mortgagee himself for recovery of the agricultural income tax which the mortgagor failed to pay.

12. When we examine the pleadings of the parties, in the plaint averments, it was pleaded on behalf of the appellants that all the mortgage deeds specifically mandated the mortgagee to pay all taxes and other levies to the State, that in spite of the said obligation cast upon the mortgagee he deliberately committed default in paying the tax and brought the B and C scheduled properties for revenue sale and thereby failed to keep the mortgaged property intact. It was further pleaded that the property was brought to sale by the mortgagee fraudulently

and deceptively behind the back of the mortgagor and the fact that in the revenue sale the property was purchased by the son of the mortgagee for a paltry sum of Rs.2820/- supported the above stand of the Appellants.

13. The further contention was that the mortgagee being in the position of the trustee any title obtained by fraud or collusion by committing breach of trust cannot be permitted to set up any claim against the mortgagor or their successors. While filing the suits, the Respondents' claimed to have deposited the mortgage amount of Rs.25,000/- and pleaded for redemption. On behalf of the appellants while refuting the allegation of fraudulent or deceptive sale of the mortgage property, it was contended that the payment of agricultural income tax had no direct link to the property mortgaged by way of Government dues and, therefore, the sale effected under the Revenue Recovery Act and the purchase made by the son of the mortgagee cannot be held to be a fraudulent sale, much less a sale behind the back of the mortgagor. In other words, according to the appellants the sale and purchase was effected independently and it had nothing to do with the privity of the contract between the mortgagor and mortgagee under Exhibits B1, B2 and A1.

14. Keeping the above stand of the respective parties in mind, in order to appreciate the legal question raised before us, it will be appropriate to make a reference to the Full Bench Decision of this Court in *Rajalinga Raja* (supra). That was also a case where interpretation of Section 3 of the Madras Plantations Agricultural Income Tax, 1955 came up for consideration. Though, the interpretation came to be made under a different circumstance which pertains to the expression 'agricultural income', we feel that the interpretation placed by this Court on the said expression can be usefully referred to for deciding the issues involved in these appeals. At pages 952-953 the proposition has been set out as under:

> "*Prima facie*, s. 3 of the Act read with the definition of 'agricultural income' charges to tax the monetary return either as rent or revenue or agricultural produce from the plantation. The expression "income" in its normal connotation does not mean mere production or receipt of a commodity which may be converted into money. Income arises when the commodity is disposed of by sale, consumption or use in the manufacture or other processes carried on by the assessee *qua* that commodity. There is no reason to think that the expression "income" in the Act has any other connotation. A tax on income whether agricultural or non-agricultural is, unless the Act provides otherwise, a tax on monetary return – actual or notional. Section 4 of the Act supports that view, for in the total agricultural income is comprised all agricultural income derived from a plantation in the State. It is not necessary, however, for income to accrue that there must be a sale of a commodity: consumption or use of a commodity in the business of the assessee from which the assessee obtains benefit of the commodity may be deemed to give rise to income. Therefore, merely because the produce of his plantation was received in the earlier years, assuming that the appellant's case is true, income derived from sale of that produce in the year of account is not exempt from tax under the Act, in that year."
>
> (Emphasis added)

The crucial set of expressions stated therein that "a tax on income whether agricultural or non-agricultural is, unless the Act provides otherwise, a tax on monetary return – actual or notional" are more relevant.

15. We can also make a useful reference to a Division Bench decision of the Madras High Court in *R. Vaidyanatha Mudaliar Vs. State of Madras* – (1976) 104 ITR 444 (Mad) which has followed the above decision of this Court. Paragraph

17 will throw some light on this issue which reads as under:

> "17. It is, therefore, clear that "agricultural income" arises not necessarily by any supervening trading or commercial activity or mechanical process, but by the factum of production, receipt and derivation of the produce from the land."
>
> (Emphasis added)

The conclusion that agricultural income is derived from the produce of the land in our opinion can be the only outcome in respect of an income that a land owner can earn from the lands owned by him. Applying the said principle to the case on hand, we can conclude that the levy of income tax on the agricultural income would be based on whatever the mortgagor derived from the produce of the lands owned by him including the mortgaged lands and, therefore, such liability towards agricultural income tax can by no stretch of imagination be held to be Government dues simpliciter in order to fasten the liability on the mortgagee.

16. In yet another decision of the Kerala High Court in *Plakkad Estate (P) Ltd. and Ors. Vs. Agricultural Income Tax Officer and Ors.* – (1980) 125 ITR 564 (Ker), a Single Judge after referring to the principle set out in *Rajalinga Raja* (supra), while dealing with a converse situation held as under in paragraphs 20 and 21:

> "20. The agricultural produce derived or received by a mortgagee in possession from the mortgaged lands, therefore, becomes chargeable to tax under the Act only in the event of the mortgagee, who admittedly obtains the same, sells, consumes or uses it. Over none of these acts the mortgagor has any control. He may not even know of the quantum of produce obtained by the mortgagee so that he cannot include it in his return with any amount of certainty. For the sin of being compelled to borrow money

> by furnishing possessory-landed-security, he is visited with the punishment of being taxed unlike others, on the agricultural income derived or received by another; an income, as regards the derivation or receipt of which he has no control and as regards the quantum whereof he is not in a position to ascertain…..
>
> 21. What Section 4(2) says is that agricultural income derived from the land in the possession of the mortgagee shall be deemed to be the agricultural income received by the mortgagor. This means that even where bare agricultural lands wherefrom no agricultural income is derived have been possessorily mortgaged and the mortgagee makes improvements thereon or raises other crops on such land and thereby earns agricultural income, he need not pay agricultural Income Tax in respect of such income, and the mortgagor who does not earn any such income from the lands is liable to pay such tax. Section 4(2) puts the creditor in an advantageous position by providing that his debtor shall pay the agricultural Income Tax which normally and but for that provision is payable by the former. There is no rationale to support this discriminatory treatment of the debtor."

The conclusion is, therefore, inescapable that while the lands are in the possession of a mortgagee and thereby liable to pay the Government dues when it comes to the question of payment of agricultural income tax it cannot be held that such liability would come within the expression 'Government dues' in as much as such tax liability is not *qua* the land mortgaged but *qua* the owner of the land who was benefited by the produce of such lands which alone falls within the definition of 'Agricultural Income'. Let us visualize a situation where there was no yield from the land in question, though a land tax or other local levies may be payable for the mere possession of the land, there would be no scope for levy of any income tax. If the said situation is understood, it can be held that agricultural income

tax levied and demanded against an assessee can never be held to be a liability *qua* the land but can only be held to be a liability *qua* the land owner or the one who was responsible for the cultivation of such lands and the income derived from the produce so cultivated.

17. Keeping the above principle in mind when we examine the points raised in these appeals, the question for consideration would be whether the sale of the property by way of public auction by invoking the provisions of the Revenue Recovery Act for the dues towards agricultural income tax payable by the mortgagor can be held to have attracted Section 76(c) of the Transfer of Property Act and thereby put the mortgagee to peril. It is true that the deed of mortgage covered by Exhibits B1, B2 and A1 specifically stipulated that it was the responsibility of the mortgagee to meet all Government dues. That part of the stipulation contained in the mortgage deed, covered by Exhibit B1, states:

> "……and also for the maintenances of the minors received a cash of Rs.10,000/- from you today and you can enjoy the scheduled mentioned property up to the stipulated period and pay the Government Kist….."
>
> In Exhibit B2 it is stated:
>
> "……In case if any encumbrance is renewal my other properties will be the guarantee you have to pay the Government kist as before."
>
> In Exhibit A1 it is stated
>
> "I have let the property as further mortgage the possession in your enjoyment and you can enjoy the same as before and you may pay the government kist."
>
> (Emphasis added)

18. What is to be found out is what was specifically agreed

by the mortgagee to meet by way of Government dues. Can it be said to be whatever dues that may arise at the instance of the Government as against the mortgagor whether it related to property mortgaged or on any other account. To find an answer to the above relevant question, the set of expressions "you can enjoy the scheduled mentioned property upto the stipulated period" and preceding the expression "pay the Government kist" would be more relevant. With that view when we read the above extracted part of the terms contained in the documents, namely, B1, B2 and A1 it is relevant to note that when the mortgagee was given rights to enjoy the scheduled mentioned property up to the stipulated period, it would be equally responsible for him to meet whatever Government dues that may arise with particular reference to the property mortgaged and when that property would be under his control and enjoyment. We are of the considered view that, that can be the only way to understand, explain and interpret, the said part of the terms contained in the mortgage deed.

19. Once, we are able to reach the above conclusion with particular reference to the terms contained in the mortgage deeds the other question that falls for our consideration would be whether the agricultural income tax payable by the mortgagor can be held to be part of Government dues relatable to the properties mortgaged which would have mandated the mortgagee to have cleared such dues by virtue of the above referred to agreed terms. In this respect, we find that the ratio laid down by this Court in *Rajalinga Raja* (supra) assumes significance. As held in the said decision a tax on income whether agricultural or non-agricultural is unless otherwise stipulated in the Act itself will be a tax on monitory return whether actual or notional. To be more explicit, it is relevant to state that agricultural income tax payable by the mortgagor cannot be held to be an assessment of tax made with reference to the extent of land mortgaged by him. What was assessed by way of agricultural income tax was based on the total agricultural income derived by the land holder from and out of the entirety

of the land held by him which may also include the lands mortgaged. It cannot, therefore, be held that merely because, what was sought to be recovered was Agricultural Income Tax, such liability should be held to be linked to the property mortgaged.

20. It can also be explained by stating that while the agricultural income tax would be relatable to the assessee as owner of the land and from the income derived from the commodity or produce of the land owned by him, that by itself cannot be a circumstance to hold that the such tax should be held to be part of Government dues attributable to simple holding of such lands either by way of land tax or such other similar statutory liabilities on the land mortgaged. A clear distinction, therefore, has to be drawn between a statutory tax liability pertaining to the land simpliciter vis-à-vis the land owner and the other liability by way of income tax to be borne by the same land owner as an assessee to income tax on the agricultural income earned by him. Therefore, when it came to the question of meeting the tax liability of the land owner such liability might have accrued based on the commodity generated from whatever extent of land held by the land owner which cannot be spelt out or linked in exactitude to any particular land, inasmuch as the assessment of such tax liability is on the total income generated by the assessee from the overall sale of commodity or produce generated from whatever land held and possessed by the assessee. The said agricultural income tax payable by the mortgagor, as against any statutory due relatable to the land in question which is subject matter of mortgage is, therefore, clearly distinguishable.

21. It is relevant to note that the agreed terms under the mortgage deeds, namely, B1, B2 and A1 to the effect it is the obligation of the mortgagee to pay the Government dues, can only be relatable to such of those statutory dues which would have arisen against the land mortgaged and not against the person of the mortgagor. Having regard to the above

conclusions of ours we find force in the submission of the learned senior counsel for the appellants that the emergence of Exhibit B5 sale certificate dated 04.12.1964 based on the revenue recovery proceedings to meet the agricultural income tax liability of the mortgagor cannot be held to be a factor for which the entire responsibility can be thrown upon the mortgagee. If the mortgaged properties were, thus, brought to sale to meet the agricultural income tax liability of the mortgagor it was upon the mortgagor himself to have met that liability in order to ensure that the property was kept intact free from any encumbrance even at the hands of the mortgagee. Therefore, the purchase made by the son of the mortgagee cannot be held to be a fraudulent sale or a deceptive one in the absence of any specific allegation to that effect at the instance of the mortgagor. To our dismay in the plaint except alleging fraud on the mortgagee by stating that it was a collusive sale there was nothing brought out in evidence either oral or documentary to support the said stand.

22. In this context the stand of the appellants that no steps were ever taken on behalf of the respondents to challenge the revenue sale covered by Exhibit B5 assumes significance. It is not, as if the, respondents were not aware of the sale prior to filing of the suit in the year 1993. In Exhibit B8 while replying to the legal notice issued on behalf of the mortgagee on 23.01.1971 it was specifically pointed out that the property was sold in public auction to meet the agricultural income tax liability of the mortgagor, but yet, the respondents neither took any steps to set aside the said sale in the manner known to law nor was any document placed before the Court to show that the said statement contained in Exhibit B8 was not true or was not known to the respondents earlier.

23. In the above said background the factum of the filing of the suit nearly after 30 years of the mortgage was very relevant. If really the respondents were serious about the consequences which flowed from the public auction sale or

were really aggrieved of the sale effected under Exhibit B5, the respondents should have been prompt in taking any steps for redressal of their grievance in order to save the property mortgaged. Having failed to evince any such keen interest in protecting their property, it is too late in the day for the respondents to have approached the Court at their own sweet will (i.e.) after nearly 30 long years of the mortgage and file a simple suit for redemption without taking any steps to question a sale which was effected by way of public auction and that too by invoking the provisions of the Revenue Recovery Act which sale once effected would enure to the benefits of the purchaser free from all encumbrance as provided in Section 44 of the Travancore Revenue Recovery Act, 1951 which was the relevant statute applicable at that point of time. In the light of our above conclusions, we do not find any scope to apply any of the decisions relied upon by learned counsel for the respondents.

24. In the various decisions relied upon by the learned counsel for the respondents 1 to 7 reported in *The Commissioner of Income-tax, West Bengal, Calcutta Vs. Raja Benoy Kumar Sahas Roy* – (1958) SCR 102, *Commissioner of Income-tax Vs. State of U.P.* – (1965) 3 SCR 700, *Tata Tea Limited Vs. State of West Bengal* – (1988) 3 SCR 961, *Karimatharuvi Tea Estates Ltd. Vs. State of Kerala & Ors.* – (1963) 1 SCR 823, *Anglo American Co. Vs. C.A.I.T.* – (1968) 2 SCR 749, the common principle stated was that agricultural income must necessarily be derived from the land. No one can dispute the said principle when it comes to the question of ascertaining the income earned by an assessee based on the agricultural operations by way of cultivation, etc., on the land possessed or owned by such assessee. But when it comes to the question of meeting the liability on such agricultural income by way of agricultural Income Tax, can it be said that such liability would simply fall within the expression 'Government dues' or the personal liability of the person who had the advantage of earning such agricultural income by selling away

the produce derived from such land. The definite answer to the question can only be that such liability cannot be brought within the expression of 'Government dues' simpliciter but the exclusive liability of the person who derived such income. We, therefore, find that the decisions relied upon by the respondents No.1 to 7 rather than supporting their stand fully supports our conclusion.

25. Since, the above conclusions of ours are drawn based on pure interpretation of statutory construction, it is relevant to hold that some payments made towards either sales tax or agricultural income tax by the mortgagee in the years 1957-58 to 1961-62 cannot be held to have estopped the appellants from raising a plea purely based on legal and statutory construction. In the light of our above conclusions, we are convinced that the First Appellate Court as well as the High Court miserably failed to appreciate the issue involved in the proper perspective.

26. As far as the contention made on behalf of the respondents-plaintiffs based on Section 76(c) of the Transfer of Property Act in the light of our conclusion to the effect that under the contractual terms under Exhibits B1, B2 and A1, we hold that there was no obligation on the part of the mortgagee to clear the agricultural income tax liability of the mortgagor. Relevant part of Section 76(c) needs extraction which reads as under:

> "he must, <u>in the absence of a contract to the contrary</u>, out of the income of the property, pay the Government revenue, all other charges of a public nature and all rent accruing due in respect thereof during such possession, and any arrears of rent in default of payment of which the property may be summarily sold;"

Even going by Section 76(c) of the Transfer of Property Act it can be easily visualized that what is noted as Government dues are charges of a public nature, rent accruing during the

period of possession of the land in question including arrears, if any, default of which may result in bringing the property for sale. Certainly such liabilities noted and contemplated to be cleared by the mortgagee cannot and will not include the income tax liability of an assessee which is purely personal and not of a public nature. Therefore, Section 76(c) can have limited application to the specific Government dues of public nature as well as those which are referable to the land and not to the personal statutory dues of the owner of the land. For the very same reason and for the reasons which we have elaborately stated in the earlier paragraphs, Section 90 of the Indian Trust Act will also have no application.

27. We, therefore, conclude that the sale effected under Exhibit B5 to meet the agricultural income tax liability of the mortgagor has extinguished the mortgagors right and consequently the suit was liable to be dismissed. We, therefore, while setting aside the judgments and orders impugned in these appeals as well as that of the First Appellate Court, restore the judgment of the Trial Court. Appeals stand allowed. No costs.

K.K.T. Appeals allowed.

KULWANT SINGH & ORS.
v.
STATE OF PUNJAB
(Criminal Appeal No. 1548 of 2007)

APRIL 02, 2013

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

Penal Code, 1860 – ss.304B and 498A – Death of married woman within seven years of marriage at the house of her in-laws in suspicious circumstances – She died due to aluminium phosphide poisoning – Conviction of husband and parents-in-law u/ss.304B & 498A – Justification – Held: On facts, justified – There was no delay in lodging the FIR – Evidence on record clearly indicates that the deceased was subjected to harassment for dowry not only by the husband (appellant no.1) but also by the parents-in-law (appellant nos.2 & 3) – Deceased was harassed for dowry till almost immediately before her death – Presumption of dowry death can safely be drawn in the instant case – Evidence Act, 1872 – s.113B.

Penal Code, 1860 – s.304B – Death of married woman within seven years of marriage at the house of her in-laws in suspicious circumstances – Husband (appellant no.1) and parents-in-law (appellant nos. 2 & 3) convicted u/s.304B IPC and sentenced to 7 years RI – Plea of appellant nos.2 and 3 for leniency in sentence considering their old age and physical disability – Held: Rejected – Law prescribes a minimum of seven years imprisonment for offence u/s.304-B IPC – No provision for reducing the sentence for any reason whatsoever nor has any exception being carved out in law – Even though appellant nos. 2 and 3 are now aged, they were responsible for the death of the wife of appellant no.1 through aluminium phosphide poisoning – Sentence / Sentencing.

Evidence Act, 1872 – s.113B – Presumption as to dowry death – When can be safely drawn – Discussed – Penal Code, 1860 – s.304B.

A married woman died under suspicious circumstances at the house of her in-laws due to aluminium phosphide poisoning. The death occurred within seven years of marriage. The deceased had been allegedly harassed and maltreated by the husband (appellant no.1), and the parents-in-law (appellant nos. 2 & 3) for bringing insufficient dowry. PW5 is the father of the deceased. The appellants were convicted by the courts below under Section 304-B and Section 498-A of IPC.

In the instant appeal, while challenging their conviction under Section 304-B and Section 498-A of IPC, the appellants made three submissions - firstly that there was a delay in lodging the FIR by PW5; secondly, there was a great deal of improvement in the case by PW5 and other prosecution witnesses inasmuch as the FIR and the statements recorded during investigations under Section 161 CrPC did not mention anything about the demand for dowry having been raised by the appellants more particularly about a buffalo having been demanded and given to the appellants and payment of Rs.6,000/- again on the demand of the appellants; and thirdly, the ingredients of Section 304-B IPC were not made out since the alleged demand for dowry was not proximate to the death.

Dismissing the appeal, the Court

HELD: 1. There was no delay in lodging the FIR. The facts reveal that PW-5 had made sufficient attempts to have the FIR lodged but was unable to do so since the report of the Chemical Examiner had not yet been received by the concerned police station. In any event, it

is also clear from the evidence of ASI (PW-12) that PW5 had submitted an application which was marked by S.I. (PW-13) the Station House Officer of Police Station to him on 18th October 1989. PW13 also stated in his evidence that he had received an application made by PW5 to the Senior Superintendent of Police and it was then that he registered the FIR on 2nd November 1988. As such, it cannot be said that there was any delay in lodging the FIR. [Pars 28] [615-C-E]

Gurmail Singh v. State of Punjab **(2012) 11 SCALE 224 and** *Jitender Kumar v. State of Haryana* **(2012) 6 SCC 204: 2012 (4) SCR 408 – relied on.**

2.1. It is true that in the FIR PW5 did not give any specific instance of the demand for dowry made by the appellants but he did categorically mention that there was a demand for more dowry by the appellants. Apart from the statement in the FIR, both the Courts have considered the overwhelming evidence of several prosecution witnesses to the effect that there was a demand for dowry made by the appellants and concurrently held that the appellants had made a demand. There is no reason to interfere with this finding of fact. [Para 30] [615-H; 616-A-B]

2.2. That apart, there is sufficient evidence on record that the appellants had demanded a buffalo from PW5 and this demand was acceded to. There is also sufficient evidence that the appellants had demanded Rs.6,000/- from PW5 and even this demand was acceded to with PW-11 giving the amount to the appellants. [Para 31] [616-C-D]

3. The evidence on record clearly indicates that the deceased was subjected to harassment for dowry not only by appellant no.1 but also by his parents. In fact, the harassment continued, as stated by the members of the

Panchayat who visited the house of appellant no.1 on 13th September 1988 and also by PW-9 on 8th October 1988. The deceased was, therefore, harassed for dowry till almost immediately before her death. [Para 33] [617-A-B]

4. The presumption of a dowry death can be raised in four circumstances, viz.: (1) The question before the court must be whether the accused has committed the dowry death of a woman. (This means that the presumption can be raised only if the accused is being tried for the offence under Section 304-B IPC.); (2) The woman was subjected to cruelty or harassment by her husband or his relatives; (3) Such cruelty or harassment was for, or in connection with, any demand for dowry and (4) Such cruelty or harassment was soon before her death. All these ingredients are present in this case and a presumption of a dowry death can safely be drawn. [Para 35] [617-F-H; 618-A-B]

Tarsem Singh v. State of Punjab **(2008) 16 SCC 155: 2008 (17) SCR 379 – relied on.**

Appasaheb & Anr. v. State of Maharashtra **(2007) 9 SCC 721: 2007 (1) SCR 164; and** *Vipin Jaiswal v. State of Andhra Pradesh* **2013 (3) SCALE 525 – held inapplicable.**

Bachni Devi v. State of Haryana **(2011) 4 SCC 427: 2011 (2) SCR 627 – referred to.**

5.1. There is no doubt that insofar as the present case is concerned, the deceased was harassed by her husband and in-laws for dowry and that she died under abnormal circumstances due to aluminium phosphide poisoning. There is sufficient evidence to hold the appellants guilty of offences punishable under Section 304-B of the IPC and 498-A of the IPC. There is no reason to disturb the conclusions concurrently arrived at by both the Courts below. [Para 38] [618-H; 619-A-B]

5.2. The law prescribes a minimum of seven years imprisonment for an offence under Section 304-B of the IPC. There is no provision for reducing the sentence for any reason whatsoever nor has any exception being carved out in law. Even though appellant nos. 2 and 3 are now aged, they were responsible for the death of the wife of appellant no.1 through aluminium phosphide poisoning. The deceased was a young lady when she died and one can only guess the trauma that her unnatural death would have caused to her parents. Sympathizing with an accused person or a convict does not entitle to this Court to ignore the feelings of the victim or the immediate family of the victim. [Paras 40, 41] [619-D-F]

Case Law Reference:

(2012) 11 SCALE 224	**relied on**	**Para 29**
2012 (4) SCR 408	**relied on**	**Para 29**
2008 (17) SCR 379	**relied on**	**Para 35**
2007 (1) SCR 164	**held inapplicable**	**Para 36**
2011 (2) SCR 627	**referred to**	**Para 36**
2013 (3) SCALE 525	**held inapplicable**	**Para 37**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1548 of 2007.

From the Judgment & Order dated 02.05.2007 of the High Court for the States of Punjab & Haryana at Chandigarh in Criminal Appeal No. 356-SB of 1993.

Nagendra Rai, Rishi Malhotra, Gopi Raman for the Appellants.

V. Madhukar, AAG, Paritosh Anil, Anvita Cowshish, Srajita Mathur, Kuldip Sing for the Respondent.

The Judgment of the Court was delivered by

MADAN B. LOKUR, J. 1. The question before us is whether the conviction of Kulwant Singh (appellant No.1), his father Gurtehal Singh (appellant no.2) and his mother Harminder Kaur (appellant no.3) for offences punishable under Section 304-B and Section 498-A of the Indian Penal Code (IPC) ought to be sustained. In our opinion, there is sufficient evidence on record to sustain their conviction.

The facts:

2. Rachhpal Kaur (deceased) married Kulwant Singh on 18th November 1984. It appears from the record that even though she brought sufficient dowry, she was harassed and maltreated by her husband and in-laws for bringing insufficient dowry. The harassment and maltreatment continued resulting in the intervention by the Panchayat on or about 13th September 1988 to sort out the problem so that the couple could live a normal married life. Unfortunately, the efforts of the Panchayat did not yield any positive result and about a month later on 14th October 1988 Rachhpal Kaur died under suspicious circumstances.

3. The record indicates that Rachhpal Kaur was taken to the Civil Hospital, Mandi Gobindgarh after rigor mortis had set in and there was froth coming from her mouth and nose. The appellants submitted an application Exh. DC for taking possession of the corpse without a post-mortem examination but that was not acceded to. A post-mortem examination was conducted on 15th October 1988 which revealed that Rachhpal Kaur was carrying a 26-week fetus. Some parts of her body were then removed, sealed and sent for chemical examination to the Chemical Examiner to the Government of Punjab, Patiala. The report of the Chemical Examiner, received much later, indicated the presence of aluminium phosphide (a pesticide) in the stomach of the deceased and phosphine, a constituent of aluminium phosphide, detected in her liver,

spleen, right kidney and right lung. According to Dr. Asha Kiran, Medical Officer, Civil Hospital, Mandi Gobindgarh (PW-1) the contents were sufficient to cause the death of Rachhpal Kaur.

4. Her younger sister Avtar Kaur (PW-9) gave intimation of Rachhpal Kaur's death on 15th October 1988 to her father Sukhdev Singh (PW-5). Thereupon Sukhdev Singh reached the hospital and claimed the body of Rachhpal Kaur and later cremated her.

5. Sukhdev Singh sought to lodge a first information report (FIR) regarding the suspicious death of Rachhpal Kaur but could not do so. The police authorities declined to register the FIR since the report of the chemical examination was not available. However, Sukhdev Singh did make an application in the concerned police station which was marked for necessary action to ASI Karnail Singh (PW-12) on 18th October 1988.

6. Eventually, after the cause of Rachhpal Kaur's death was ascertained, FIR No.67/1988 dated 2nd November 1988 was registered and investigations commenced by the police.

7. The FIR broadly stated that sufficient dowry had been given to the appellants at the time of Rachhpal Kaur's marriage with Kulwant Singh. However, a few days after her marriage she was maltreated for bringing insufficient dowry, treated with cruelty and beaten up several times. The FIR goes on to state that a Panchayat had visited the house of Kulwant Singh but he and the other in-laws of the deceased informed the Panchayat that they would continue to maltreat Rachhpal Kaur until their demands for dowry were fulfilled.

8. In the FIR, Sukhdev Singh stated that on 15th October 1988 he came to know from his daughter Avtar Kaur that Rachhpal Kaur had been murdered under suspicious circumstances. Sukhdev Singh was astonished to learn this and he reported the matter to the local police but they refused to take action since the report of the chemical examination had not been received. According to Sukhdev Singh, the appellants

and other in-laws of Rachhpal Kaur had committed an offence punishable under Section 304-B and Section 498-A of the IPC for causing the death of Rachhpal Kaur.

9. Upon registration of the FIR and receipt of the report of the Chemical Examiner, the local police carried out investigations and filed a charge sheet against the appellants as well as Gurcharan Singh and Sukhwant Singh, brothers of Kulwant Singh. The case was committed to the Sessions Court and registered as Sessions Case No.35-T of 5.5.1989 by the Additional Sessions Judge at Patiala.

10. After charges were framed, all the accused persons pleaded not guilty and claimed trial.

11. The prosecution produced several witnesses to bring home its case that the accused persons killed Rachhpal Kaur by poisoning her. The defence also produced their witnesses.

Decision of the Trial Court:

12. The Trial Judge, by his judgment and order dated 17th September 1993 found the appellants Kulwant Singh, Gurtehal Singh and Harminder Kaur guilty of an offence punishable under Section 304-B of the IPC. They were then sentenced to undergo rigorous imprisonment for seven years. They were also convicted for an offence punishable under Section 498-A of the IPC and sentenced to undergo rigorous imprisonment for one year and to pay a fine of Rs.500/-. The sentences were to run concurrently.

13. The Trial Court held that there was no delay in lodging the FIR by Sukhdev Singh. In fact, soon after the cremation of Rachhpal Kaur he went to the concerned Police Station at Amloh and apparently reported the suspicious circumstances under which his daughter had died. However, a case was not registered since the chemical examination report had not been received. Sukhdev Singh also moved an application before senior police officers and even appeared before the Senior

Superintendent of Police at Patiala and it is then that the FIR was registered on 2nd November 1988. On these facts the Trial Court concluded that there was no delay in lodging the FIR by Sukhdev Singh.

14. On the issue of a demand for dowry, maltreatment and harassment of Rachhpal Kaur, the Trial Court relied on the evidence of Sukhdev Singh (PW-5), his daughter Avtar Kaur (PW-9) his son Jasbir Singh (PW-11) and more importantly the members of the Panchayat, Sohan Singh (PW-7) and Darshan Singh (PW-8) who had gone to Kulwant Singh's house to sort out the issues between him and Rachhpal Kaur. The members of the Panchayat categorically stated (and this was believed by the Trial Court) that when they met Rachhpal Kaur on 13th September 1988 she was crying and had told them that the appellants demanded more dowry from her. She also stated that the appellants were given a buffalo and Rs.6,000/- in cash over and above the dowry given at the time of marriage but the appellants still complained that the dowry was insufficient.

15. Avtar Kaur (PW-9) had met Rachhpal Kaur on 8th October 1988 and was told by the deceased that her husband and members of his family were harassing her for dowry. The appellants subjected her to beating and that she wanted to be taken away from the house of her in-laws.

16. Jasbir Singh (PW-11) was believed by the Trial Court when he stated that he had borrowed Rs.6,000/- to give to the appellants as demanded by them. It was contended that Sukhdev Singh owned sufficient land and therefore, there was no need for his son to borrow Rs.6,000/- against a promissory note for payment to the appellants. The Trial Court did not accept this contention and found that since Sukhdev Singh had a very large family, it was not unnatural if his son had borrowed some money to give to the appellants.

17. The Trial Court also concluded that Rachhpal Kaur had died due to aluminium phosphide poisoning and the ingredients

of Section 304-B of the IPC had been made out and additionally the ingredients of Section 498-A had also been made out. It was held that Rachhpal Kaur's death was not a case of suicide.

18. On the above findings, the Trial Court concluded that the appellants were guilty of the offences that they were charged with. However, it was held that the prosecution had not been able to prove beyond reasonable doubt that Sukhwant Singh and Gurcharan Singh had committed any offence. On this basis, they were found not guilty while the appellants were awarded the punishment as mentioned above.

Decision of the High Court:

19. Feeling aggrieved by the judgment and order as well as the sentence awarded by the Trial Court, the appellants preferred Criminal Appeal No.356-SB of 1993, which was heard and dismissed by the High Court of Punjab and Haryana by its judgment and order dated 2nd May 2007.

20. The High Court independently examined the evidence on record and concluded that the prosecution had led sufficient evidence to show that the appellants, on account of a demand for dowry, maltreated Rachhpal Kaur and that she died under abnormal circumstances at the house of her in-laws. The High Court believed the witnesses who had consistently supported the prosecution version of harassment, maltreatment and misbehavior by the appellants with Rachhpal Kaur on account of her allegedly bringing insufficient dowry.

21. The High Court also believed the case put forward by the prosecution that in addition to the dowry brought by Rachhpal Kaur at the time of her marriage, the appellants had been given a buffalo and Rs.6,000/- in cash by Sukhdev Singh (PW-5) and Jasbir Singh (PW-11).

22. The High Court considered and rejected the contention of the appellants that the demand for dowry was an afterthought

since it did not find any mention in the FIR. The High Court noted that the FIR clearly records that Rachhpal Kaur had mentioned the demand for dowry to the members of the Panchayat and her immediate family. Though the demand for dowry was not specific, there was undoubtedly a demand made by the appellants and which was satisfied by Rachhpal Kaur's family.

23. The High Court found that the death of Rachhpal Kaur was due to aluminium phosphide poisoning and that there was sufficient evidence on record to hold the appellants guilty of the offences that they were charged with. Accordingly, the appeal filed by the appellants was dismissed by the High Court.

24. It is under these circumstances that the present appeal is before us.

Submissions and discussion:

25. Learned counsel for the appellants made three submissions before us. It was firstly submitted that there was a delay in lodging the FIR by Sukhdev Singh inasmuch as the incident occurred on 14th October 1988 but the FIR was lodged on 2nd November 1988; secondly, there was a great deal of improvement in the case by Sukhdev Singh and other prosecution witnesses inasmuch as the FIR and the statements recorded during investigations under Section 161 of the Code of Criminal Procedure did not mention anything about the demand for dowry having been raised by the appellants more particularly about a buffalo having been demanded and given to the appellants and payment of Rs.6,000/- again on the demand of the appellants. It was contended, in other words, that a completely new story was set up by the prosecution witnesses and for this reason they should not be believed; thirdly, the ingredients of Section 304-B of the IPC were not made out since the alleged demand for dowry was not proximate to the death of Rachhpal Kaur.

26. We are unable to agree with learned counsel for the

appellants in respect of any of the submissions advanced by him.

27. As far as the delay in lodging the FIR is concerned, we are in agreement with the conclusion arrived at by the Trial Court that there was no delay in lodging the FIR. It may be mentioned that the argument of delay in lodging the FIR was not raised before the High Court.

28. Be that as it may, the facts reveal that Sukhdev Singh (PW-5) had made sufficient attempts to have the FIR lodged but was unable to do so since the report of the Chemical Examiner had not yet been received by the concerned police station. In any event, it is also clear from the evidence of ASI Karnail Singh (PW-12) that Sukhdev Singh had submitted an application which was marked by S.I. Balbir Singh (PW-13) the Station House Officer of Police Station Amloh to him (Karnail Singh) on 18th October 1989. S.I. Balbir Singh also stated in his evidence that he had received an application made by Sukhdev Singh to the Senior Superintendent of Police at Patiala and it was then that he registered the FIR on 2nd November 1988. As such, it cannot be said that there was any delay in lodging the FIR.

29. We may also mention that the issue about the delay in lodging an FIR has been dealt by this Court *ad nauseum* and we should not make a fetish out of any perceived delay in lodging the FIR. Some time back, one of us (Madan B.Lokur, J.) had occasion to deal with this issue in *Gurmail Singh v. State of Punjab,* (2012) 11 SCALE 224 and it is not necessary to repeat the conclusions arrived at nor is it necessary to reaffirm the principle that delay in lodging the FIR cannot be a ground for throwing away the entire prosecution case as held in *Jitender Kumar v. State of Haryana,* (2012) 6 SCC 204.

30. The second contention urged by the appellants also does not merit any serious consideration. It is true that in the FIR Sukhdev Singh did not give any specific instance of the

demand for dowry made by the appellants but he did categorically mention that there was a demand for more dowry by the appellants. Apart from the statement in the FIR, both the Courts have considered the overwhelming evidence of several prosecution witnesses to the effect that there was a demand for dowry made by the appellants and concurrently held that the appellants had made a demand. We do not see any reason to interfere with this finding of fact.

31. That apart, there is sufficient evidence on record that the appellants had demanded a buffalo from Sukhdev Singh and this demand was acceded to. There is also sufficient evidence that the appellants had demanded Rs.6,000/- from Sukhdev Singh and even this demand was acceded to with Jasbir Singh (PW-11) giving the amount to the appellants.

32. The final contention urged on behalf of the appellants also requires to be rejected. Section 304-B of the IPC reads as follows:

> "**304-B. Dowry death.-**(1) Where the death of a woman is caused by any burns or bodily injury or occurs otherwise than under normal circumstances within seven years of her marriage and it is shown that soon before her death she was subjected to cruelty or harassment by her husband or any relative of her husband for, or in connection with, any demand for dowry, such death shall be called "dowry death", and such husband or relative shall be deemed to have caused her death.
>
> Explanation.- For the purposes of this sub- section, "dowry" shall have the same meaning as in section 2 of the Dowry Prohibition Act, 1961 (28 of 1961).
>
> (2) Whoever commits dowry death shall be punished with imprisonment for a term which shall not be less than seven years but which may extend to imprisonment for life."

33. There is no dispute that Rachhpal Kaur died under

abnormal circumstances due to aluminium phosphide poisoning within seven years of her marriage. The evidence on record clearly indicates that she was subjected to harassment for dowry not only by Kulwant Singh but also by his parents. In fact, the harassment continued, as stated by the members of the Panchayat who visited Kulwant Singh's house on 13th September 1988 and also by Avtar Kaur (PW-9) on 8th October 1988. Rachhpal Kaur was, therefore, harassed for dowry till almost immediately before her death.

34. We may also make a reference to Section 113-B of the Evidence Act, 1872 which reads as follows:-

> "**113-B. Presumption as to dowry death**.- When the question is whether a person has committed the dowry death of a woman and it is shown that soon before her death such woman had been subjected by such person to cruelty or harassment for, or in connection with, any demand for dowry, the Court shall presume that such person had caused the dowry death.
>
> Explanation.- For the purposes of this section, "dowry death" shall have the same meaning as in section 304-B of the Indian Penal Code (45 of 1860)."

35. The presumption of a dowry death can be raised in four circumstances given below and which have been mentioned in *Tarsem Singh v. State of Punjab* (2008) 16 SCC 155:

> "(1) The question before the court must be whether the accused has committed the dowry death of a woman. (This means that the presumption can be raised only if the accused is being tried for the offence under Section 304-B IPC.)
>
> (2) The woman was subjected to cruelty or harassment by her husband or his relatives.

> (3) Such cruelty or harassment was for, or in connection with, any demand for dowry.
>
> (4) Such cruelty or harassment was soon before her death."

All these ingredients are present in this case and a presumption of a dowry death can safely be drawn.

36. Learned counsel for the appellants referred to *Appasaheb & Anr. v. State of Maharashtra,* (2007) 9 SCC 721 wherein it was held that asking the wife to bring money for meeting domestic expenses on account of financial stringency and for purchasing manure cannot be held as a demand for dowry. We are unable to see how this decision has any relevance to the facts of the present case or to the controversy that we are concerned with. In any event, the observations made in *Appasaheb* were explained in *Bachni Devi v. State of Haryana,* (2011) 4 SCC 427 wherein it was held that the observations in *Appasaheb* were required to be understood in the context of the case. It was held that *Appasaheb* cannot be read as laying down an absolute proposition that a demand for money or some property or valuable security on account of some business or financial requirement could not be termed as a demand for dowry.

37. Finally, reference was made to *Vipin Jaiswal v. State of Andhra Pradesh,* 2013 (3) SCALE 525 which also has no relevance to the present case since in that case the ingredients of harassment or cruelty had not been made out. Vipin Jaiswal's wife committed suicide and left behind a note to the effect that nobody was responsible for her death and that her parents and family members had harassed her husband and it is because of this that she was fed up with her life and the quarrels taking place.

38. There is no doubt that insofar as the present case is concerned, Rachhpal Kaur was harassed by her husband and in-laws for dowry and that she died under abnormal

circumstances due to aluminium phosphide poisoning. In our opinion, there is sufficient evidence to hold the appellants guilty of offences punishable under Section 304-B of the IPC and 498-A of the IPC. We see no reason to disturb the conclusions concurrently arrived at by both the Courts below.

39. Learned counsel appearing for the appellants contended that Gurtehal Singh is today about 80 years old and his legs have been amputated because of severe diabetes. It was also submitted that Harminder Kaur is about 78 years of age and she needs to look after Gurtehal Singh. In these circumstances considering their age and physical disability, a sympathetic view should be taken in the matter as far as they are concerned.

40. We have given considerable thought to this submission but find that the law prescribes a minimum of seven years imprisonment for an offence under Section 304-B of the IPC. There is no provision for reducing the sentence for any reason whatsoever nor has any exception being carved out in law. Consequently, we cannot accept this plea.

41. We must not lose sight of the fact that even though Gurtehal Singh and Harminder Kaur are now aged, they were responsible for the death of Rachhpal Kaur through aluminium phosphide poisoning. Rachhpal Kaur was a young lady when she died and we can only guess the trauma that her unnatural death would have caused to her parents. Sympathizing with an accused person or a convict does not entitle to us to ignore the feelings of the victim or the immediate family of the victim.

Conclusion:

42. There is no merit in the appeal. It is accordingly dismissed.

B.B.B. Appeal dismissed.

UNION OF INDIA & ORS.
v.
EX-GNR AJEET SINGH
(Civil Appeal No.4465 of 2005)

APRIL 2, 2013

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

Army Act, 1950 – ss.39(a) and 52(a) – Army Rules, 1951 – rr.65, 72 and 79 – Court martial proceedings for absence without leave, for theft of ammunitions and for possession of counterfeit seal – Punishment of dismissal from service and 7 years RI – Writ petition – High Court held that entire court martial proceedings stood vitiated as the same could not have been held for the offences which the delinquent had committed as a juvenile – Held: In view of the Juvenile Justice Act, the delinquent could not have been tried in Court Martial for the offences which he had committed as a juvenile – But each charge was in respect of a separate and distinct offence and each charge could have been tried separately – Thus, trial by Court Martial was partly valid – Valid part of the proceedings is required to be saved by applying the principle of severability of offences – Hence, Court Martial Proceedings could not have been held invalid in entirety – By joint trial of all the charges, no prejudice has been caused to the accused, rather he has been benefited – Therefore, conviction recorded by the Court Martial is maintained, but in view of the facts of the case, sentence is reduced to 5 years RI – Juvenile Justice (Care and Protection of Children) Act, 2000.

Juvenile Justice (Care and Protection of Children) Act, 2000 – ss.6, 15, 16, 18, 19, 20, 29 and 37 – Applicability of the Act – Held: The Act being a special Act, has an overriding effect on any other statute – In the instant case, in Court

Martial proceedings, plea of juvenility was not raised at initial stage,, hence not applicable – Army Rules, 1951 – r.51.

Code of Criminal Procedure, 1973 – s.464 – Misjoinder of charges – Affect of – Held: Misjoinder for charges is merely an irregularity which can be cured – Misjoinder of charges would not invalidate the proceedings unless a failure of justice has occasioned or the person aggrieved has been prejudiced.

Court Martial – Nature of – Court Martial proceeding is substitute of a criminal trial – Hence the case coming against the order in Court Martial proceedings should be examined in accordance with the principles/law applicable in a criminal case.

Criminal Jurisprudence – There would be failure of justice not only by unjust conviction, but also by acquittal of the guilty – In case substantial justice has been done, it should not be defeated, when pitted against technicalities – Justice should not be tampered with mercy.

The respondent who was enrolled in Army, was charged for absence without leave on three occasions, for committing theft of ammunitions on two occasions and for possessing counterfeit seal with intent to commit forgery. Stolen articles were recovered at his instance. After General Court Martial Proceedings, he was awarded the punishment of dismissal from service and 7 years RI. The sentence was confirmed by the Competent Authority. The respondent challenged the award of punishment on the ground that he was a juvenile at the time when he had committed some of the charged offences, hence in view of Juvenile Justice (Care and Protection of Children) Act, 2000, those offences could not have been tried with other offences which he had committed after attaining majority in a joint trial.

High Court allowed the writ petition, holding that

entire Court Martial (GCM) proceeding stood vitiated as GCM could not have been held for the offences committed as a juvenile. Appellant was given liberty to proceed against the respondent *de novo f*or the offences, which he had committed after attaining majority. Hence the present appeal.

Allowing the appeal, the Court

HELD: 1.1. Section 6 of Juvenile Justice (Protection of Children) Act, contains a *non-obstante* clause, giving overriding effect on any other law for the time being in force. It also provides that the Juvenile Justice Board shall "have the power to deal exclusively" with all the proceedings, relating to juveniles under the Act, that are in conflict with other laws. Moreover, non-obstante clauses contained in various provisions thereof, particularly Sections 15, 16, 18, 19 and 20, render unambiguously, the legislative intent behind the JJ Act, i.e. of the same being a special law that would have an overriding effect on any other statute, for the time being in force. Such a view stands further fortified, in view of the provisions of Sections 29 and 37, that provide for the constitution of Child Welfare Committee, which provides for welfare of children in all respects, including their rehabilitation. [Para 15] [638-E-G]

1.2. During the GCM proceeding, the respondent did not raise the plea of being a juvenile, even though he was a juvenile at the time of commission of some of the offences. Where the plea of juvenility has not been raised at the initial stage of trial and has been taken only on the appellate stage, this Court has consistently maintained the conviction, but has set aside the sentence. Rule 51 of the Army Rules requires that the accused must raise the objection in respect of jurisdiction at an early stage of the commencement of proceedings. Had the respondent raised the issue of juvenility at the

appropriate stage, the authority conducting the GCM could have dropped the charges in respect of offences committed by him as a juvenile. Further, Rule 72 provides for mitigation of sentence in case of invalidity in framing of charges or on finding thereon. [Paras 10, 17 and 24] [634-H; 635-A; 639-C-D; 642-F-G]

Jayendra and Anr. vs. State of U.P. **AIR 1982 SC 685;** *Gopinath Ghosh vs. State of West Bengal* **AIR 1984 SC 237: 1984 SCR 803;** *Bhoop Ram vs. State of U.P.* **AIR 1989 SC 1329;** *Umesh Singh and Anr. vs. State of Bihar* **AIR 2000 SC 2111;** *Akbar Sheikh and Ors. vs. State of West Bengal* **(2009) 7 SCC 415;** *Hari Ram v. State of Rajasthan and Anr.* **(2009) 13 SCC 211: 2009 (7) SCR 623;** *Babla @ Dinesh vs. State of Uttarakhand* **(2012) 8 SCC 800: 2012 (7) SCR 477** *Abuzar Hossain @ Gulam Hossain vs. State of West Bengal* **(2012) 10 SCC 489: 2012 (9) SCR 244 – referred to.**

2.1. The respondent pleaded guilty to all the offences, though at a belated stage. As a member of the Indian Army, the respondent was duty bound to protect the nation. His conduct reminds one of situations when the "legislator becomes the transgressor" and the "fence eats the crops". He abused the nation instead of protecting it. Therefore, his conduct had been unpardonable and not worthy of being a soldier. [Para 24] [642-H; 643-A-B]

2.2. Considering the nature of service of the respondent, the gravity of offences committed by him after attaining the age of 18 years and the totality of the circumstances, grant of relief to the respondent, even on the principles of "justice, equity, and good conscience"; was not permissible. The High Court has decided the case in a laconic manner, without considering the gravity of the charges against the respondent and without deliberating on whether, in the light of such a fact-situation, any prejudice had been caused to the

respondent. [Paras 27 and 12] [637-C; 644-B]

2.3. Each charge had been in respect of a separate and distinct offence. Each charge could have been tried separately. Thus, the trial by way of a GCM remained partly valid. The offences committed by the respondent after attaining the age of 18 years, were not a part of the same transaction i.e. related to the offences committed by him as a juvenile. Nor were the same so intricately intertwined that the same could not be separated from one another. Thus, invalidity of part of the order could not render the GCM proceedings invalid in entirety. Therefore, the valid part of the proceedings is required to be saved by applying the principle of severability of offences. [Para 26] [643-D-E]

2.4. As the offences committed by the respondent after attaining majority were of a very serious nature, and in view of the provisions of Rule 65 of the Army Rules, only composite (single) sentence is permissible, the High Court could substitute the punishment considering the gravity of the offences committed by the respondent after attaining 18 years of age But no occasion was there for the High Court to say that entire GCM procedure stood vitiated. [Para 18] [639-F-G]

2.5. The maximum punishment for absence from duty without leave, under Section 39(a) of the Army Act, is 3 years RI. For any offence committed under Section 52(a), the maximum punishment is 10 years RI; and under Section 69, the maximum punishment is 7 years RI. After considering the entirety of the circumstances, in view of the provisions contained in Rule 65 of the Army Rules, the respondent was awarded the punishment of 7 years RI for all the charges proved. Though for the 2nd charge alone, the respondent could have been awarded 10 years RI; for the 4th and 5th charges, he could have been awarded a sentence of 3 years RI on each count; and for

charge no. 6, a punishment of 7 years RI could have been imposed. The respondent could have asked for a separate trial of different charges as provided under Rule 79. However, in that case the punishment would have been much more severe, as all the sentences could not run concurrently. In fact, the respondent has benefited from the joint trial of all the charges and thus, by no means can he claim that his cause stood prejudiced by resorting to such a course. The High Court ought to have taken a cue from Rule 72 of the Army Rules for the purpose of deciding the case, as the same provides for mitigation of sentence in the event that a charge or finding thereon is found to be invalid, as the respondent could not have been tried by a GCM for the offences that had been committed by him as a juvenile, keeping in view the provisions of Rule 65 thereof. [Paras 19 and 27] [639-H; 640-A-C; 643-F-H; 644-A]

2.6. The judgment and order passed by the High Court is set aside and the order of conviction recorded by the GCM is restored. However, in light of the facts and circumstances of the case, the sentence imposed by the GCM is reduced to five years. [Para 28] [644-C-D]

3. Though the case is labeled as a civil appeal, in fact it is purely a criminal case. GCM is a substitute of a criminal trial. Thus, the case ought to have been examined by the High Court keeping in mind, the principles/ law applicable in a criminal trial. The respondent is governed by the Army Act and Army Rules, and not by the provisions of Code of Criminal Procedure, 1973. However, Cr.P.C. basically deals with procedural matters to ensure compliance of the principles of natural justice etc. Thus, the principles enshrined therein may provide guidelines with respect to the misjoinder of charges and a joint trial for various distinct charges/ offences as there are similar provisions in the Army

Rules. Section 464 Cr.P.C., provides that a finding or sentence would not be invalid merely because there has been a omission or error in framing the charges or misjoinder of charges, unless a "failure of justice" has in fact been occasioned. A case of misjoinder of charges is merely an irregularity which can be cured, and that the same is not an illegality which would render the proceedings void. The court should not interfere with the sentence or conviction passed by a court of competent jurisdiction on such grounds, unless the same has occasioned a failure of justice, and the person aggrieved satisfies the court that his cause has in fact been prejudiced in some way. [Paras 13 and 14] [637-E-H; 638-A-B]

Birichh Bhuian and Ors. vs. State of Bihar **AIR 1963 SC 1120: 1963 Suppl. SCR 328;** *Kamalanantha & Ors. vs. State of T.N.* **AIR 2005 SC 2132: 2005 (3) SCR 182;** *State of U.P. vs. Paras Nath Singh* **(2009) 6 SCC 372: 2008 (13) SCR 800 – relied on.**

4.1. There would be "failure of justice"; not only by unjust conviction, but also by acquittal of the guilty. The Court has to examine whether there is really a failure of justice or whether it is only a camouflage. Justice is a virtue which transcends all barriers. Neither the rules of procedure, nor technicalities of law can stand in its way. Even the law bends before justice. The order of the court should not be prejudicial to anyone. Justice means justice between both the parties. The interests of justice equally demand that the "guilty should be punished" and that technicalities and irregularities, which do not occasion the "failure of justice"; are not allowed to defeat the ends of justice. They cannot be perverted to achieve the very opposite end as this would be counter-productive. "Courts exist to dispense justice, not to dispense with justice. And, the justice to be dispensed, is not palm-tree justice or idiosyncratic justice". Law is not an escape

route for law breakers. If this is allowed, this may lead to greater injustice than upholding the rule of law. The guilty man should be punished, and in case substantial justice has been done, it should not be defeated when pitted against technicalities. [Paras 20 and 22] [640-E; 641-E-H; 642-A]

Darbara Singh vs. State of Punjab **AIR 2013 SC 840: 2012 (7) SCR 541;** *Shivaji Sahebrao Bobade and Anr. vs. State of Maharashtra* **AIR 1973 SC 2622: 1974 (1) SCR 489;** *Rafiq Ahmed @ Rafi vs. State of U.P.* **AIR 2011 SC 3114: 2011 (11) SCR 907;** *Rattiram and Ors. vs. State of M.P.* **AIR 2012 SC 1485: 2012 (3) SCR 496;** *Bhimanna vs. State of Karnataka* **AIR 2012 SC 3026: 2012 (7) SCR 909;** *Ramesh Harijan vs. State of U.P.* **AIR 2012 SC 1979: 2012 (6) SCR 688;** *Sucha Singh vs. State of Punjab* **AIR 2003 SC 3617;** *S. Ganesan vs. Rama Raghuraman and Ors.* **(2011) 2 SCC 83: 2011 (1) SCR 27;** *Ramesh Kumar vs. Ram Kumar and Ors.* **AIR 1984 SC 1929;** *S. Nagaraj vs. State of Karnataka* **1993 Supp (4) SCC 595: 1993 (2) Suppl. SCR 1;** *State Bank of Patiala and Ors. vs. S.K Sharma* **AIR 1996 SC 1660: 1996 (1) SCR 818;** *Shaman Saheb M. Multani vs. State of Karnataka* **AIR 2001 SC 921: 2001 (1) SCR 514 – relied on.**

4.2. Justice is the virtue by which the Society/Court/ Tribunal gives a man his due, opposed to injury or wrong. Justice is an act of rendering what is right and equitable towards one who has suffered a wrong. Therefore, while tempering justice with mercy, the Court must be very conscious, that it has to do justice in exact conformity with some obligatory law, for the reason that human actions are found to be just or unjust on the basis of whether the same are in conformity with, or in opposition to, the law. [Para 23] [642-D-E]

Delhi Administration vs. Gurudeep Singh Uban **AIR 2000 SC 3737: 2000 (2) Suppl. SCR 496;** *Girimallappa vs. Special Land Acquisition Officer M and MIP* ***and Anr.*** **AIR 2012 SC 3101: 2012 SCR 975 – relied on.**

Case Law Reference:

1963 Suppl. SCR 328	**relied on**	**Para 14**
2005 (3) SCR 182	**relied on**	**Para 14**
2008 (13) SCR 800	**relied on**	**Para 14**
AIR 1982 SC 685	**referred to**	**Para 17**
1984 SCR 803	**referred to**	**Para 17**
AIR 1989 SC 1329	**referred to**	**Para 17**
AIR 2000 SC 2111	**referred to**	**Para 17**
(2009) 7 SCC 415	**referred to**	**Para 17**
2009 (7) SCR 623	**referred to**	**Para 17**
2012 (7) SCR 477	**referred to**	**Para 17**
2012 (9) SCR 244	**referred to**	**Para 17**
2012 (7) SCR 541	**relied on**	**Para 20**
1974 (1) SCR 489	**relied on**	**Para 20**
2011 (11) SCR 907	**relied on**	**Para 20**
2012 (3) SCR 496	**relied on**	**Para 20**
2012 (7) SCR 909	**relied on**	**Para 20**
2012 (6) SCR 688	**relied on**	**Para 21**
AIR 2003 SC 3617	**relied on**	**Para 21**
2011 (1) SCR 27	**relied on**	**Para 21**
AIR 1984 SC 1929	**relied on**	**Para 22**
1993 (2) Suppl. SCR 1	**relied on**	**Para 22**
1996 (1) SCR 818	**relied on**	**Para 22**
2001 (1) SCR 514	**relied on**	**Para 22**

2000 (2) Suppl. SCR 496 relied on Para 23

2012 SCR 975 relied on Para 23

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4465 of 2005.

From the Judgment & Order dated 08.03.2004 of the High Court of Delhi at New Delhi in Writ Petition (Civil) No. 8573 of 2003.

Paras Kuhad, ASG, S. Wasim A. Qadri, R. Balasubramani, Shubham Aggarwal, B.V. Balram Das, Anil Katiyar for the Appellants.

S.M. Dalal, Rameshwar Prasad Goyal for the Respondent.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. This appeal has been preferred against the judgment and order, dated 8.3.2004, passed by the High Court of Delhi at New Delhi in Writ Petition (Civil) No.8573 of 2003 by way of which the High Court has set aside the order dated 3.4.2003 passed by the General Court Martial (hereinafter referred to as 'GCM'), that had awarded the punishment of dismissal from service and 7 years rigorous imprisonment (hereinafter referred to as 'RI') to the respondent. The High Court held that, under the Juvenile Justice (Care & Protection of Children) Act, 2000 (hereinafter referred to as 'the JJ Act') the respondent could not be tried by GCM for the charges related to the period when he was juvenile and therefore, the GCM proceedings stood vitiated in entirety. However, the High Court has given liberty to the appellant to hold a fresh GCM, on the charges related to offences committed by the respondent after he attained the age of 18 years.

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

A. The respondent was enrolled in the Army on15.12.2000, and was posted to 77 Medium Regiment. He absented himself without leave from 26.2.2002 to 8.3.2002 i.e. (11 days). The respondent, while on Sentry duty on 17/18.3.2002 at the Ammunition Dump of the said Regiment, committed theft of 30 Grenades Hand No.36 High Explosive and 160 rounds of 5.56 MM INSAS. The respondent once again absented himself without leave from 12.6.2002 to 2.9.2002 (81 days). The respondent absented himself without leave from 4.9.2002 to 26.9.2002 (23 days) yet again. The respondent also committed theft of a Carbine Machine Gun 9 MM on 27.9.2002. He was apprehended by the Railway Police Phulera (Rajasthan) with the said Carbine Machine Gun, and an FIR No.56/2002 was registered by the Railway Police on 4.10.2002.

B. On 11.10.2002, the respondent was produced before the Chief Judicial Magistrate, Jodhpur, who passed an order for handing over the respondent to the Military Authorities, and it was later at his instance that the buried, stolen ammunition i.e. 30 Grenades and 5.56 MM INSAS rounds were recovered on 13.10.2002. A Court of Inquiry was ordered and summary of evidence was recorded.

C. The chargesheet was served upon the respondent on 11.3.2003, and it contained six charges, under the provisions of the Army Act, 1950 (hereinafter referred to as 'the Army Act'). After the conclusion of the GCM proceedings, the respondent was awarded punishment vide order dated 3.4.2003, as has been referred to hereinabove.

D. The sentence awarded in the GCM was confirmed by the Competent Authority, i.e. Chief of the Army Staff, while dealing with the petition under Section 164(2) of the Army Act. After such confirmation of sentence, the respondent was handed over to the civil jail at Agra to serve out the sentence. The respondent filed a post confirmation petition against the said order of punishment.

E. During the pendency of the post confirmation petition, the respondent filed a writ petition before the High Court, challenging the said order dated 3.4.2003, mainly on the ground that he was a juvenile at the time of some of the charged offences and in view of the provisions of the JJ Act, the joint trial of those offences that he had allegedly committed as a juvenile and other offences that he had allegedly committed after attaining majority had vitiated the GCM proceedings in entirety.

F. The appellant contested the said writ petition on the grounds that some of the offences with which the respondent had been charged, were of very serious nature, and they had been committed by the respondent after attaining the age of 18 years. Moreover, the respondent had not raised the plea of juvenility when the GCM proceedings were in progress.

G. The High Court allowed the writ petition, quashing the aforesaid punishment, and holding that the entire GCM proceeding stood vitiated, as the GCM could not be held for the offences alleged to have been committed by him as a juvenile. The High Court, therefore, directed release of the respondent forthwith. However, in relation to particular charges that were related to offences committed by him after attaining the age of 18 years, the appellant was given liberty to proceed in accordance with law against him de novo.

Hence, this appeal.

3. Shri Paras Kuhad, learned ASG appearing for the appellants, has submitted that the High Court has committed an error by holding that the entire GCM proceedings stood vitiated, for the reason that serious offences had been committed by the respondent after attaining the age of 18 years, and that at least with respect to such specific charges, the GCM proceeding could not be considered to have been vitiated. Additionally, even if the High Court had observed that the respondent was a juvenile at the time of some of the

charged offences at most the sentence could have been quashed; the conviction should have been sustained. Thus, the appeal deserves to be allowed.

4. Per contra, Shri S.M. Dalal, learned counsel appearing for the respondent, has opposed the appeal contending that the High Court has taken into consideration all relevant facts and law, particularly the provisions of the JJ Act, and has interpreted the same in correct perspective, because the GCM could not have been conducted for charges relating to offences that the respondent had committed as a juvenile, owing to which, the entire proceedings stood vitiated. Therefore, no interference with the impugned judgment is called for.

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

6. Relevant parts of the chargesheet issued to the respondent read as under:-

(i) Charged under Army Act Section 52(a)- theft of 30 Grenade Hand No.36 High Explosive and160 rounds of 5.56 MM INSAS on 17/18.3.2002.

(ii) Charged under Army Act Section 52(a) - theft of carbine machine gun 9 MM on 27.9.2002.

(iii) Charged under Army Act Section 39(a) – absent from duty without leave from 26.2.2002 to 8.3.2002.

(iv) Charged under Army Act Section 39(a) – absent from duty without leave from 12.6.2002 to 2.9.2002.

(v) Charged under Army Act Section 39(a) – absent from duty without leave from 4.9.2002 to 27.9.2002.

(vi) Charged under Army Act Section 69 – possessing counterfeit seal with intent to commit forgery contrary to Section 473 of Indian Penal Code, 1860 (hereinafter referred to as 'IPC').

7. We have summoned the original record of the GCM proceeding that makes it clear that the respondent was provided with a defense counsel, namely, Dr. Balbir Singh, a practicing advocate at the aforesaid GCM proceedings. Secondly, it also becomes clear that no witness was called in the defence by the accused. Thirdly, it is evident that he did not cross examine the court witnesses, and thus Rule 141(2) and 142(2) of the Army Rules were complied with. Upon being asked in question 16 whether the accused wanted to address the Court, he answered in the affirmative and stated:

> "……. that I am really ashamed of my acts and really regret my acts. The past seven months I have been attached to this Regiment and the misery and embarrassment which I am undergoing is more than a punishment. My family is also dependent on me for a permanent source of income. I have a younger sister whose marriage's responsibility is also on my shoulders. I am a soldier and have just started my career. I request the Honourable Judges to have mercy on me and give me a chance to serve, I shall never repeat such acts. I further request the Honourable Judges not to close all the ends of my career and life at this early age of service and give mea chance to redeem my prestige as well as keep up the aspirations of my parents."

8. Furthermore, it is evident from the record that the respondent had confessed before the Commanding Officer with respect to having stolen the arms and ammunition as mentioned in the chargesheet. It was the information furnished by him that led to the recovery of the stolen ammunition. He had also admitted to having sold 140 rounds of 156 mm INSAS to a civilian named Wasim Ali, for a sum of Rupees 30, 000, though he later asserted that he had fabricated these details.

In his prayer for mitigation of punishment, the respondent has stated that he was only 22 years of age, and that his entire life lay before him. His parents were old, and that he was the

sole bread earner of the house. He had the responsibility of getting his sister married. From the initial stages of the proceeding, he had admitted to his crimes, and that any mistake he had made was only because of his immaturity. Further, he stated that he understood the serious nature of his crime.

9. The original record of the proceeding reveals that the respondent had initially pleaded not guilty to all 6 charges that had been framed against him. It was only on the 1st of April, 2003, during the examination of the fifth witness for the prosecution (Major S.R. Gulia), the respondent had requested for grant of audience for defence. At that stage, he had stated:

> "I wish to withdraw my plea of 'Not Guilty', and to plead 'Guilty' to all six charges, as are contained in the charge sheet (B-2) against me, and therefore, that the Prosecution Witness present before the Court, may please be allowed to retire."

He further stated that he had wanted to accept his guilt from the very beginning of the Court Martial, but had been misguided by his parents and other relatives to plead 'Not Guilty'.

At this point, the Judge Advocate changed the plea of the accused from 'Not Guilty' to 'Guilty', and referred to Rules 52(2) and (2A); 54 and 55 Army Rules. It was duly pointed out by the Judge Advocate that the accused had the right to change his plea at any point during the trial, so long as the effect of doing so is properly explained to him.

10. Undoubtedly, given the date of birth of the respondent as per the service record is 20.4.1984, he attained 18 years of age on 20.4.2002. Accordingly, the charge nos. 2, 4, 5 and 6 relate to offences that the respondent committed after attaining the age of 18 years. Admittedly, during the GCM proceeding, the respondent did not raise the plea of being a

juvenile, even though he was a juvenile at the time of commission of some of the offences.

11. The relevant Army Rules, 1954 (hereinafter referred to as 'Army Rules'), which may be attracted in this appeal read as under:-

"51. Special plea to the jurisdiction. — (1) The accused, before pleading to a charge, may offer **a special plea to the general jurisdiction of the court,** and if he does so, and the court considers that anything stated in such plea shows that the court has no jurisdiction it shall receive any evidence offered in support, together with any evidence offered by the prosecutor in disproof or qualification thereof, and, any address by or on behalf of the accused and reply by the prosecutor in reference thereto.

xx xx xx xx

52. General plea of "Guilty" or "Not Guilty"

(1) ……..

(2) If an accused person pleads "Guilty", that plea shall be recorded as the finding of the court; but before it is recorded, the presiding officer or judge-advocate, on behalf of the court, shall ascertain that the accused understands the nature of the charge to which he has pleaded guilty and shall inform him of the general effect of that plea, and in particular of the meaning of the charge to which he has pleaded guilty, and of the difference in procedure which will be made by the plea of guilty, and shall advise him to withdraw that plea if it appears from the summary of evidence that the accused ought to plead "Not Guilty".

xx xx xx xx

65. Sentence. - The **Court shall award a single sentence in respect of all the offences** of which the

accused is found guilty, and **such sentence shall be deemed** to be awarded in respect of the offences in each charge in respect of which it can be legally given and not to be **awarded in respect of any offence in a charge in respect of which it cannot be legally given.**

72. Mitigation of sentence on partial confirmation. -

(1) …….

(2) Where a sentence has been awarded by a court-martial in respect of offences in several charges and has been confirmed, and any one or **such charges the finding thereon is found to be invalid,** the authority having power to mitigate, remit, or commute the punishment awarded by the sentence shall take into consideration the fact of such invalidity, and if it seems just, mitigate, remit or commute the punishment awarded according as it seems just, having regard to the offences in the charges which with the findings thereon are not invalid, and the punishment as so modified shall be as valid as if it had been originally awarded only in respect of those offences.

79. Separate charge-sheets. —

(1) xx xx xx

(2) xx xx xx

(3) xx xx xx

(4) xx xx xx

(5) Where **a charge-sheet contains more than one charge, the accused may, before pleading, claim to be tried separately in respect of any charge or charges** in that charge-sheet, on the ground that he will be embarrassed in his defence if he is not so tried

separately; and in such case the court unless they think his claim unreasonable, shall arraign and try the accused in like manner as if the convening officer had inserted the said charge or charges in different charge-sheets."

(Emphasis added)

12. Unfortunately, the attention of the High Court was not drawn to the aforesaid relevant rules and to the scope of their application to the facts of the present case. The High Court has decided the case in a laconic manner, without considering the gravity of the charges against the respondent and without deliberating on whether, in light of such a fact-situation, any prejudice had been caused to the respondent. Questions with respect to whether there has been any failure of justice in the present case and whether in light of the facts of the case, the entire GCM proceedings actually stood vitiated, as the respondent indeed could not be tried by the GCM for those charges that had been committed when the respondent was a juvenile.

13. Though the case is labeled as a civil appeal, in fact it is purely a criminal case. GCM is a substitute of a criminal trial. Thus, the case ought to have been examined by the High Court keeping in mind, the principles/ law applicable in a criminal trial. The respondent is governed by the Army Act and Army Rules, and not by the provisions of Code of Criminal Procedure, 1973 (hereinafter referred to as the 'Cr.P.C.'). However, Cr.P.C. basically deals with procedural matters to ensure compliance of the principles of natural justice etc. Thus, the principles enshrined therein may provide guidelines with respect to the misjoinder of charges and a joint trial for various distinct charges/offences as there are similar provisions in the Army Rules. Section 464 Cr.P.C., provides that a finding or sentence would not be invalid merely because there has been a omission or error in framing the charges or misjoinder of charges, unless a "failure of justice" has in fact been occasioned.

14. In *Birichh Bhuian & Ors. v. State of Bihar,* AIR 1963 SC 1120, this Court has held, that a case of misjoinder of charges is merely an irregularity which can be cured, and that the same is not an illegality which would render the proceedings void. The court should not interfere with the sentence or conviction passed by a court of competent jurisdiction on such grounds, **unless the same has occasioned a failure of justice**, and the person aggrieved satisfies the court that **his cause has** in fact **been prejudiced** in some way.

A similar view has also been reiterated in *Kamalanantha & Ors. v. State of T.N.,* AIR 2005 SC 2132; and *State of U.P. v. Paras Nath Singh,* (2009) 6 SCC 372.

15. The JJ Act that came into force on 1.4.2001 repealed the JJ Act 1986, and provides that a juvenile will be a person who is below 18 years of age.

Section 6 of the JJ Act contains a non-obstante clause, giving overriding effect to any other law for the time being in force. It also provides that the Juvenile Justice Board, where it has been constituted, shall "have the power to deal **exclusively**" with all the proceedings, relating to juveniles under the Act, that are in conflict with other laws. Moreover, non-obstante clauses contained in various provisions thereof, particularly Sections 15, 16, 18, 19 and 20, render unambiguously, the legislative intent behind the JJ Act, i.e. of the same being a special law that would have an overriding effect on any other statute, for the time being in force. Such a view stands further fortified, in view of the provisions of Sections 29 and 37, that provide for the constitution of Child Welfare Committee, which provides for welfare of children in all respects, including their rehabilitation.

16. Clause (n) of Section 2 of the JJ Act defines 'offence', as an offence punishable under any law for the time being in force. Thus, the said provision does not make any distinction

between an offence punishable under the IPC or one that is punishable under any local or special law.

17. The provisions of the JJ Act have been interpreted by this Court time and again, and it has been clearly explained that raising the age of "juvenile" to 18 years from 16 years would apply retrospectively. It is also clear that the plea of juvenility can be raised at any time, even after the relevant judgment/order has attained finality and even if no such plea had been raised earlier. Furthermore, it is the date of the commission of the offence, and not the date of taking cognizance or of framing of charges or of the conviction, that is to be taken into consideration. Moreover, where the plea of juvenility has not been raised at the initial stage of trial and has been taken only on the appellate stage, this Court has consistently maintained the conviction, but has set aside the sentence. (See: *Jayendra & Anr. v. State of U.P.,* AIR 1982 SC 685; *Gopinath Ghosh v. State of West Bengal,* AIR 1984 SC 237; *Bhoop Ram v. State of U.P.,* AIR 1989 SC 1329; *Umesh Singh & Anr. v. State of Bihar,* AIR 2000 SC 2111; *Akbar Sheikh & Ors. v. State of West Bengal,* (2009) 7 SCC 415; *Hari Ram v. State of Rajasthan & Anr.,* (2009) 13 SCC 211; *Babla @ Dinesh v. State of Uttarakhand,* (2012) 8 SCC 800 and *Abuzar Hossain @ Gulam Hossain v. State of West Bengal,* (2012) 10 SCC 489).

18. So far as the joint trial of the charges is concerned, as the offences committed by the respondent after attaining majority were of a very serious nature, and in view of the provisions of Rule 65 of the Army Rules, only composite (single) sentence is permissible, the High Court could substitute the punishment considering the gravity of the offences committed by the respondent after attaining 18 years of age. But there was no occasion for the High Court to observe that the entire GCM proceeding stood vitiated.

19. The maximum punishment for absence from duty

without leave, under Section 39(a) of the Army Act, is 3 years RI. For any offence committed under Section 52(a), the maximum punishment is 10 years RI; and under Section 69, the maximum punishment is 7 years RI. After considering the entirety of the circumstances, in view of the provisions contained in Rule 65 of the Army Rules, the respondent was awarded the punishment of 7 years RI for all the charges proved. Though for the 2nd charge alone, the respondent could have been awarded 10 years RI; for the 4th and 5th charges, he could have been awarded a sentence of 3 years RI on each count; and for charge no. 6, a punishment of 7 years RI could have been imposed.

20. So far as the failure of justice is concerned, this Court in *Darbara Singh v. State of Punjab,* AIR 2013 SC 840, held that:

> *"Failure of justice" is an extremely pliable or facile expression, which can be made to fit into any situation in any case. The court must endeavour to find the truth.* ***There would be "failure of justice"; not only by unjust conviction, but also by acquittal of the guilty,*** *as a result of unjust failure to produce requisite evidence. Of course, the rights of the accused have to be kept in mind and also safeguarded, but they should not be overemphasised to the extent of forgetting that the victims also have rights. It has to be shown that the accused has suffered some disability or detriment in respect of the protections available to him under the Indian criminal jurisprudence. "Prejudice" is incapable of being interpreted in its generic sense and applied to criminal jurisprudence. The plea of prejudice has to be in relation to investigation or trial, and not with respect to matters falling outside their scope. Once the accused is able to show that there has been* ***serious prejudice caused to him****, with respect to either of these aspects, and that the same has defeated the rights available to him under criminal jurisprudence, then*

the accused can seek benefit under the orders of the court."

(Emphasis added)

(See also: *Shivaji Sahebrao Bobade & Anr. v. State of Maharashtra,* AIR 1973 SC 2622; *Rafiq Ahmed @ Rafi v. State of U.P.,* AIR 2011 SC 3114; *Rattiram & Ors. v. State of M.P.,* AIR 2012 SC 1485; and *Bhimanna v. State of Karnataka,* AIR 2012 SC 3026)

21. In *Ramesh Harijan v. State of U.P.,* AIR 2012 SC 1979, this court dealt with the issue of the liberal approach adopted by the court to grant an unwarranted acquittal, and held that while dealing with a criminal case, it is a matter of paramount importance for any court to ensure that the mis-carriage of justice be avoided in all circumstances. (See also: *Sucha Singh v. State of Punjab,* AIR 2003 SC 3617**;** and *S. Ganesan v. Rama Raghuraman & Ors.,* (2011) 2 SCC 83)

22. The expression "failure of justice" would appear, sometimes, as an etymological chameleon. The Court has to examine whether there is really a failure of justice or whether it is only a camouflage. Justice is a virtue which transcends all barriers. Neither the rules of procedure, not technicalities of law can stand in its way. Even the law bends before justice. The order of the court should not be prejudicial to anyone. Justice means justice between both the parties. The interests of justice equally demand that the "guilty should be punished" and that technicalities and irregularities, which do not occasion the "failure of justice"; are not allowed to defeat the ends of justice. They cannot be perverted to achieve the very opposite end as this would be counter-productive. "Courts exist to dispense justice, not to dispense with justice. And, the justice to be dispensed, is not palm-tree justice or idiosyncratic justice". Law is not an escape route for law breakers. If this is allowed, this may lead to greater injustice than upholding the rule of law. The guilty man, therefore, should be punished, and in case

substantial justice has been done, it should not be defeated when pitted against technicalities. (Vide : *Ramesh Kumar v. Ram Kumar & Ors.,* AIR 1984 SC 1929; *S. Nagaraj v. State of Karnataka*,1993 Supp (4) SCC 595; *State Bank of Patiala & Ors. v. S.K Sharma,* AIR 1996 SC 1660; and *Shaman Saheb M. Multani v. State of Karnataka,* AIR 2001 SC 921)

23. In *Delhi Administration v. Gurudeep Singh Uban,* AIR 2000 SC 3737, this Court observed that justice is an illusion as the meaning and definition of 'justice' vary from person to person and party to party. A party feels that it has got justice only and only if it succeeds before the court, though it may not have a justifiable claim. (See also: *Girimallappa v. Special Land Acquisition Officer M & MIP & Anr.,* AIR 2012 SC 3101)

Justice is the virtue by which the Society/Court/Tribunal gives a man his due, opposed to injury or wrong.

Justice is an act of rendering what is right and equitable towards one who has suffered a wrong. Therefore, while tempering justice with mercy, the Court must be very conscious, that it has to do justice in exact conformity with some obligatory law, for the reason that human actions are found to be just or unjust on the basis of whether the same are in conformity with, or in opposition to, the law.

24. Rule 51 of the Army Rules requires that the accused must raise the objection in respect of jurisdiction at an early stage of the commencement of proceedings. Had the respondent raised the issue of juvenility at the appropriate stage, the authority conducting the GCM could have dropped the charges in respect of offences committed by him as a juvenile. Further, Rule 72 provides for mitigation of sentence in case of invalidity in framing of charges or on finding thereon.

The respondent pleaded guilty to all the offences, though at a belated stage. As a member of the Indian Army, the respondent was duty bound to protect the nation. Regrettably,

however, his conduct reminds one of situations when the "legislator becomes the transgressor" and the "fence eats the crops". Put simply, he abused the nation instead of protecting it. Therefore, his conduct had been unpardonable and not worthy of being a soldier.

25. At the cost of repetition, it may be observed that after attaining 18 years of age, the respondent committed four serious offences; he could have been punished with 10 years' RI for the 2nd charge, 7 years' RI for the 6th charge and 3 years' RI on each count for the 4th and 5th charges. Further, there had been a joint trial, and in view of the provisions of Rule 65, a composite sentence of 7 years RI had been imposed.

26. Undoubtedly, each charge had been in respect of a separate and distinct offence. Each charge could have been tried separately. Thus, the trial by way of a GCM remained partly valid. The offences committed by the respondent after attaining the age of 18 years, were not a part of the same transaction i.e. related to the offences committed by him as a juvenile. Nor were the same were so intricately intertwined that the same could not be separated from one another. Thus, invalidity of part of the order could not render the GCM proceedings invalid in entirety. Therefore, the valid part of the proceedings is required to be saved by applying the principle of severability of offences.

27. The respondent could have asked for a separate trial of different charges as provided under Rule 79. However, in that case the punishment would have been much more severe, as all the sentences could not run concurrently. In fact, the respondent has benefited from the joint trial of all the charges and thus, by no means can he claim that his cause stood prejudiced by resorting to such a course. The High Court ought to have taken a cue from Rule 72 of the Army Rules for the purpose of deciding the case, as the same provides for mitigation of sentence in the event that a charge or finding thereon is found to be invalid, as the respondent could not have been tried by a GCM for the offences that had been committed

by him as a juvenile, keeping in view the provisions of Rule 65 thereof.

Thus, considering the nature of service of the respondent, the gravity of offences committed by him after attaining the age of 18 years and the totality of the circumstances, we are of the considered opinion that grant of relief to the respondent, even on the principles of "justice, equity, and good conscience"; was not permissible.

28. In view of the above, the appeal succeeds, and is allowed. The judgment and order passed by the High Court impugned herein, is set aside and the order of conviction recorded by the GCM is restored. However, in light of the facts and circumstances of the case, the sentence imposed by the GCM is reduced to five years. There shall be no order as to costs.

K.K.T. Appeal allowed.

M/S. USHA STUD AND AGRICULTURAL FARMS PRIVATE LIMITED AND OTHERS
v.
STATE OF HARYANA AND OTHERS
(Civil Appeal No. 2557 of 2013)

APRIL 02, 2013

[G.S. SINGHVI, RANJANA PRAKASH DESAI AND KURIAN JOSEPH, JJ.]

Land Acquisition Act, 1894 – ss. 5-A and 6(1) – Violation of – Discrimination in release of acquired land – Lands owned by appellants and five similarly situated others acquired for one and the same purpose – State Government / HUDA released acquired lands of five others, by executing agreements with them, but did not accord similar treatment to appellants – Justification – Held: Not justified – Appellants were subjected to hostile discrimination – The solitary reason put forward by the respondents for not releasing the appellants' land, namely, that most of it was lying vacant was ex-facie erroneous, which is clear from the notings recorded by the officers and the Special Secretary to the Chief Minister of the State on the objections filed by the appellants – While ordering the issue of notification u/s.6(1), the Chief Minister did not even advert to the objections filed by the appellants and the report made by the Land Acquisition Collector u/s.5-A(2) – Direction given by the Chief Minister for issue of notification u/s.6(1) without considering the objections of the appellants and other relevant factors was vitiated due to non-application of mind – Decision taken at the level of the Chief Minister not in consonance with the scheme of s.5-A(2) r/w s.6(1) – The State Government's refusal to release the appellants' land resulted in violation of their right to equality granted u/Article 14 of the Constitution – Constitution of India, 1950 – Art. 14.

Land Acquisition Act, 1894 – s.5-A(2) – Purpose and effect of – Opportunity to the objector – Obligation of the Collector – Rule of audi alteram partem.

The appellants challenged the acquisition of their land in Writ Petition which was dismissed by the High Court along with other similar petitions. The appellants and the others similarly situated then filed Special Leave Petition. During the pendency of the SLPs, the State Government released the land belonging to the other similarly situated petitioners.

Subsequently, the Chief Town Planner submitted a note for release of the appellants' land subject to the condition that they should withdraw the SLP. The appellants did the needful, whereafter an agreement was executed between the appellants and Haryana Urban Development Authority (HUDA) for release of land. However, before the all terms of the said agreement could be acted upon, the State Government issued fresh notification dated 7.12.1988 under Section 4(1) of the Land Acquisition Act, 1894 for the acquisition of land including the land owned by the appellants. They filed detailed objections dated 4.1.1989. The Land Acquisition Collector as also the Chief Town and Country Planner made recommendation that the land of the appellants may not be notified because the same had already been released from acquisition. However, the State Government did not accept their recommendations and issued a declaration under Section 6(1), which was published in the Official Gazette dated 6.12.1989.

The appellants challenged notifications dated 7.12.1988 and 6.12.1989 in Writ Petition. During the pendency of those petitions, the Land Acquisition Collector passed award, which was followed by a supplementary award. Thereupon, the appellants filed another Writ Petition and prayed for quashing of the

awards. Meanwhile a substantial portion of the lands belonging to the similarly situated others had been released by the State Government / HUDA.

In the writ petitions filed by them, the appellants highlighted the discrimination practiced against them and pleaded that even though the Land Acquisition Officer and the Chief Town Planner had recommended the release of their land, the State Government arbitrarily issued the declaration under Section 6(1) by wrongly assuming that the entire land was lying vacant. The Division Bench of the High Court dismissed the writ petitions, and therefore the instant appeal.

The question which arose for consideration of this Court was whether the acquisition of the appellants' land was vitiated due to violation of Sections 5-A and 6(1) of the Land Acquisition Act, 1894 and whether the State Government resorted to discrimination in the matter of release of the acquired land.

Allowing the appeals, the Court

HELD:1.1. The lands owned by the appellants and five others were acquired for one and the same purpose. Therefore, once the State Government took a conscious decision to release the lands of the five others, albeit by executing agreements with them, there could be no justification whatsoever for not according similar treatment to the appellants. The solitary reason put forward by the respondents for not releasing the appellants' land, namely, that most of it was lying vacant was ex-facie erroneous, which is clear from the notings recorded by the officers and the Special Secretary to the Chief Minister of the State on the objections filed by the appellants. [Paras 17, 18] [657-H; 658-A-B; 661-D]

1.2. It is intriguing that while ordering the issue of

notification under Section 6(1), the Chief Minister did not even advert to the objections filed by the appellants and the report made by the Land Acquisition Collector under Section 5-A(2). He was totally oblivious of the fact that the appellants had already utilised substantial portion of their land for establishing Stud Farm and for other activities, like, animal husbandry, agriculture, horticulture, nursery and dairy farming and had also constructed a large number of buildings by spending crores of rupees and planted 5,000 trees. Be that as it may, the direction given by the Chief Minister for the issue of notification under Section 6(1) without considering the objections of the appellants and other relevant factors must be held as vitiated due to non application of mind. [Paras 18] [661-D-G]

1.3. Not only the Chief Minister, but the High Court also overlooked the fact that after the Chief Minister had ordered acquisition of vacant land belonging to the similarly situated others and notification was issued, the State Government and/or HUDA executed agreement with them and released the acquired land leaving out the appellants' land and in this manner they were subjected to hostile discrimination. [Para 19] [661-G-H; 662-A]

2. The declaration issued by the State Government was vitiated due to violation of Section 5-A (2) read with Section 6(1). Section 5-A(2) of the Land Acquisition Act, 1894, which represents statutory embodiment of the rule of audi alteram partem, gives an opportunity to the objector to make an endeavour to convince the Collector that his land is not required for the public purpose specified in the notification issued under Section 4(1) or that there are other valid reasons for not acquiring the same. That section also makes it obligatory for the Collector to submit report(s) to the appropriate Government containing his recommendations on the objections, together with the record of the proceedings

held by him so that the Government may take appropriate decision on the objections. Section 6(1) provides that if the appropriate Government is satisfied, after considering the report, if any, made by the Collector under Section 5-A(2) that particular land is needed for the specified public purpose then a declaration should be made. This necessarily implies that the State Government is required to apply mind to the report of the Collector and take final decision on the objections filed by the landowners and other interested persons. Then and then only, a declaration can be made under Section 6(1). The decision taken at the level of the Chief Minister was not in consonance with the scheme of Section 5-A(2) read with Section 6(1). Further, the State Government's refusal to release the appellants' land resulted in violation of their right to equality granted under Article 14 of the Constitution. [Paras 20, 33 and 34] [662-B; 672-G-H; 673-A-E]

Raghbir Singh Sehrawat v. State of Haryana **(2012) 1 SCC 792: 2011 (14) SCR 1113;** *Kamal Trading (P) Ltd. v. State of West Bengal* **(2012) 2 SCC 25: 2011 (13) SCR 529;** *Munshi Singh v. Union of India* **(1973) 2 SCC 337: 1973 (1) SCR 973;** *State of Punjab v. Gurdial Singh* **(1980) 2 SCC 471: 1980 (1) SCR 1071;** *Shyam Nandan Prasad v. State of Bihar* **(1993) 4 SCC 255: 1993 (1) Suppl. SCR 533;** *Union of India v. Mukesh Hans* **(2004) 8 SCC 14;** *Hindustan Petroleum Corporation Ltd. v. Darius Shapur Chenai* **(2005) 7 SCC 627: 2005 (3) Suppl. SCR 388 and** *Radhy Shyam v. State of U.P.* **(2011) 5 SCC 553: 2011 (8) SCR 359 – relied on.**

3. The impugned order is set aside and the declaration issued by the State Government under Section 6(1) is quashed. However, this judgment shall not preclude the State Government from taking fresh decision after objectively considering the objections filed by the appellants under Section 5-A(1). If the final

decision of the State Government is adverse to the appellants, then they shall be free to challenge the same before an appropriate judicial forum and urge all legally permissible contentions in support of their cause. [Paras 35, 36] [673-E-G]

Case Law Reference:

2011 (14) SCR 1113	**relied on**	**Para 15, 31**
2011 (13) SCR 529	**relied on**	**Paras 15, 32**
1973 (1) SCR 973	**relied on**	**Para 28, 31**
1980 (1) SCR 1071	**relied on**	**Para 29, 31**
1993 (1) Suppl. SCR 533	**relied on**	**Para 30, 31**
(2004) 8 SCC 14	**relied on**	**Para 31**
2005 (3) Suppl. SCR 388	**relied on**	**Para 31**
2011 (8) SCR 359	**relied on**	**Para 31**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2557 of 2013.

From the Judgment & Order dated 27.01.2012 of the High Court of Punjab & Haryana at Chandigarh in CWP No. 3822 of 1991.

WITH

C.A. Nos. 2576. 2577, 2578, 2580, 2582, 2583, 2584 of 2013.

Soli J. Sorabjee, Pallav Shishodia, Arvind Kr. Sharma, Ritika Goyal, Mehernal Mehta, Saurabh Mishra for the Appellant.

Neeraj Kr. Jain, Anubha Agrawal for the Respondents.

The Judgment of the Court was delivered by

G.S. SINGHVI, J. 1. Whether the acquisition of the appellants' land is vitiated due to violation of Sections 5-A and 6(1) of the Land Acquisition Act, 1894 (for short, 'the Act') and whether the State Government resorted to discrimination in the matter of release of the acquired land are the questions which arise for consideration in these appeals filed against order dated 27.1.2012 passed by the Punjab and Haryana High Court.

2. By notification dated 13.11.1981 issued under Section 4(1), the State Government proposed the acquisition of 1005.30 acres land of three villages, namely, Mullahera, Dundahera and Daulatpur Nasirabad (Carterpur) for the development of Sectors 21, 22, 23 and 23A of Gurgaon. The appellants, whose land measuring 52.74 acres situated in village Daulatpur Nasirabad (Carterpur) was included in the notification, filed objections under Section 5-A(1). The Land Acquisition Collector submitted report under Section 5-A(2) and recommended the acquisition of 702.37 acres land. As regards the appellants' land, the Land Acquisition Collector opined that Stud Farm cannot be allowed to remain in the residential zone and, therefore, the entire land may be acquired except the portion on which residential building had been constructed. The State Government accepted the recommendations of the Land Acquisition Collector and issued five separate declarations under Section 6(1). For 91.98 acres land of village Daulatpur Nasirabad (Carterpur), the declaration was published in the Official Gazette dated 15.11.1984.

3. The appellants challenged the acquisition of their land in Writ Petition No.5623/1984 which was dismissed by the High Court along with other similar petitions.

4. The appellants then filed Special Leave Petition (C) No.2302/1986. During the pendency of the matter before this Court, the State Government released the land belonging to M/s. Jawala Textiles Ltd., M/s. Rani Shaver Poultry Farm Ltd., M/s. Enfilco Ltd., M/s. Indo Swiss Time Limited and M/s. Omega Commercial (Pvt.) Ltd.

5. On 13.7.1986, the Chief Town Planner, Haryana submitted a note for release of the appellants' land subject to the condition that they should withdraw the Special Leave Petition. The appellants did the needful. Thereafter, the Commissioner and Secretary, Town and Country Planning Department sent communication dated 21.8.1986 to the appellants incorporating therein the terms on which the land was released. As a sequel to this, agreement dated 8.6.1987 was executed between the appellants and Haryana Urban Development Authority (HUDA) for release of 47.74 acres land.

6. In furtherance of the agreement, the appellants deposited Rs.1,00,000/- which, according to them, were towards the first instalment of the development charges. However, before the other terms of agreement could be acted upon, the State Government issued fresh notification dated 7.12.1988 under Section 4(1) for the acquisition of 55.10 acres land including the land owned by the appellants. They filed detailed objections dated 4.1.1989, the salient features of which were:

(i) they had established Stud Farm on the acquired land by spending substantial amount for breeding, rearing and exporting horses and were doing other activities like animal husbandry, agriculture, horticulture, nursery and dairy farming;

(ii) they had grown 5,000 trees on the land and also constructed 'A' class buildings worth several crores of rupees;

(iii) the purpose of acquisition was vague;

(iv) the notification issued under Section 4(1) was not published in two newspapers and was not affixed in the vicinity of the acquired land, and

(v) the decision of the State Government to acquire their land was discriminatory and violative of Article 14 of the Constitution.

7. Land Acquisition Collector, Urban Estate, Gurgaon submitted report dated 17.11.1989 with the recommendation that the land of the appellants may not be notified because the same had already been released from acquisition. Similar recommendation was made by the Chief Town and Country Planner. However, the State Government did not accept their recommendations and issued a declaration under Section 6(1), which was published in the Official Gazette dated 6.12.1989.

8. The appellants challenged notifications dated 7.12.1988 and 6.12.1989 in Writ Petition Nos. 3820-3823/1991. During the pendency of those petitions, the Land Acquisition Collector passed award dated 5.12.1991, which was followed by supplementary award dated 25.8.1993. Thereupon, the appellants filed Writ Petition Nos. 1152-1155/1994 and prayed for quashing of the awards.

9. While the writ petitions filed by them were pending, the appellants made an application to the competent authority for permission to use the acquired land for group housing. The Additional Director, Urban Estates recommended the release of 37.906 acres land in favour of the appellants but no final decision was taken in the matter apparently because the writ petitions filed by them were pending.

10. M/s. Rani Shaver Poultry Farm Ltd., M/s. Indo Swiss Time Ltd., and M/s. Kanodia Petro Products Ltd., successor of M/s. Jawala Textile Mills, whose lands were acquired in 1981 but were released by the State Government and were re-acquired vide notification dated 11.9.1990 filed Writ Petition Nos. 11679/1993, 10456/1993 and 3942/1992 for quashing the same. After receiving the notices issued by the High Court, the State Government/HUDA executed separate agreements with them and released substantial portion of their land. As a

sequel to this, the writ petitions were dismissed as withdrawn. However, the writ petition filed by M/s. Enfilco Ltd. was dismissed by the High Court. When the matter was carried to this Court (Civil Appeal No.4359/1994) an agreement was executed between HUDA and M/s. Enfilco Ltd. and major portion of its land was released.

11. In the writ petitions filed by them, the appellants highlighted the discrimination practiced against them. They pleaded that the Stud Farm established by them is covered by the term 'agriculture' defined in Section 2(1) of the Punjab Scheduled Roads and Controlled Areas (Restriction of Unregulated Development) Act, 1963 (for short, 'the 1963 Act') and they had raised constructions in consonance with the provisions of that Act. The appellants further pleaded that even though the Land Acquisition Officer and the Chief Town Planner had recommended the release of their land, the State Government arbitrarily issued the declaration under Section 6(1) by wrongly assuming that the entire land was lying vacant.

12. In the counter affidavits filed on behalf of the respondents, it was averred that the objections filed by the appellants were duly considered and final decision to acquire their land was taken by the highest political functionary of the State, i.e., the Chief Minister. It was further averred that the construction made by the appellants was contrary to the provisions of the 1963 Act because they had not obtained permission from the competent authority. The respondents also pleaded that rearing and breeding of horses is a commercial activity, which could not have been undertaken by the appellants without obtaining sanction from the competent authority for change of land use.

13. The Division Bench of the High Court rejected the contentions raised on behalf of the appellants and dismissed the writ petitions. While dealing with the question whether the acquisition of the appellants' land was vitiated due to violation of Section 5-A(2), the Division Bench observed as under:

"As regards the contention of the counsel for the petitioners that since the Land Acquisition Collector has not made any recommendation in his report while considering the objections filed by the petitioners under Section 5-A of the Act, the same only requires to be noted and rejected for the simple reason that the Collector is not the competent authority to decide the objections under Section 5-A of the Act raised by the land owners against the acquisition. He is required to submit his report as it existed on the spot as he is required to enquire into the objections, record the statements of the parties, inspect the sites and send his report to the State Government. Along with his report he may make recommendation or may not do so because it has no bearing as the competent authority to take decision on the objections is the State Government. Thus, for the failure to make any recommendation by the Collector, acquisition proceedings cannot be quashed on the ground that it violates the procedure or deny the rights conferred on the land owners under Section 5-A of the Act."

14. The Division Bench of the High Court also negatived the appellants' plea of discrimination in the following words:

"A ground of discrimination has been raised by the petitioners alleging that in an earlier acquisition in the year 1981, petitioners and other similarly placed Companies, namely, M/s Rani Shaver Poultry Farm, M/s Omega Commercial Pvt. Ltd., Anand Purifier (now M/s Enfilco Ltd.), Indo Swiss Time Ltd., M/s Jawala Textile Mills, had challenged the said acquisition by filing independent writ petitions. These writ petitions were dismissed and during the pendency of the Special Leave Petitions before the Supreme Court, an agreement was entered into and the land of the petitioners as also these Companies were released from acquisition. Thereafter, while notification for acquisition of the land of the petitioners was issued, land of other companies was not re-acquired. This objection

was raised under Section 5-A of the Act, which led to the issuance of the notifications for acquiring the land of other companies also. As the petitioners challenged, similarly other companies also challenged the notifications. During the pendency of the writ petitions, agreements were entered into between these companies and respondents and on the basis of these agreements, writ petitions were withdrawn by these companies as their lands stood released from acquisition except that in the case of M/s Enfilco. This contention of the petitioners can also not be accepted as it is not in dispute that the acquisition, through which the lands of these companies were acquired, was different from the notifications issued for acquisition of the land of the petitioners. The judgments relied upon by the counsel for the petitioners in the case of *Hari Ram and another* (supra), *M/s Aggarwal Paper Board and Allied Industries* (supra), *Chandu Singh* (supra) and *Anil Kakkar* (supra) would not be applicable to the facts of the present case for the reason that in those cases, the land, which was being acquired and discrimination qua which was raised by the land owners, was the same whereas the notifications for acquisition are different in the present case."

15. Shri Soli Sorabjee and Shri Pallav Shishodia, learned senior counsel appearing for the appellants, argued that the impugned order is liable to be set aside because the finding recorded by the High Court on the issue of discrimination is ex-facie erroneous. Learned senior counsel emphasized that the lands belonging to the appellants and those of M/s. Rani Shaver Poultry Farm Ltd. and others were acquired for developing different sectors of Gurgaon and, therefore, the State Government was not at all justified in adopting different yardsticks in the matter of release of the acquired land. Shri Sorabjee submitted that if the lands of M/s. Rani Shaver Poultry Farm Ltd. and others were released on the ground that the same had already been utilised for establishing industrial units,

the same treatment should have been accorded to the appellants because they had not only established Stud Farm for rearing and breeding of horses but also started agricultural, horticulture, animal husbandry, nursery and dairy farming and planted 5,000 trees. Learned senior counsel criticized the view expressed by the High Court on the issue of compliance of Section 5-A and argued that the same is contrary to the law laid down by this Court in *Raghbir Singh Sehrawat v. State of Haryana* (2012) 1 SCC 792 and *Kamal Trading (P) Ltd. v. State of West Bengal* (2012) 2 SCC 25.

16. Shri Neeraj Jain, learned senior counsel appearing for the respondents, supported the impugned order and argued that the High Court did not commit any error by dismissing the writ petitions. Shri Jain submitted that the appellants cannot seek invalidation of the acquisition proceedings on the ground of violation of Section 5-A because final decision to acquire the land was taken by none other than the Chief Minister. He submitted that the role of the Land Acquisition Collector ended with the making of recommendations and it was for the State Government to decide whether or not the particular piece of land should be acquired for the specified public purpose. Shri Jain further argued that the State Government cannot be accused of practicing discrimination because while the lands belonging to M/s. Rani Shaver Poultry Farm Ltd. and others had already been used for industrial, commercial and other purposes, those owned by the appellants were lying vacant.

17. We have considered the respective arguments. We shall first consider whether the reason recorded by the High Court for rejecting the appellants' plea of discrimination is legally correct. It is not in dispute that the lands owned by the appellants and M/s. Rani Shaver Poultry Farm Ltd. and four others were acquired for one and the same purpose i.e. the development of Sectors 21, 22, 23 and 23A of Gurgaon. Therefore, once the State Government took a conscious decision to release the lands of M/s. Rani Shaver Poultry Farm Ltd. and four others,

albeit by executing agreements with them, there could be no justification whatsoever for not according similar treatment to the appellants. As will be seen hereafter, the solitary reason put forward by the respondents for not releasing the appellants' land, namely, that most of it was lying vacant was ex-facie erroneous. In this context, it will be apposite to take cognizance of the notings recorded by the officers and the Special Secretary to the Chief Minister of the State on the objections filed by the appellants:

(i) **09.10.1989**

"For acquiring pie land of Usha stud farm and Agricultural farms, Gurgaon, Sector-4 notification dated 7.12.88 was advertised in national newspaper the Tribune on 14.12.88 and in The NAV BHARAT Times on 17.12.88. It was issued in the vicinity on 9.12.88. Section 5-A objections were received from four persons which are put in the file. The report of the land acquisition collector is marked on page "K".

I have studied the objections. The details of the development on this land before section 4 has been made which can be seen on page B . On the shajra plan this development has also been marked which is at page " kh". Out of the total land of 55 Acres A class construction is on 1K-11M, Class B construction is on 18 Marias and class C and D construction is on 6 k. In my view the class A construction of residential accommodation should not be acquired while the rest of the land should be acquired.

One of the objections raised by the objectors is that earlier when the land of the objectors was released land of other land owners like Rani Shaver Farm, Jwala Textile Mills, and Indo-swiss Times ltd and others land was also released. But now only the land of the objectors is being re acquired while not of the others. In order to get to get a solution to this objection, it is my suggestion that before we issue

Section 6 notification in respect of the land of the objectors, we should issue Section 4 notification to re acquire the land of the others so that the objectors do not have the ground of discrimination available.

The objectors have also written that when their land was released earlier they had deposited the development charges. My view on this may be seen on page 65 whereby it is clear that the objectors had sent a cheque of 1 lakh of Rupees to the Estate Officer, HUDA, Gurgaon without being asked to do so. In my view, in case this cheque has already not been returned then the Estate Officer should be instructed to return the cheque immediately.

Sd/-
Additional Director Urban Estates
9-10-1989"

(ii) **09.11.1989**

"The objection of M/s Usha Stud and Agricultural Farm, Gurgaon whose lands are now to be notified, u/s 6 of the LA. Act have clearly stated the aspect of discrimination since, lands in respect of M/s Rani Shaver, Jawala Textile Mills Indian Swiss Time Ltd. notified for acquisition in Nov., 1981 along with Usha Stud simultaneously and subsequently all these were released.

However, now only lands of M/s Usha Stud and Agricultural Farms are proposed to be acquired leaving the other lands.

The ADUE has therefore proposed that to remove any plea of discrimination the lands of M/s Rani Shaver, Jawala Textile Mills and Indo Swiss time should also now be acquired and therefore notified simultaneously.

To my mind this would not a practicable proposition since all these are functioning enterprises and to disturb and

disrupt them through acquisition would not be appropriate.

Therefore keeping into consideration the aspect of discrimination and the report of ADUE the Government may take an appropriate view regarding notifying this land u/s 6 which should have to be done prior to 6.12.89.

Sd/-
D. U. E.
9-11-89"

C.T.C.P.

(iii) **17.11.1989**

"In view of the position explained by the DUE, we need not issue the notification under Section 6 for this land. This land was earlier released from acquisition on the grounds mentioned on Pages 13 to 17 (LFII) (Noting portion), There is no change in the situation even now.

Dy. CM(I)/CM may kindly see for approval.

Sd/- C.T.C.P.
17.11.89

Dy.C.M.(I)

Sd/-Dy. CM
27.11.89"

CM.

(iv) **05.12.1989**

"Reg. Acquisition of land of M/S Usha Stud Agricultural Farm, Gurgaon.

C.M. has ordered that the notification under section 6 for the acquisition of land of M/S Usha Stud Agricultural Farm may be issued because it is mostly lying vacant. He has further ordered that vacant lands belonging to M/S Rani

Showers Farm and Jawala Textiles may also be notified for acquisition.

Sd/-SSCM
5.12.89."

18. A reading of the above reproduced notings makes it clear that while the Additional Director and the Director, Urban Estates Department had treated the appellants' case as similar to M/s. Rani Shaver Poultry Farm Ltd. and others, the Chief Minister ordered the issue of notification under Section 6(1) in respect of the land of appellant No.1 by assuming that major portion of it was lying vacant. Of course, he also ordered that the vacant lands belonging to M/s. Rani Shaver Poultry Farm Ltd. and Jawala Textiles may also be notified for acquisition. It is a different thing that in the second round also the lands owned by M/s. Rani Shaver Poultry Farm Ltd. and four others were released during the pendency of the writ petitions and the civil appeal filed by them. It is intriguing that while ordering the issue of notification under Section 6(1), the Chief Minister did not even advert to the objections filed by the appellants and the report made by the Land Acquisition Collector under Section 5-A(2). He was totally oblivious of the fact that the appellants had already utilised substantial portion of their land for establishing Stud Farm and for other activities, like, animal husbandry, agriculture, horticulture, nursery and dairy farming and had also constructed a large number of buildings by spending crores of rupees and planted 5,000 trees. Be that as it may, the direction given by the Chief Minister for the issue of notification under Section 6(1) without considering the objections of the appellants and other relevant factors must be held as vitiated due to non application of mind.

19. What is most surprising is that not only the Chief Minister, but the High Court also overlooked the fact that after the Chief Minister had ordered acquisition of vacant land belonging to M/s. Rani Shaver Poultry Farm Ltd. and others and notification dated 11.9.1990 was issued, the State

Government and/or HUDA executed agreement with them and released the acquired land leaving out the appellants' land and in this manner they were subjected to hostile discrimination.

20. We also find merit in the argument of the learned senior counsel for the appellants that the declaration issued by the State Government was vitiated due to violation of Section 5-A (2) read with Section 6(1). For the sake of reference, Sections 4, 5-A and 6 of the Act are reproduced below:

"**4. Publication of preliminary notification and powers of officers thereupon**.—(1) Whenever it appears to the appropriate Government that land in any locality is needed or is likely to be needed for any public purpose or for a company, a notification to that effect shall be published in the Official Gazette and in two daily newspapers circulating in that locality of which at least one shall be in the regional language and the Collector shall cause public notice of the substance of such notification to be given at convenient places in the said locality (the last of the dates of such publication and the giving of such public notice, being hereinafter referred to as the date of the publication of the notification).

(2) Thereupon it shall be lawful for any officer, either generally or specially authorised by such Government in this behalf, and for his servants and workmen,—

to enter upon and survey and take levels of any land in such locality;

to dig or bore into the sub-soil;

to do all other acts necessary to ascertain whether the land is adapted for such purpose;

to set out the boundaries of the land proposed to be taken and the intended line of the work (if any) proposed to be

made thereon;

to mark such levels, boundaries and line by placing marks and cutting trenches; and,

where otherwise the survey cannot be completed and the levels taken and the boundaries and line marked, to cut down and clear away any part of any standing crop, fence or jungle:

Provided that no person shall enter into any building or upon any enclosed court or garden attached to a dwelling house (unless with the consent of the occupier thereof) without previously giving such occupier at least seven days' notice in writing of his intention to do so.

5-A. Hearing of objections.—(1) Any person interested in any land which has been notified under Section 4, sub-section (1), as being needed or likely to be needed for a public purpose or for a company may, within thirty days from the date of the publication of the notification, object to the acquisition of the land or of any land in the locality, as the case may be.

(2) Every objection under sub-section (1) shall be made to the Collector in writing, and the Collector shall give the objector an opportunity of being heard in person or by any person authorised by him in this behalf or by pleader and shall, after hearing all such objections and after making such further inquiry, if any, as he thinks necessary, either make a report in respect of the land which has been notified under Section 4, sub-section (1), or make different reports in respect of different parcels of such land, to the appropriate Government, containing his recommendations on the objections, together with the record of the proceedings held by him, for the decision of that Government. The decision of the appropriate Government on the objections shall be final.

(3) For the purposes of this section, a person shall be deemed to be interested in land who would be entitled to claim an interest in compensation if the land were acquired under this Act.

6. Declaration that land is required for a public purpose.—(1) Subject to the provisions of Part VII of this Act, when the appropriate Government is satisfied, after considering the report, if any, made under Section 5-A, sub-section (2), that any particular land is needed for a public purpose, or for a Company, a declaration shall be made to that effect under the signature of a Secretary to such Government or of some officer duly authorised to certify its orders, and different declarations may be made from time to time in respect of different parcels of any land covered by the same notification under Section 4, sub-section (1), irrespective of whether one report or different reports has or have been made (wherever required) under Section 5-A, sub-section (2):

Provided that no declaration in respect of any particular land covered by a notification under Section 4, sub-section (1)—

(i) * * *

(ii) published after the commencement of the Land Acquisition (Amendment) Act, 1984, shall be made after the expiry of one year from the date of the publication of the notification:

Provided further that no such declaration shall be made unless the compensation to be awarded for such property is to be paid by a Company, or wholly or partly out of public revenues or some fund controlled or managed by a local authority.

Explanation 1.—In computing any of the periods referred

to in the first proviso, the period during which any action or proceeding to be taken in pursuance of the notification issued under Section 4, sub-section (1), is stayed by an order of a Court shall be excluded.

Explanation 2.—Where the compensation to be awarded for such property is to be paid out of the funds of a corporation owned or controlled by the State, such compensation shall be deemed to be compensation paid out of public revenues.

(2) Every declaration shall be published in the Official Gazette, and in two daily newspapers circulating in the locality in which the land is situate of which at least one shall be in the regional language, and the Collector shall cause public notice of the substance of such declaration to be given at convenient places in the said locality (the last of the dates of such publication and the giving of such public notice, being hereinafter referred to as the date of the publication of the declaration), and such declaration shall state the district or other territorial division in which the land is situate, the purpose for which it is needed, its approximate area, and, where a plan shall have been made of the land, the place where such plan may be inspected.

(3) The said declaration shall be conclusive evidence that the land is needed for a public purpose or for a Company, as the case may be; and, after making such declaration, the appropriate Government may acquire the land in manner hereinafter appearing."

21. An analysis of the above-reproduced provisions shows that Section 4 empowers the appropriate Government to initiate the proceedings for the acquisition of land. Section 4(1) lays down that whenever it appears to the appropriate Government that land in any locality is needed or is likely to be needed for any public purpose or for a company, then a notification to that

effect is required to be published in the Official Gazette and two daily newspapers having circulation in the locality. Of these, one paper has to be in the regional language. A duty is also cast on the Collector, as defined in Section 3(c), to cause public notice of the substance of such notification to be given at convenient places in the locality. The last date of publication and giving of public notice is treated as the date of publication of the notification.

22. Section 4(2) lays down that after publication of the notification under Section 4(1), any officer authorised by the Government in this behalf, his servants or workmen can enter upon and survey and take levels of any land in the locality, dig or bore into the sub-soil, and to do all other acts necessary for ascertaining that the land is suitable for the purpose of acquisition. The officer concerned, his servants or workmen can fix the boundaries of the land proposed to be acquired and the intended line of the work, if any, proposed to be made on it. They can also mark such levels and boundaries by marks and cutting trenches and cut down and clear any part of any standing crops, fence or jungle for the purpose of completing the survey, and taking level, and marking of boundaries and line. However, neither the officer nor his servants or workmen can, without the consent of the occupier, enter into any building or upon any enclosed court or garden attached to a dwelling house without giving seven days' notice to the occupier.

23. Section 5-A, which embodies the most important dimension of the rules of natural justice, lays down that any person interested in any land notified under Section 4(1) may, within 30 days of publication of the notification, submit objection in writing against the proposed acquisition of land or of any land in the locality to the Collector. The Collector is required to give the objector an opportunity of being heard either in person or by any person authorised by him or by pleader. After hearing the objector(s) and making such further inquiry, as he may think necessary, the Collector has to make a report in respect of land notified under Section 4(1) with his recommendations on the

objections and forward the same to the Government along with the record of the proceedings held by him. The Collector can make different reports in respect of different parcels of land proposed to be acquired.

24. Upon receipt of the Collector's report, the appropriate Government is required to take action under Section 6(1) which lays down that if after considering the report, if any, made under Section 5-A(2), the appropriate Government is satisfied that any particular land is needed for a public purpose, then a declaration to that effect is required to be made under the signatures of a Secretary to the Government or of some officer duly authorised to certify its orders. This section also envisages making of different declarations from time to time in respect of different parcels of land covered by the same notification issued under Section 4(1). In terms of clause (ii) of the proviso to Section 6(1), no declaration in respect of any particular land covered by a notification issued under Section 4(1), which is published after 24.9.1989 can be made after expiry of one year from the date of publication of the notification. To put it differently, a declaration is required to be made under Section 6(1) within one year from the date of publication of the notification under Section 4(1).

25. In terms of Section 6(2), every declaration made under Section 6(1) is required to be published in the Official Gazette and in two daily newspapers having circulation in the locality in which the land proposed to be acquired is situated. Of these, at least one must be in the regional language. The Collector is also required to cause public notice of the substance of such declaration to be given at convenient places in the locality. The declaration to be published under Section 6(2) must contain the district or other territorial division in which the land is situate, the purpose for which it is needed, its approximate area or a plan is made in respect of land and the place where such plan can be inspected.

26. Section 6(3) lays down that the declaration made under

Section 6(1) shall be conclusive evidence of the fact that land is needed for a public purpose.

27. After publication of the declaration under Section 6(1), the Collector is required to take order from the State Government for the acquisition of land and cause it to be measured and planned (Sections 7 and 8). The next stage is the issue of public notice and individual notice to the persons interested in the land to file their claim for compensation. Section 11 envisages holding of an enquiry into the claim and passing of an award by the Collector who is required to take into consideration the provisions contained in Section 23.

28. In *Munshi Singh v. Union of India* (1973) 2 SCC 337, this Court emphasised the importance of Section 5-A in the following words:

> " … Sub-section (2) of Section 5-A makes it obligatory on the Collector to give an objector an opportunity of being heard. After hearing all objections and making further inquiry he is to make a report to the appropriate Government containing his recommendation on the objections. The decision of the appropriate Government on the objections is then final. The declaration under Section 6 has to be made after the appropriate Government is satisfied, on a consideration of the report, if any, made by the Collector under Section 5-A(2). The legislature has, therefore, made complete provisions for the persons interested to file objections against the proposed acquisition and for the disposal of their objections. It is only in cases of urgency that special powers have been conferred on the appropriate Government to dispense with the provisions of Section 5-A."

29. In *State of Punjab v. Gurdial Singh* (1980) 2 SCC 471, the Court observed as under:

" … it is fundamental that compulsory taking of a man's property is a serious matter and the smaller the man the more serious the matter. Hearing him before depriving him is both reasonable and pre-emptive of arbitrariness, and denial of this administrative fairness is constitutional anathema except for good reasons. Save in real urgency where public interest does not brook even the minimum time needed to give a hearing land acquisition authorities should not, having regard to Articles 14 (and 19), burke an enquiry under Section 17 of the Act. Here a slumbering process, pending for years and suddenly exciting itself into immediate forcible taking, makes a travesty of emergency power."

30. In *Shyam Nandan Prasad v. State of Bihar* (1993) 4 SCC 255, this Court reiterated that compliance of Section 5-A is mandatory and observed:

" … The decision of the Collector is supposedly final unless the appropriate Government chooses to interfere therein and cause affectation, suo motu or on the application of any person interested in the land. These requirements obviously lead to the positive conclusion that the proceeding before the Collector is a blend of public and individual enquiry. The person interested, or known to be interested, in the land is to be served personally of the notification, giving him the opportunity of objecting to the acquisition and awakening him to such right. That the objection is to be in writing, is indicative of the fact that the enquiry into the objection is to focus his individual cause as well as public cause. That at the time of the enquiry, for which prior notice shall be essential, the objector has the right to appear in person or through pleader and substantiate his objection by evidence and argument."

31. In *Raghbir Singh Sehrawat's* case (supra), this Court referred to the judgments in *Munshi Singh v. Union of India* (1973) 2 SCC 337, *State of Punjab v. Gurdial Singh* (1980) 2 SCC 471, *Shyam Nandan Prasad v. State of Bihar* (1993) 4 SCC 255, *Union of India v. Mukesh Hans* (2004) 8 SCC 14, *Hindustan Petroleum Corporation Ltd. v. Darius Shapur Chenai* (2005) 7 SCC 627, *Radhy Shyam v. State of U.P.* (2011) 5 SCC 553 and observed:

"In this context, it is necessary to remember that the rules of natural justice have been ingrained in the scheme of Section 5-A with a view to ensure that before any person is deprived of his land by way of compulsory acquisition, he must get an opportunity to oppose the decision of the State Government and/or its agencies/instrumentalities to acquire the particular parcel of land. At the hearing, the objector can make an effort to convince the Land Acquisition Collector to make recommendation against the acquisition of his land. He can also point out that the land proposed to be acquired is not suitable for the purpose specified in the notification issued under Section 4(1). Not only this, he can produce evidence to show that another piece of land is available and the same can be utilised for execution of the particular project or scheme. Though it is neither possible nor desirable to make a list of the grounds on which the landowner can persuade the Collector to make recommendations against the proposed acquisition of land, but what is important is that the Collector should give a fair opportunity of hearing to the objector and objectively consider his plea against the acquisition of land. Only thereafter, he should make recommendations supported by brief reasons as to why the particular piece of land should or should not be acquired and whether or not the plea put forward by the objector merits acceptance. In other words, the recommendations made by the Collector must reflect objective application of mind to the objections filed by the landowners and other interested persons."

32. *In Kamal Trading (P) Ltd. v. State of West Bengal* (supra), this Court again considered the scope of Section 5-A and observed:

> "13. Section 5-A(1) of the LA Act gives a right to any person interested in any land which has been notified under Section 4(1) as being needed or likely to be needed for a public purpose to raise objections to the acquisition of the said land. Sub-section (2) of Section 5-A requires the Collector to give the objector an opportunity of being heard in person or by any person authorised by him in this behalf. After hearing the objections, the Collector can, if he thinks it necessary, make further inquiry. Thereafter, he has to make a report to the appropriate Government containing his recommendations on the objections together with the record of the proceedings held by him for the decision of the appropriate Government and the decision of the appropriate Government on the objections shall be final.
>
> 14. It must be borne in mind that the proceedings under the LA Act are based on the principle of eminent domain and Section 5-A is the only protection available to a person whose lands are sought to be acquired. It is a minimal safeguard afforded to him by law to protect himself from arbitrary acquisition by pointing out to the authority concerned, inter alia, that the important ingredient, namely, "public purpose" is absent in the proposed acquisition or the acquisition is mala fide. The LA Act being an expropriatory legislation, its provisions will have to be strictly construed.
>
> 15. Hearing contemplated under Section 5-A(2) is necessary to enable the Collector to deal effectively with the objections raised against the proposed acquisition and make a report. The report of the Collector referred to in this provision is not an empty formality because it is required to be placed before the appropriate Government

> together with the Collector's recommendations and the record of the case. It is only upon receipt of the said report that the Government can take a final decision on the objections. It is pertinent to note that declaration under Section 6 has to be made only after the appropriate Government is satisfied on the consideration of the report, if any, made by the Collector under Section 5-A(2). As said by this Court in Hindustan Petroleum Corpn. Ltd., the appropriate Government while issuing declaration under Section 6 of the LA Act is required to apply its mind not only to the objections filed by the owner of the land in question, but also to the report which is submitted by the Collector upon making such further inquiry thereon as he thinks necessary and also the recommendations made by him in that behalf.
>
> 16. Sub-section (3) of Section 6 of the LA Act makes a declaration under Section 6 conclusive evidence that the land is needed for a public purpose. Formation of opinion by the appropriate Government as regards the public purpose must be preceded by application of mind as regards consideration of relevant factors and rejection of irrelevant ones. It is, therefore, that the hearing contemplated under Section 5-A and the report made by the Land Acquisition Officer and his recommendations assume importance. It is implicit in this provision that before making declaration under Section 6 of the LA Act, the State Government must have the benefit of a report containing recommendations of the Collector submitted under Section 5-A(2) of the LA Act. The recommendations must indicate objective application of mind."

33. The ratio of the aforesaid judgments is that Section 5-A(2), which represents statutory embodiment of the rule of audi alteram partem, gives an opportunity to the objector to make an endeavour to convince the Collector that his land is not required for the public purpose specified in the notification

issued under Section 4(1) or that there are other valid reasons for not acquiring the same. That section also makes it obligatory for the Collector to submit report(s) to the appropriate Government containing his recommendations on the objections, together with the record of the proceedings held by him so that the Government may take appropriate decision on the objections. Section 6(1) provides that if the appropriate Government is satisfied, after considering the report, if any, made by the Collector under Section 5-A(2) that particular land is needed for the specified public purpose then a declaration should be made. This necessarily implies that the State Government is required to apply mind to the report of the Collector and take final decision on the objections filed by the landowners and other interested persons. Then and then only, a declaration can be made under Section 6(1).

34. As a sequel to the above discussion, we hold that the decision taken at the level of the Chief Minister was not in consonance with the scheme of Section 5-A(2) read with Section 6(1). We further hold that the State Government's refusal to release the appellants' land resulted in violation of their right to equality granted under Article 14 of the Constitution.

35. In the result, the appeals are allowed, the impugned order is set aside and the declaration issued by the State Government under Section 6(1) is quashed. However, it is made clear that this judgment shall not preclude the State Government from taking fresh decision after objectively considering the objections filed by the appellants under Section 5-A(1).

36. If the final decision of the State Government is adverse to the appellants, then they shall be free to challenge the same before an appropriate judicial forum and urge all legally permissible contentions in support of their cause.

B.B.B. Appeals allowed.

BHARAT PETROLEUM CORPORATION LIMITED
v.
RAMA CHANDRASHEKHAR VAIDYA AND ANR.
(Civil Appeal No. 2770 of 2013)

APRIL 2, 2013

[AFTAB ALAM AND RANJANA PRAKASH DESAI, JJ.]

Property Law – Lease – Renewal – Statutory right as provided u/s.5(2) of the 1976 Act – Exercise of – Scope – Burmah Shell, predecessor of appellant-oil company, came in occupation of property in question on basis of lease deed dated September 22, 1955 – Lease was for 25 years and due to expire on February 28, 1980 – Lease deed gave to the lessee the unilateral right of renewal for an additional period of 25 years – 1976 Act came into force whereafter the right, title and interest of Burmah Shell first stood transferred to and vested in the Central Government and later, in the appellant-company – On October 17, 1979, appellant-lessee gave notice of renewal – After February 28, 1980, appellant continued in occupation of the suit property but no fresh deed of lease executed and registered renewing the terms of previous lease – Held: In case renewal was claimed in terms of stipulation in the lease deed, in absence of a fresh deed of renewal, the appellant's status became that of a month to month tenant and after 25 years in that relationship, it would be ludicrous for appellant to turn around and claim renewal of lease u/s.5(2) – The lessor cannot be faulted for terminating the tenancy by a notice under the TPA Act – The other possibility is that though in the renewal notice dated October 17, 1979 there is no reference to s.5(2), the renewal must be deemed to have taken place under that provision and by virtue of s.5(2), renewal clause of the existing lease stood superseded – If that be the position, then appellant has already exercised and exhausted its right u/s.5(2) and there

can be no question of a second renewal in terms of the statutory provision – Viewed from any angle, the appellant cannot claim any further renewal of lease beyond February 28, 2005 – Burmah Shell (Acquisition of Undertakings in India) Act, 1976 – Transfer of Property Act, 1882.

Burmah Shell, the predecessor of appellant-oil company, came in occupation of the land in question on basis of a lease deed dated September 22, 1955. The lease was for a period of 25 years. The lease deed gave to the lessee the unilateral right of renewal for an additional period of 25 years. On January 24, 1976, the Burmah Shell (Acquisition of Undertakings in India) Act, 1976 came into force and by virtue of section 3 of the Act, the right, title and interest of Burmah Shell first stood transferred to and vested in the Central Government and later, following a notification issued by the Central Government under section 7(1) of the Act, were transferred to and vested in the appellant-Company.

On October 17, 1979, the appellant gave notice to the lessor asking for renewal of the lease, for a further period of 25 years with effect from March 1, 1980. The appellant continued to occupy the suit premises for the next 25 years, yet no fresh lease deed was actually executed between the parties and registered in renewal of the previous lease.

As the second 25 year term was nearing expiry, another notice for renewal of the lease was given on behalf of the appellant to the lessor on October 7, 2004. The lessor responded by a notice of termination of tenancy stating that the 1955 lease had expired on September 21, 1980 and, thereafter the appellant only continued as a month to month tenant. The respondent–lessor also filed a suit for eviction of the appellant in the Court of Small Causes which was dismissed. On appeal, however, the appellate Bench of the Small Causes Court

held in favour of the respondent. That order was upheld in revision by the High Court.

In the instant appeal against the decree of eviction, the appellant claimed the right of renewal of lease in terms of section 5(2) of the Act contending that the right of renewal under the lease and in terms of section 5(2) of the Act are two distinct and separate rights, the former being contractual and the latter statutory; and that the two rights could, therefore, be exercised separately and successively, independently of each other.

Dismissing the appeal with costs of Rs.50,000/-, the Court

HELD:1.1. The original 1955 lease (which, as a matter of fact, is the only lease deed that came into existence between the parties) was for a period of 25 years and was due to expire on February 28, 1980. On October 17, 1979, the appellant gave the notice of renewal invoking the renewal clause in the lease deed. In the renewal notice, there is no reference at all to any provision, much less section 5(2) of the Act. After February 28, 1980, the appellant admittedly continued in occupation of the suit premises but it is undeniable that no fresh deed of lease was executed and registered renewing the terms of the previous lease. [Para 18] [683-E-G]

1.2. In the absence of a fresh deed being executed and registered between the parties, there are only two possibilities; one, that the renewal notice was in exercise of the renewal clause in the lease deed. If that be so, the execution and registration of a fresh deed of lease was essential for the renewal of lease to take place. In case the renewal was claimed in terms of the stipulation in the lease deed, in the absence of a fresh deed of renewal, the appellant's status became that of a

month to month tenant and after twenty five years, in that relationship it would be ludicrous for the appellant to turn around and claim renewal of lease under section 5(2) of the Act. In case, renewal was claimed under a clause of the previous lease, the appellant has no case and the lessor cannot be faulted for terminating the tenancy by a notice under the Transfer of Property Act, 1882. [Paras 19, 20 and 22] [683-G-H; 684-A, B-C-F-G]

1.3. The other possibility is that though in the renewal notice dated October 17, 1979 there is no reference to section 5(2) of the Act, the renewal must be deemed to have taken place under that provision because the Act had come into force on January 24, 1976 and by virtue of section 5(2) of the Act, the renewal clause of the existing lease stood superseded. If the "renewal", beginning from March 1, 1980 is to be deemed under section 5(2) of the Act that would be a legally valid and correct renewal even in the absence of a fresh deed being executed between the parties. If that be the position, then the appellant has already exercised and exhausted its right under section 5(2) of the Act and there can be no question of a second renewal in terms of the statutory provision. [Para 23] [684-G; 685-A-C]

4. Viewed from any angle, the appellant cannot claim any further renewal of lease beyond February 28, 2005. However, having regard to the business of the appellant, it is given two months' time from the date of the judgment to vacate the suit premises. [Paras 24 and 25] [685-D-E]

Bharat Petroleum Corporation Ltd. v. P. Kesavan and Another, **(2004) 9 SCC 772 and** *Hindustan Petroleum Corporation Ltd. And another v. Dolly Das*, **(1999) 4 SCC 450 – held inapplicable.**

State of U.P. and others v. Lalji Tandon (dead) through

Lrs., **(2004) 1 SCC 1;** *Anthony v. K.C. Ittoop & Sons and others*, **(2000) 6 SCC 394 and** *Hardesh Ores (P) Ltd. v. Hede and Company*, **(2007) 7 SCC 614 – referred to.**

Syed Ali Kaiser v. Mst. Ayesha Begum, **AIR 1977 Calcutta 226 and** *Ranjit Kumar Dutta v. Tapan Kumar Shaw*, **AIR 1997 Calcutta 278 – cited.**

Case Law Reference:

(2004) 9 SCC 772	**held inapplicable**	**Para 13**
(1999) 4 SCC 450	**held inapplicable**	**Para 13**
(2004) 1 SCC 1	**referred to**	**Para 19**
(2000) 6 SCC 394	**referred to**	**Para 19**
(2007) 7 SCC 614	**referred to**	**Para 19**
AIR 1977 Calcutta 226	**cited**	**Para 21**
AIR 1997 Calcutta 278	**cited**	**Para 21**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2770 of 2013.

From the Judgment and Order dated 14.10.2009 of the High Court of Bombay in CRA No. 535 of 2009.

WITH

SLP (C) No. 15 of 2010.

C.A. Sundaram, Parijat Sinha, Reshmi Rea Sinha, Anil Kumar Mishra, Rohini Musa, Vikram Ganguly, S.C. Ghosh, Zaffar Inayat, Yogesh for the Appellant.

Shyam Divan, Priti Ramani, Narayan Sahu, Gaurav Goel, Mahesh Agarwal (for E.C. Agrawala) for the Respondents.

The Judgment of the Court was delivered by

AFTAB ALAM J.

SLP(C) No.355 of 2010

1. Leave granted.

2. The appellant-Bharat Petroleum Corporation Limited, is a Public Sector Oil Company. In appeal against a decree of eviction, it claims the right to another innings under section 5(2) of the Burmah Shell (Acquisition of Undertakings in India) Act, 1976 (hereinafter referred to as "the Act").

3. The facts which provide the context for judging the appellant's claim are brief and simple.

4. The predecessor of the appellant, namely, Burmah Shell Oil Storage and Distributing Company of India Limited came in occupation of a piece of land situated at Kurla, Taluka-South Salsette, District Bombay suburban, now included in Greater Bombay, admeasuring an area of 19,188 square feet, bearing Hissa No.1 (part) of Survey No.305 of Kurla (the suit premises) on the basis of a registered deed of lease dated September 22, 1955. The lease was for a period of 25 years beginning from March 1, 1955 and further gave to the lessee [vide. Clause 3 (d)] the unilateral right of renewal for an additional period of twenty five years by giving a notice in writing two months prior to the expiration of its term.

5. On January 24, 1976, the Burmah Shell (Acquisition of Undertakings in India) Act, 1976 came into force and by virtue of section 3 of the Act, the right, title and interest of Burmah Shell in relation to its undertakings in India stood transferred to and vested in the Central Government. Later on, following a notification issued by the Central Government under section 7(1) of the Act, the right, title and interest and the liabilities of Burmah Shell in relation to any of its undertaking in India that had vested in the Central Government were transferred to and vested in the appellant Company.

6. A few months before the term of the lease was to come to end, the appellant, on October 17, 1979 gave a notice to the lessor invoking the renewal clause in the lease deed[1] and asking for the renewal of the lease, at the same rent and upon the same terms and conditions as were contained in the lease, for a further period of 25 years with effect from March 1, 1980. In the notice it was also stated that a fresh engrossment of lease was being drawn up for execution and registration.

7. At this stage, it needs to be noted that though the appellant gave to the lessor the renewal notice and also continued to occupy the suit premises for the next twenty five years, no fresh lease deed was actually executed between the parties and registered in renewal of the previous lease. It also needs to be noted here that the lessor sent a letter to the appellant on April 24, 1980 stating that the monthly rent of the suit premises stood increased to Rs.500/- from March 1, 1980[2], but the appellant was remitting rent to the lessor at the old rate of Rs.400/- only. The appellant was requested by the letter to pay the differential amount for the past two months and to pay the future rent at the increased rate of Rs.500/- per month.

8. As the second twenty five year term was nearing expiry, another notice for renewal of the lease was given on behalf of the appellant to the lessor on October 7, 2004. This notice was, once again, with reference to the lease deed dated September 22, 1955. It was stated in the notice that the lease after its renewal would be expiring on February 28, 2005 and the appellant was desirous of continuing in occupation of the premises for another period of thirty years. This notice concluded by observing and claiming as under:

1. Though the notice mentions clause 4(b) of the lease deed, it actually refers to clause 3(d) which is the renewal clause. Claue 4(b) relates to the determination of the lease on account of the failure of the lessor to obtain a licence or a renewal in respect of the pump outfit or outfits standing upon the suit premises at the time of execution of the deed or to be erected and maintained thereupon in future.

2. As per the stipulation in the 1955 lease.

"Since we are in occupation of the site and carrying on the business of retailing of petroleum products from the above premises for the last 50 years, and in public interest are desirous of continuing the business of storing and selling of petroleum products from the above premises for a further period of 30 years w.e.f. 1st March, 2005 on the same terms and conditions."

9. This time the lessor responded by a notice of termination of tenancy dated March 3, 2005. In this notice, it was stated on behalf of the lessor that the 1955 lease expired on September 21, 1980 but the appellant neither sent any notice for renewal of the lease period nor the lease in respect of the suit premises, an open plot of land, was renewed. Hence, the appellant continued as a month to month tenant in respect of the open plot of land on payment of rent at the rate of Rs.500/- per month. The notice further stated that the lessor was not interested in continuing the monthly tenancy of the appellant and the tenancy was being terminated by that notice.

10. A reply to the termination notice was given, on behalf of the appellant, by letter dated March 10, 2005 in which the provisions of sections 5 and 7 of the Act were invoked for the first time and a claim was raised for the renewal of the lease for a further period of 30 years on the same terms and conditions as contained in the earlier lease.

11. At that stage the respondent – lessor filed a suit for eviction of the appellant which was registered as T.E. & R Suit No.72/86 of 2005 in the court of Small Causes at Mumbai. The appellant contested the suit by filing a written statement and the court of Small Causes by judgment and order dated January 18, 2007 dismissed the suit. The respondent filed an appeal (appeal No.163 of 2007) before the Appellate Bench of the Small Causes Court at Mumbai challenging the order dismissing the suit. The appeal was allowed by the Appellate Bench by its judgment and order dated March 5, 2009. Against the order of the Appellate Bench of the Small Causes Court,

the appellant filed a revision (revision application no.535 of 2009) before the Bombay High Court. The revision application was dismissed by the High Court by order dated October 14, 2009 and the appellant then brought this matter to this Court in appeal by special leave.

12. Mr. C.A. Sundaram, learned senior counsel appearing for the appellant, strongly argued that the right of renewal under the lease and the right of renewal in terms of section 5(2) of the Act are two distinct and separate rights, the former being contractual and the latter statutory. He further contended that the two rights being different in nature and arising from different sources could, therefore, be exercised separately and successively, independently of each other. Mr. Sundaram contended that though in the year 1980, the Act had come into force nevertheless, the appellant chose first to exercise its right of renewal in terms of the provision in the lease. However, the exercise of the contractual right of renewal would not abrogate the appellant's statutory right as provided under section 5(2) of the Act and at the expiry of the lease renewed in terms of the contract, it would be still open to the appellant to get a further renewal of the lease in exercise of the statutory right under section 5(2) of the Act.

13. In support of the submission, Mr. Sundaram relied upon the decisions of this Court in *Bharat Petroleum Corporation Ltd.* v. *P. Kesavan and another*[3] and *Hindustan Petroleum Corporation Ltd. And another* v. *Dolly Das*[4].

14. The decision in *P. Kesavan* does not touch upon the issues raised by Mr. Sundaram and does not seem to have any application in the facts of this case. In *P. Kesavan*, this Court held that renewal of the lease in terms of section 5(2) of the Act takes place by operation of law and the renewal is, therefore, not dependent upon the execution or registration of

3. (2004) 9 SCC 772.

4. (1999) 4 SCC 450.

a fresh deed of lease. By virtue of section 5(2), the term of the earlier lease would be deemed to be renewed on the same terms and conditions on which the earlier lease or tenancy was held regardless of the execution or registration of a fresh lease deed. This is not the question arising in the present case.

15. The case of *Dolly Das* is indeed quite similar to the case in hand on facts and seems to have given rise to similar issues as arising in this case. But in *Dolly Das*, the Court did not adjudicate on the issues and gave certain directions having regard to the special facts and circumstances of the case. *Dolly Das*, too, therefore, is of no help in deciding this case.

16. Therefore, the points urged by Mr. Sundaram need to be examined on their own merits.

17. On a careful consideration of the matter, we find that though Mr. Sundaram has crafted his submissions very skilfully, the points raised by him do not really arise in the facts and circumstances of the case as noted above.

18. The original 1955 lease (which, as a matter of fact, is the only lease deed that came into existence between the parties) was for a period of 25 years and was due to expire on February 28, 1980. On October 17, 1979, the appellant gave the notice of renewal invoking the renewal clause in the lease deed. In the renewal notice, there is no reference at all to any provision, much less section 5(2) of the Act. After February 28, 1980, the appellant admittedly continued in occupation of the suit premises but it is undeniable that no fresh deed of lease was executed and registered renewing the terms of the previous lease.

19. Now, let us examine what would be the position in the absence of a fresh deed being executed and registered between the parties. There are only two possibilities; one, that the renewal notice was in exercise of the renewal clause in the lease deed. If that be so, the execution and registration of a

fresh deed of lease was essential for the renewal of lease to take place. (See: *State of U.P. and others* v. *Lalji Tandon (dead) through Lrs.*[5] paragraphs 13 and 14: *Anthony* v. *K.C. Ittoop & Sons and others*[6], paragraphs 8 to 11 and *Hardesh Ores (P) Ltd.* v. *Hede and Company*,[7]).

20. In case the renewal was claimed in terms of the stipulation in the lease deed (described as the "contractual right" by Mr. Sundaram), in the absence of a fresh deed of renewal, the appellant's status became that of a month to month tenant and after twenty five years, in that relationship it would be ludicrous for the appellant to turn around and claim renewal of lease under section 5(2) of the Act..

21. Mr. Sundaram made an attempt to argue that it was not a case of renewal of lease but a case of extension of the term of the lease and in that case no fresh deed was required to be executed and registered between the parties. In support of the submission, he relied upon two decisions of Calcutta High Court, one by a division bench in *Syed Ali Kaiser* v. *Mstt. Ayesha Begum* and the other by a learned single Judge of the same court in *Ranjit Kumar Dutta* v. *Tapan Kumar Shaw*.[8] We need not go into the question whether an extension of lease is permissible in the absence of any fresh deed for the simple reason that this is unquestionably a case of renewal of lease and not of extension of lease.

22. Thus, in case, renewal was claimed under a clause of the previous lease, the appellant has no case and the lessor cannot be faulted for terminating the tenancy by a notice under the Transfer of Property Act, 1882.

23. The other possibility is that though in the renewal notice

5. (2004) 1 SCC 1.
6. (2000) 6 SCC 394.
7. (2007) 5 SCC 614.
8. AIR 1977 Calcutta 226.

dated October 17, 1979 there is no reference to section 5(2) of the Act, the renewal must be deemed to have taken place under that provision because the Act had come into force on January 24, 1976 and by virtue of section 5(2) of the Act, the renewal clause of the existing lease stood superseded. If the "renewal", beginning from March 1, 1980 is to be deemed under section 5(2) of the Act that would be a legally valid and correct renewal even in the absence of a fresh deed being executed between the parties, as was held in *P. Kesavan*. If that be the position, then the appellant has already exercised and exhausted its right under section 5(2) of the Act and there can be no question of a second renewal in terms of the statutory provision.

24. Thus, viewed from any angle, the appellant cannot claim any further renewal of lease beyond February 28, 2005.

25. In light of the discussions made above, we find no merit in the appeal. It is, accordingly, dismissed with costs quantified at Rs.50,000/-.

26. However, having regard to the business of the appellant, it is given two months' time from the date of the judgment to vacate the suit premises.

SLP(C) No.15/2010.

27. SLP(C) No.15 of 2010 is dismissed for the reasons stated in the judgment in the connected matter, being Civil Appeal (arising from SLP (C) No. 355 of 2010).

O R D E R

1. These interlocutory applications have been filed by the respondent (the landlord) stating that in gross violation of the undertakings given before the High Court, the petitioner, in

9. AIR 1997 Calcutta 278.

connivance with its dealer, has inducted a rank outsider to the suit premises.

2. The appeal of the appellant/petitioner (the tenant) is dismissed by the judgment and order pronounced today.

3. It will, therefore, be open to the respondent/landlord to get the decree of eviction passed in his favour duly executed and/or to initiate a proceeding for contempt before the Bombay High Court and/or to seek appropriate reliefs in any other way that may be available to him in law.

4. The IAs are disposed of.

B.B.B. Matters disposed of.

RAMESH CHANDRA SHAH AND OTHERS
v.
ANIL JOSHI AND OTHERS
(Civil Appeal Nos. 2802-2804 of 2013)

APRIL 3, 2013

[G.S. SINGHVI AND KURIAN JOSEPH, JJ.]

Service Law – Selection – Procedure of – Challenge to – Waiver of right to objection – Held: Person who consciously takes part in the process of selection cannot, thereafter, turn around and question the method of selection and its outcome – On facts, the private respondents having taken part in the process of selection with full knowledge that recruitment was being made under the General Rules, they had waived their right to question the advertisement or the methodology adopted for making selection – Having appeared in the written test and taken a chance to be declared successful, they will be deemed to have waived their right to challenge the advertisement and the procedure of selection – The conduct of the private respondents clearly disentitles them from seeking relief under Art.226 of the Constitution – High Court committed grave error by entertaining the grievance made by them – Uttar Pradesh Medical Health and Family Welfare Department Physiotherapist and Occupational Therapist Service Rules, 1998 (Special Rules) – Uttarakhand Procedure for Direct Recruitment for Group "C" Posts (Outside the purview of the Uttarakhand Public Service Commission) Rules, 2008 (General Rules) – Uttar Pradesh Procedure for Direct Recruitment for Group 'C' Posts (Outside the purview of the Uttar Pradesh Public Service Commission) Rules, 1998 – Doctrines –Doctrine of waiver.

In response to an advertisement published in a newspaper, the appellants and the private respondents submitted applications for the posts of Physiotherapist

and appeared in the written test. The appellants were declared successful and became entitled to be appointed against the advertised posts. The private respondents, who failed to clear the test filed Writ Petition for quashing the advertisement and the process of selection. They pleaded that the advertisement and the test conducted by the Uttarakhand Board of Technical Education were *ultra vires* the provisions of the Uttar Pradesh Medical Health and Family Welfare Department Physiotherapist and Occupational Therapist Service Rules, 1998 ['the Special Rules'].

The Single Judge allowed the writ petition and quashed the selection with a direction that the available posts be advertised afresh. On appeal, the Division Bench of the High Court held that after having taken a chance for selection, the private respondents were not entitled to question the process of selection. Notwithstanding this conclusion, the Division Bench observed that the private respondents were entitled to insist for a direction to complete the selection process by adding 30% marks for intermediate examination and 70% marks for diploma/degree examination to the marks obtained by each examinee, who appeared in the test conducted by the Board and also to declare that those who have not obtained 30% marks in diploma/degree examination are unfit.

In the instant appeal, the appellants contended that after having accepted their contention on the issue of locus of the private respondents to challenge the process of selection, the Division Bench of the High Court was not justified in directing the Board to prepare fresh select list by adding marks for intermediate and degree/diploma qualifications; and that the Single Judge and the Division Bench committed grave error by refusing to non-suit the private respondents despite the

fact that from the stage of submission of applications they knew that the selection was being held in accordance with the Uttarakhand Procedure for Direct Recruitment for Group "C" Posts (Outside the purview of the Uttarakhand Public Service Commission) Rules, 2008 (General Rules).

Allowing the appeals, the Court

HELD:1.1. Those who were desirous of competing for the post of Physiotherapist, which is a Group 'C' post in the State of Uttarakhand must have, after reading the advertisement, become aware of the fact that by virtue of Office Memorandum dated 3.8.2010, the Uttarakhand Board of Technical Education has been designated as the recruiting agency and the selection will be made in accordance with the provisions of the Uttarakhand Procedure for Direct Recruitment for Group "C" Posts (Outside the purview of the Uttarakhand Public Service Commission) Rules, 2008 [General Rules]. They appeared in the written test knowing that they will have to pass the examination enumerated in the advertisement. If they had cleared the test, the private respondents would not have raised any objection to the selection procedure or the methodology adopted by the Board. They made a grievance only after they found that their names do not figure in the list of successful candidates. In other words, they took a chance to be selected in the test conducted by the Board on the basis of the advertisement issued in November 2011. This conduct of the private respondents clearly disentitles them from seeking relief under Article 226 of the Constitution. To put it differently, by having appeared in the written test and taken a chance to be declared successful, the private respondents will be deemed to have waived their right to challenge the advertisement and the procedure of selection. It is settled law that a person who consciously takes part in the process of selection cannot, thereafter, turn around and

question the method of selection and its outcome. [Paras 17, 18] [702-D-H; 703-A-B]

1.2. Having taken part in the process of selection with full knowledge that the recruitment was being made under the General Rules, the respondents had waived their right to question the advertisement or the methodology adopted by the Board for making selection and the Single Judge and the Division Bench of the High Court committed grave error by entertaining the grievance made by the respondents. [Para 24] [706-F-G]

Manak Lal v. Dr. Prem Chand **AIR 1957 SC 425: 1957 SCR 575;** *Dr. G. Sarna v. University of Lucknow* **(1976) 3 SCC 585: 1977 (1) SCR 64;** *Om Prakash Shukla v. Akhilesh Kumar Shukla* **(1986) Supp. SCC 285: 1986 SCR 855;** *Madan Lal v. State of J & K* **(1995) 3 SCC 486: 1995 (1) SCR 908;** *Manish Kumar Shahi v. State of Bihar* **(2010) 12 SCC 576 and** *Vijendra Kumar Verma v. Public Service Commission, Uttarakhand and others* **(2011) 1 SCC 150: 2010 (12) SCR 944 – relied on.**

Case Law Reference:

1957 SCR 575	**relied on**	**Para 19**
1977 (1) SCR 64	**relied on**	**Para 20**
1986 SCR 855	**relied on**	**Para 21**
1995 (1) SCR 908	**relied on**	**Para 21**
(2010) 12 SCC 576	**relied on**	**Para 22**
2010 (12) SCR 944	**relied on**	**Para 23**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2802-2804 of 2013.

From the Judgment and Order dated 02.05.2012 of the High Court of Uttarakhand at Naintial in W.P. No. 1625 of 2011,

SA No. 77 of 2012 dated 13.07.2012 in SA No. 77 of 2012, RA No. 520 of 2012 dated 30.07.2012 in SA No. 77 of 2012, RA No. 599 of 2012.

Pallav Shishodia, Chandra Shekhar Srivastava, Ravindra Kumar, Rachana Srivastava, Rahul Verma, B.K. Pal, Ravindra S. Garia for the appearing parties.

The Judgment of the Court was delivered by

G.S. SINGHVI, J. 1. Leave granted.

2. In response to an advertisement issued by the Uttarakhand Board of Technical Education (for short, 'the Board'), which was published in the newspaper "Amar Ujala" dated 5.5.2011, the appellants and the private respondents submitted applications for the posts of Physiotherapist. All of them appeared in the written test held on 25.9.2011. The appellants were declared successful and they became entitled to be appointed against the advertised posts.

3. The private respondents, who failed to clear the test filed Civil Misc. Writ Petition No.1625/2011 for quashing the advertisement and the process of selection. They pleaded that the advertisement and the test conducted by the Board were *ultra vires* the provisions of the Uttar Pradesh Medical Health and Family Welfare Department Physiotherapist and Occupational Therapist Service Rules, 1998 (hereinafter described as 'the Special Rules').

4. In the counter affidavit filed by the official respondents, it was averred that the selection was made in accordance with the Uttarakhand Procedure for Direct Recruitment for Group "C" Posts (Outside the purview of the Uttarakhand Public Service Commission) Rules, 2008 (hereinafter described as, 'the General Rules'). It was further averred that the writ petitioners (the private respondents herein) do not have the locus to question the advertisement and the selection process because they had submitted applications and participated in the test

knowing fully well that the selection was being made in accordance with the General Rules.

5. The learned Single Judge overruled the objection taken by the official respondents by observing that the process of recruitment was vitiated due to patent illegality and, in such a case, the principle of waiver cannot be invoked for non-suiting the writ petitioners. On merits, the learned Single Judge opined that even though Rule 2 of the General Rules contains a *non obstante* clause, the Special Rules regulating the recruitment of Physiotherapists will prevail and the Board was not entitled to conduct the test and declare the result by relying upon the General Rules. He, accordingly, allowed the writ petition and quashed the selection with a direction that the available posts be advertised afresh.

6. On an appeal filed by some of the successful candidates, the Division Bench of the High Court held that after having taken a chance for selection, the private respondents were not entitled to question the process of selection. Notwithstanding this conclusion, the Division Bench observed that the private respondents were entitled to insist for a direction to complete the selection process by adding 30% marks for intermediate examination and 70% marks for diploma/degree examination to the marks obtained by each examinee, who appeared in the test conducted by the Board and also to declare that those who have not obtained 30% marks in diploma/degree examination are unfit. The operative portion of the judgment of the Division Bench reads as under:

> "We, accordingly, allow the appeal and modify the judgment and order under appeal by upholding the quashing of concerned merit list of Physiotherapists prepared by the Board, but at the same time, direct the Board to reject all those examinees, who appeared in the examination for being appointed as Physiotherapists, but not received 30% marks in diploma examination and to complete the selection of Physiotherapists by adding to

the marks obtained by the fit examinees in the written examination, 30% marks for intermediate examination and 70% marks for diploma / degree examination. Let the said exercise be completed as quickly as possible, but not later than two months from the date of service of a copy of this order upon the Board."

7. The review applications filed by the selected candidates were dismissed by the Division Bench but the time fixed for compliance of the direction contained in judgment dated 2.5.2012 was extended.

8. Learned counsel for the parties reiterated the arguments made by their counterparts before the High Court. Shri Pallav Shishodia, learned senior counsel appearing for the appellants argued that after having accepted the appellants' contention on the issue of locus of the private respondents to challenge the process of selection, the Division Bench of the High Court was not at all justified in directing the Board to prepare fresh select list by adding marks for intermediate and degree/diploma qualifications. He further argued that the learned Single Judge and the Division Bench committed grave error by refusing to non suit the private respondents despite the fact that from the stage of submission of applications they knew that the selection was being held in accordance with the General Rules. Learned senior counsel referred to Office Memorandum No.1083/XXXX(2)/2010 dated 3.8.2010 issued by the Personnel Department of the State and the opening paragraph of the advertisement to drive home the point that the selection was to be made in accordance with the procedure prescribed under the General Rules and every candidate was aware of this.

9. Ms. Rachana Srivastava, Standing Counsel for the State of Uttarakhand adopted the arguments of Shri Shishodia and submitted that the Division Bench of the High Court was not at all justified in making out an altogether new case for which there were no pleadings.

10. Learned counsel for the private respondents supported the order passed by the learned Single Judge and argued that the Division Bench of the High Court did not commit any error by directing the Board to prepare fresh select list by adding marks for the academic qualifications to the marks secured in the written test.

11. We have considered the respective arguments and scrutinized the records.

12. The State of Uttarakhand (earlier known as 'Uttaranchal') was formed w.e.f. 9.11.2000. Before formation of the new State, recruitment to the posts of Physiotherapist and Occupational Therapist was governed by the Special Rules and recruitment to other group "C" posts was governed by the provisions contained in the Uttar Pradesh Procedure for Direct Recruitment for Group 'C' Posts (Outside the purview of the Uttar Pradesh Public Service Commission) Rules, 1998, which were published in Official Gazette dated 9.6.1998. After formation of the new State, the rules governing the recruitment and other conditions of service applicable to the erstwhile State of Uttar Pradesh were adopted by the Government of the new State by Adaptation and Modification Order 2002. In 2008, the Governor of Uttarakhand in exercise of the powers conferred upon him by the proviso to Article 309 of the Constitution amended the Special Rules. The academic and preferential qualifications for the post of Physiotherapist, as contained in the Special Rules were:

"**8. Academic Qualifications** - A candidate for direct recruitment to the various categories of posts in the service must possess the following qualifications-

(1) **Physiotherapist** - (i) must have passed the Intermediate Examination with Science of the Board of High School and Intermediate Education, Uttar Pradesh or an examination recognized by the Government as equivalent thereto.

(ii) Must possess as degree or diploma in physiotherapy from an Institution, recognized by the Government.

(2) Occupational Therapist - (i) must have passed the Intermediate Examination with Science of the Board of High School and Intermediate Education, Uttar Pradesh or an examination recognized by the Government as equivalent thereto.

(ii) Must possess a degree or diploma in Occupational Therapy from an Institution recognized by the Government.

9. Preferential Qualification - A candidate who has-

(i) Served in the Territorial Army for a minimum period of two years, or

(ii) Obtained 'B' Certificate of National Cadet Corps, shall, other things being equal be given preference in the matter of direct recruitment."

By Rule 15 of the Special Rules, which is reproduced below, it was laid down that direct recruitment to the various categories of posts shall be made in accordance with the General Rules:

"**15. Procedure for direct recruitment** - Direct recruitment to the various categories of posts in the service shall be made in accordance with the Uttar Pradesh Procedure for Direct Recruitment for Group 'C' Posts (outside the purview of the Uttar Pradesh Public Service Commission) Rule, 1998, as amended from time to time."

13. By Notification dated 4.8.2008, the Special Rules were amended and the existing Rule 15 was substituted by the following:

"15(1) For direct recruitment the appointing Authority shall noting the format of application form and vacancies together in the following manner:

(i) By issuing advertisement in daily newspaper, having wide circulation.

(ii) By pasting the notice on the notice-board of the office or by advertising through Radio/Television and other employment newspaper.

(iii) By notifying vacancies to the Employment Exchange.

(2) For the purpose of direct recruitment there shall be constituted a selection committee compressing the following-

(i) Appointing Authority Chairman

(ii) If the Appointing Authority does not belong to the Scheduled castes or scheduled tribes, an officer belonging to the Scheduled castes or Scheduled Tribes, not below the rank of joint Director, shall nominated by the Director General. If the Appointing Authority belongs to the Scheduled Castes or Scheduled, Tribes, in that cases an officer belonging to other than Scheduled Castes or Scheduled Tribes, shall be nominated by the Director GeneralMember

(iii) An officer belonging to the minority community, not below the rank of joint Director to be nominated by the Director General Member

(iv) An officer belonging to Backward Classes, not below the rant of Joint Director, to be nominated by the Director General Member

(3) The Selection Committee shall, having regard to the need of securing due representation of the candidates, belonging to the Scheduled Castes, Scheduled Tribes and other categories in

accordance with rule 6, scrutinize the applications.

4(i) For Selection, there shall be an objective type written examination of 100 marks consisting of single questions paper which will include General Hindi, General Knowledge and concerned subject. While evaluating the questions paper, one marks shall be awarded, for each correct answer and 1A mark shall be deducted for each incorrect answer be deducted for each incorrect answer as negative marking

(ii) After the examination is over, the candidates shall be allowed to carry back the Question Booklet of the Written examination with them

(iii) After the written examination, shall be displayed on the Uttarakhand website www.ua.nic.in or published in the daily newspaper, having wide circulation.

(iv) The Answer Sheet of the written examination shall be in duplicate (including the carbon copy and the candidates shall be permitted to carry back the duplicate copy with them.

(v) The candidates will be awarded 30 percent and 70 percent marks for the percentage of marks obtained in the intermediate examination and Diploma/Degree examination, respectively.

(vi) Candidates obtaining less than 40 percent marks in the written test and less than 30 percent marks in Diploma examination shall be unfit for selection.

(vii) The merit list shall be prepared by the Selection committee on the basis of the aggregate of marks

obtained in the test for selection carrying 200 marks, which will include 100 marks for written examination, 30 percent marks of Intermediate examination and 70 per cent marks of Diploma/ Degree examination.

(5) Thereafter the Selection Committee shall prepare a list in order of proficiency as disclosed by the aggregate of marks obtained by each candidate and recommend such number of candidates , it considers suitable for appointment. It more candidates obtain equal marks in the aggregate, the name of the candidate obtaining more marks in the written examination shall be placed higher in the list if two or more candidates obtain equal marks in the written test also, the candidate senior in age shall be placed higher in the section list. The number of names in the list shall be more (but not more than 25 percent) than the number of vacancies, the selection Committee shall forward the list to the Appointing Authority."

14. Rule 2 of the General Rules, which is *pari materia* to rule framed by the Governor of Uttar Pradesh in 1998 and which contains a *non obstante* clause, reads as under:

"Overriding effect 2. These rules shall have effect notwithstanding anything to the contrary contained in any other Rules or orders."

15. At this stage, it will also be useful to notice the contents of Office Memorandum dated 3.8.2010 and the opening paragraph of the advertisement issued by the Board which, as mentioned above, was published in the newspaper dated 5.5.2011:

Office Memorandum

"**STATE OF UTTARAKHAND**
PERSONNEL DEPARTMENT-2
NO.1083/XXXX(2)/ 2010 DATED 03rd AUGUST, 2010

OFFICE MEMORANDUM

As per Provisions prescribed, for selection / recruitment on parties of Group 'C falling outside the purview of Public Service Commission, selection has to be made by concerned Appointing Authority.

As separate recruitment/selections, on vacant posts by every Appointing Authority would require more time & labour.

Hence, after proper consideration Hon'ble Governor Uttrakhand, in respect of vacant posts of falling outside the purview of Public Service Commission has nominated Uttrakhand Technical Education Board, as recruiting agency & further prescribes the following:

1. In this respect, State will provide to Uttrakhand Technical Education required resources.

2. Every Appointing Authority, will calculated the vacant posts falling outside the purview of Uttrakhand Public Service Commission, and will sent requisition in prescribe proforma in which detail of number of posts reserve for vertical as well as horizontal reservation should be clearly mentioned and should provided the same Uttrakhand Technical Education Board.

3. Technical Education Board on receiving such requisition from Appointing Authority should

advertise for recruitment under prescribe Rules, within one month.

4. Technical Education Board, after publication of advertisement, shall start the selection proceedings, as per provisions of Uttrakhand Procedure for Direct Recruitment for Group 'C' Posts (outside the purview of Uttarakhand Public Service Commission) Rule 2008 & shall complete selection proceedings as soon as possible & forward its recommendation to the Appointing Authority.

(Dileep Kr. Kotia)
Principal Secretary"

Advertisement

"**UTTARAKHAND TECHNICAL EDUCATION BOARD ROORKEE (HARIDWAR)-247667**

ADVERTISEMENT NO STATE GROUP 'C' COMBINED

RECRUITMENT EXAMINATION 2011

DATED 4 MAY 2011

DATE OF ADVERTISEMENT- MAY 04, 2011

LAST DATE OF ACCEPTANCE OF APPLICATION FORMS- JUNE 04, 2011

FOR DETAILED ADVERTISEMENT PLEASE VISIT BOARD'S WEBSITE AT

Vide Office Memo No-1063/XXX(2) 2010 dated 03.08.2010 of Personnel Department-2, Uttarakhand State, Uttarakhand Technical Education Board, Roorkee has been chosen as recruiting agency for vacant posts in

various departments of government which are outside the purview of Public Service Commission Group 'c' Combined Recruitment Examination- 2011."

16. The method of selection enumerated in para 11 of the advertisement, which was a clear departure from the Special Rules, reads thus:

"11. SELECTION EXAMINATION AND SYLLABUS OF QUESTION PAPER:- For selection, there shall be an

Objective type written examination Of 100 marks consisting of single Question paper out of which questions of 50 marks will include general Hindi, general knowledge, general awareness and knowledge of geography, culture, economy and history of State of Uttarakhand and questions of 50 Marks will be based on the subjects Of minimum required qualification for the concerned post. Written examination will be of two hours. While evaluating the question paper, one mark shall be awarded for each correct answer & marks shall be deducted for each incorrect answer as negative marking.

Retrenched employees will be awarded 5 marks for each year of completed Service upto the maximum of 15 marks.

After the written examination is over, the candidate shall be allowed to carry with them the question booklet along with the carbon copy of the answer sheet.

After the written examination, the answer key of the written examination will be displayed on the Board's website uk.gov.in and www.ubter.in

In the marks obtained in written Examination will be added other evaluations which Includes weightage points for 'retrenched employees' and for post having technical

subject Of (village development officer) for which competitive exam of prescribed marks is held and marks obtained in such exams, after adding such marks or weightage as the case may be in the marks obtained in written test merit list will be prepared (final select list).

Such list shall contain names more than the vacancies (but not more than 25%)

Final select list will be displayed on the Board's web site uk.gov.in and www.ubter.in

If two candidates obtain equal marks than one who has obtained higher marks in the written test shall be placed higher in the merit list, but if marks are equal in the written test also then one who is elder in age shall be placed higher in the merit list."

17. Those who were desirous of competing for the post of Physiotherapist, which is a Group 'C' post in the State of Uttarakhand must have, after reading the advertisement, become aware of the fact that by virtue of Office Memorandum dated 3.8.2010, the Board has been designated as the recruiting agency and the selection will be made in accordance with the provisions of the General Rules. They appeared in the written test knowing that they will have to pass the examination enumerated in para 11 of the advertisement. If they had cleared the test, the private respondents would not have raised any objection to the selection procedure or the methodology adopted by the Board. They made a grievance only after they found that their names do not figure in the list of successful candidates. In other words, they took a chance to be selected in the test conducted by the Board on the basis of the advertisement issued in November 2011. This conduct of the private respondents clearly disentitles them from seeking relief under Article 226 of the Constitution. To put it differently, by having appeared in the written test and taken a chance to be

declared successful, the private respondents will be deemed to have waived their right to challenge the advertisement and the procedure of selection.

18. It is settled law that a person who consciously takes part in the process of selection cannot, thereafter, turn around and question the method of selection and its outcome.

19. One of the earliest judgments on the subject is Manak Lal v. Dr. Prem Chand AIR 1957 SC 425. In that case, this Court considered the question whether the decision taken by the High Court on the allegation of professional misconduct leveled against the appellant was vitiated due to bias of the Chairman of the Tribunal constituted for holding inquiry into the allegation. The appellant alleged that the Chairman had appeared for the complainant in an earlier proceeding and, thus, he was disqualified to judge his conduct. This Court held that by not having taken any objection against the participation of the Chairman of the Tribunal in the inquiry held against him, the appellant will be deemed to have waived his objection. Some of the observations made in the judgment are extracted below:

> ".....If, in the present case, it appears that the appellant knew all the facts about the alleged disability of Shri Chhangani and was also aware that he could effectively request the learned Chief Justice to nominate some other member instead of Shri Chhangani and yet did not adopt that course, it may well be that he deliberately took a chance to obtain a report in his favour from the Tribunal and when he came to know that the report had gone against him he thought better of his rights and raised this point before the High Court for the first time.
>
> From the record it is clear that the appellant never raised this point before the Tribunal and the manner in which this point was raised by him even before the High Court is somewhat significant. The first ground of objection filed by the appellant against the Tribunal's report was that Shri

> Chhangani had pecuniary and personal interest in the complainant Dr Prem Chand. The learned Judges of the High Court have found that the allegations about the pecuniary interest of Shri Chhangani in the present proceedings are wholly unfounded and this finding has not been challenged before us by Shri Daphtary. The learned Judges of the High Court have also found that the objection was raised by the appellant before them only to obtain an order for a fresh enquiry and thus gain time.....
>
> .....Since we have no doubt that the appellant knew the material facts and must be deemed to have been conscious of his legal rights in that matter, his failure to take the present plea at the earlier stage of the proceedings creates an effective bar of waiver against him. It seems clear that the appellant wanted to take a chance to secure a favourable report from the Tribunal which was constituted and when he found that he was confronted with an unfavourable report, he adopted the device of raising the present technical point."

20. In *Dr. G. Sarna v. University of Lucknow* (1976) 3 SCC 585, this Court held that the appellant who knew about the composition of the Selection Committee and took a chance to be selected cannot, thereafter, question the constitution of the Committee.

21. In *Om Prakash Shukla v. Akhilesh Kumar Shukla* (1986) Supp. SCC 285, a three-Judge Bench ruled that when the petitioner appeared in the examination without protest, he was not entitled to challenge the result of the examination. The same view was reiterated in *Madan Lal v. State of J & K* (1995) 3 SCC 486 in the following words:

> "The petitioners also appeared at the oral interview conducted by the Members concerned of the Commission who interviewed the petitioners as well as the contesting respondents concerned. Thus the petitioners took a

chance to get themselves selected at the said oral interview. Only because they did not find themselves to have emerged successful as a result of their combined performance both at written test and oral interview, they have filed this petition. It is now well settled that if a candidate takes a calculated chance and appears at the interview, then, only because the result of the interview is not palatable to him, he cannot turn round and subsequently contend that the process of interview was unfair or the Selection Committee was not properly constituted. In the case of Om Prakash Shukla v. Akhilesh Kumar Shukla it has been clearly laid down by a Bench of three learned Judges of this Court that when the petitioner appeared at the examination without protest and when he found that he would not succeed in examination he filed a petition challenging the said examination, the High Court should not have granted any relief to such a petitioner."

22. In *Manish Kumar Shahi v. State of Bihar* (2010) 12 SCC 576, this Court reiterated the principle laid down in the earlier judgments and observed:

"We also agree with the High Court that after having taken part in the process of selection knowing fully well that more than 19% marks have been earmarked for viva voce test, the petitioner is not entitled to challenge the criteria or process of selection. Surely, if the petitioner's name had appeared in the merit list, he would not have even dreamed of challenging the selection. The petitioner invoked jurisdiction of the High Court under Article 226 of the Constitution of India only after he found that his name does not figure in the merit list prepared by the Commission. This conduct of the petitioner clearly disentitles him from questioning the selection and the High Court did not commit any error by refusing to entertain the writ petition."

23. The doctrine of waiver was also invoked in *Vijendra*

Kumar Verma v. Public Service Commission, Uttarakhand and others (2011) 1 SCC 150 and it was held:

"When the list of successful candidates in the written examination was published in such notification itself, it was also made clear that the knowledge of the candidates with regard to basic knowledge of computer operation would be tested at the time of interview for which knowledge of Microsoft Operating System and Microsoft Office operation would be essential. In the call letter also which was sent to the appellant at the time of calling him for interview, the aforesaid criteria was reiterated and spelt out. Therefore, no minimum benchmark or a new procedure was ever introduced during the midstream of the selection process. All the candidates knew the requirements of the selection process and were also fully aware that they must possess the basic knowledge of computer operation meaning thereby Microsoft Operating System and Microsoft Office operation. Knowing the said criteria, the appellant also appeared in the interview, faced the questions from the expert of computer application and has taken a chance and opportunity therein without any protest at any stage and now cannot turn back to state that the aforesaid procedure adopted was wrong and without jurisdiction."

24. In view of the propositions laid down in the above noted judgments, it must be held that by having taken part in the process of selection with full knowledge that the recruitment was being made under the General Rules, the respondents had waived their right to question the advertisement or the methodology adopted by the Board for making selection and the learned Single Judge and the Division Bench of the High Court committed grave error by entertaining the grievance made by the respondents.

25. We are also *prima facie* of the view that the learned Single Judge committed an error by holding that despite the

non obstante clause contained in Rule 2 of the General Rules, the Special Rules would govern recruitment to the post of Physiotherapist. However, we do not consider it necessary to express any conclusive opinion on this issue and leave the question to be decided in an appropriate case.

26. In the result, the appeals are allowed, the impugned orders as also the one passed by the learned Single Judge are set aside and the writ petition filed by the private respondents is dismissed. Parties are left to bear their own costs.

B.B.B. Appeals allowed.

BHAGWATI DEVELOPERS PRIVATE LTD.

v.

THE PEERLESS GENERAL FINANCE INVESTMENT COMPANY LIMITED & ORS.

(Civil Appeal Nos. 361-362 of 2005)

APRIL 4, 2013.

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

Companies Act, 1956:

ss. 397 and 398 – Company petition – With the consent of other share-holders – Withdrawal of, by original petitioners – Effect of – Held: The withdrawal would not render the petition non-existent, or non-maintainable – The constructive parties who provide consent to file the petition, are entitled to be transposed as petitioners in the case.

s. 399 – Company petition – With the consent of other share-holders – Form of consent – Held: Consent need not be given by the share-holder personally – It can be given by Power of Attorney holder of such share-holder – The issue of consent must be decided on he basis of broad concensus approach, in relation to the avoidance and subsistence of the case – If share-holder who had initially given consent to help meet the requirement of 1/10th share-holding, transfer of shares by him or if he ceases to be share-holder, would not affect the maintainability and continuity of petition.

Companies Rules, 1959 – r. 88(2) – Company petition – Withdrawal of – Procedure for, prescribed under r. 88(2) – Whether excludes applicability of the procedure under CPC – Held: No – Code of Civil Procedure, 1908.

Code of Civil Procedure, 1908:

Or. XXIII r. 1(5) – Withdrawal of case – Without the consent of other parties – Propriety of – Held: A suit filed in representative capacity also represents persons besides the plaintiff – Grant of withdrawal of such petition without the consent of other parties, is unjustified and such order is without jurisdiction.

Doctrines:

'Ubi jus ibi idem remedium' – Applicability.

'Actus Curiae Neminem Gravabit' – Applicability.

The two share-holders of the respondent-Company, with the consent of two share-holders, including the appellant-Company, filed petition u/ss. 397 and 398 of Companies Act, 1956, alleging mis-management and oppression. The Company Court dismissed the petition as not maintainable. The two share-holders filed two appeals before Division Bench of High Court. Subsequently they applied for withdrawal of their appeals and the Division Bench of High Court dismissed the appeals as withdrawn, by order dated 16.11.1993 and 18.11.1993 respectively.

The appellant filed two applications for recalling the order of dismissal of those appeals and for transposition of appellants therein as proforma respondents and substituting the appellant as sole appellant therein. The Division Bench of High Court dismissed the applications holding that the appellant was a stranger having no *locus standi;* and that there was inordinate delay in the filing of such an application. Appellant approached Supreme Court by way of Special Leave Petition. The same was disposed of by judgment dated 26.4.1996, observing that the appellant could prefer fresh appeal against he order of Single Judge of High Court in the winding up petition

and further observed that the same would not be dismissed by the Division Bench on the grounds of limitation or *locus standi*; and that withdrawal of the appeals by the two share-holders would not come in the way of the appellant raising such contentions as are permissible and available to it. In pursuance of the order dated 26.4.1996 the appellants filed appeals, before the Division Bench of High Court, which were dismissed. Hence the appeals.

Allowing the appeals, the Court

HELD: 1. The right to apply for the winding up of a company is available, provided that the applicant satisfies the requisite requirements under Sections 397, 398 and 399 of the Companies Act 1956, with respect to holding 10% shares in the total share-holding of the company. It is not necessary that the petitioner(s) must hold the same individually. Such a winding up petition can even be filed after obtaining the consent of other shareholders, so as to meet the requirement of having an aggregate of 10 per cent out of the total share-holding. [Para 6] [720-C-E]

2. The winding up application is maintainable under Section 397, where the affairs of the company are being conducted in a manner that is prejudicial to public interest, or in a manner that is oppressive with respect to any member or members of the company. [Para 7] [720-E-F]

M.S.D.C. Radharamanan vs. M.S.D. Chandrasekara Raja and Anr. **AIR 2008 SC 1738: 2008 (5) SCR 182 – relied on.**

3. Section 399 of the Act 1956, neither expressly nor by implication requires, that the consent to be accorded therein, should be given by a member personally, as the same can also be given by the Power of Attorney holder

of such a shareholder. Furthermore, the issue of consent must be decided on the basis of a broad consensus approach, in relation to the avoidance and subsistence of the case. The same must be decided on the basis of the form of such consent, rather on the substance of the same. There is hence, no need of written consent, or even of the consent being annexed with the Company Petition. Such consent may even be given by the power of attorney holder of the shareholder. If the shareholder who had initially given consent to file the Company Petition to help meet the requirement of 1/10th share holding, transfers the shares held by him, or ceases to be a shareholder, the same would not affect the maintainability and continuity of the petition. [Paras 10 and 11] [722-C-E; 723-B-C]

P. Punnaiah and Ors. vs. Jeypore Sugar Co. Ltd. and Ors. **AIR 1994 SC 2258;** *J. P. Srivastava and Sons Pvt. Ltd. and Ors. vs. M/s. Gwalior Sugar Co. Ltd. and Ors.* **AIR 2005 SC 83: 2004 (5) Suppl. SCR 648 – relied on.**

4. Where the Company Petition is filed with the consent of the other shareholders, the same must be treated in a representative capacity, and therefore, the making of an application for withdrawal by the original petitioner in the Company Petition, would not render the petition under Sections 397 or 398 of the Act 1956, non-existent, or non-maintainable. The other persons, i.e., the constructive parties who provide consent to file the petition, are in fact entitled to be transposed as petitioners in the said case. Additionally, in case the petitioner does not wish to proceed with his petition, it is not always incumbent upon the court to dismiss the petition. The court may, if it so desires, deal with the petition on merit without dismissing the same. [Para 11] [722-F-H; 723-A-B]

Rajahmundry Electric Supply Corporation Ltd. by its

Vice-ChairmanAppanna Ranga Rao vs. The State of Andhra **AIR 1954 SC 251: 1954 SCR 779;** *M/s. Dale and Carrington Invt. (P) Ltd. and Anr. vs. P. K. Prathapan and Ors.* **AIR 2005 SC 1624: 2004 (4) Suppl. SCR 334 – relied on.**

5. The Division Bench has reasoned, that if a party is allowed to withdraw from the appeal, and it is evident that in the absence of such party, the petition itself could not be maintainable, then the entire petition and/or the appeal shall fail, and cannot be proceeded with under the law. Such an observation has been made by the Division Bench without examining the issue of maintainability of the Company Petition on merits. [Para 14] [724-B-D]

6. The High Court in the impugned judgment, did not take into consideration the effect of the order of this Court dated 26.4.1996, and rendered the same a nullity, giving unwarranted weightage to the earlier orders of the Division Bench dated 16.11.1993 and 18.11.1993, for the reason that this Court, while passing an order on 26.4.1996, did not set aside those orders, and therefore, the same remained intact. Furthermore, the Court did not examine whether a petition filed in representative capacity can be withdrawn unilaterally by the party before the court, and what effect Order XXIII Rule 1 (5) CPC, which provides that court cannot permit a party to withdraw such a case without the consent of the other parties, would have. [Para 19] [726-A-C]

7. A suit filed in representative capacity also represents persons besides the plaintiff, and that an order of withdrawal must not be obtained by such a plaintiff without consulting the category of people that he represents. The court therefore, must not normally grant permission to withdraw unilaterally, rather the plaintiff should be advised to obtain the consent of the other persons in writing, even by way of effecting substituted

service by publication, and in the event that no objection is raised, the court may pass such an order. If the court passes such an order of withdrawal, knowing that it is dealing with a suit in a representative capacity, without the persons being represented by the plaintiffs being made aware of the same, the said order would be an unjustified order. Such order therefore, is without jurisdiction. [Para 20] [726-D-F]

Mt. Ram Dei vs. Mt. Bahu Rani **AIR 1922 Pat. 489;** *Mt. Jaimala Kunwar and Anr. vs. Collector of Saharanpur and Ors.* **AIR 1934 All. 4;** *The Asian Assurance Co. Ltd. vs. Madholal Sindhu and Ors.* **AIR 1950 Bom. 378 – referred to.**

8. The view taken by the Division Bench has rendered the order of the Supreme Court dated 26.4.1996, a nullity. The Supreme Court had passed the order after hearing the present respondents on the basis of suggestions made, and concessions offered by them. It was in fact, suggested by the counsel appearing on behalf of the respondents, that if the appellant prefers such appeals in the High Court, the respondents shall not raise any objection on the ground of limitation, and that they would not also object on the ground of the *locus standi* of the consenting shareholders. Thus, the same makes it clear, that the right of maintenance of an appeal against the judgment of the Single Judge dated 2.2.1995, was in fact an offer made by the respondents themselves, with a further undertaking being provided by them with respect to the question of limitation and *locus standi* of the appellant, stating that the same would not be raised. What was granted to them, was only permission, to raise the contention that, as on the date of actual filing of the Company Petition before the company court, the petitioners alongwith the consenting parties, had 10 per cent share holding out of the total stakeholding of the company. The aforesaid terms of this Court have made

it crystal clear, that this Court was entirely oblivious of the fact that there had been two orders passed by the Division Bench, permitting the withdrawal of the appeals and further, dismissing the application of the appellant for recalling the said orders. If this Court did not set aside the said orders, there was no purpose for asking the appellant to file an appeal against the judgment and order of the Division Bench dated 2.2.1995. Thus, by the impugned order, the High Court has rendered the entire exercise undertaken by this Court, a futile one. [Para 22] [728-C-H; 729-A]

9. It is not correct to say that the phrase "so far as applicable", excludes the application of the CPC where a particular procedure is prescribed in the Rules itself, and as Rule 88(2) of 1959 Rules provides that any withdrawal will only be permitted with the leave of the court, no further requirement can be presumed. [Para 24] [729-E-F]

City Improvement Trust Board, Bangalore vs. H. Narayanaiah etc. etc. **AIR 1976 SC 2403: 1977 (1) SCR 178;** *Maktool Singh vs. State of Punjab* **AIR 1999 SC 1131: 1999 (1) SCR 1156 – relied on.**

10. If the interpretation given by the Division Bench of the High Court is accepted, it would not merely render the appellant remediless at whose instance, this Court had passed the order dated 26.4.1996, but would also defeat the doctrine embodied in the legal maxim, 'U*bi jus ibi idem remedium'* (where there is a right, there is a remedy). [Para 28] [730-B-C]

Dhannalal vs. Kalawatibai and Ors. **AIR 2002 SC 2572 : 2002 (1) Suppl. SCR 19;** *Smt. Ganga Bai vs. Vijay Kumar and Ors.* **AIR 1974 SC 1126 : 1974 (3) SCR 882 – relied on.**

11. It was respondent No.1 who had suggested to

this Court to dispose of the appeal filed by the appellant, while giving it liberty to file an appeal against the order of the Company Court. Therefore, it was not permissible for respondent No.1 to agitate the issue with respect to the fact that as the Supreme Court had not set aside the orders dated 16.11.1993 and 18.11.1993, passed by the Division Bench of the High Court, the same remained intact. Such an argument could not have been advanced by respondent No.1 before the Division Bench, in view of the legal maxim, '*Actus Curiae Neminem Gravabit* i.e. an act of Court shall prejudice no man'. The order of this Court dated 26.4.1996, if given strict literal interpretation, would render the appellant remediless, which is not permissible in law. [Para 29] [730-E-G; 731-C]

Jayalakshmi Coelho vs. Oswald Joseph Coelho **AIR 2001 SC 1084: 2001 (2) SCR 207;** *Rameshwarlal vs. Municipal Council, Tonk and Ors.* **(1996) 6 SCC 100: 1996 (5) Suppl. SCR 227 – relied on.**

12. The impugned judgment and order of the High Court dated 24.11.2003 is set aside and the matters are remanded to be decided by the High Court afresh giving strict adherence to the judgment of this Court dated 26.4.1996. While deciding the case afresh, the Division Bench shall not take note of the earlier judgments of the High Court dated 16.11.1993 and 18.11.1993. [Para 30] [731-E-F]

Case Law Reference:

2008 (5) SCR 182	**relied on**	**Para 7**
1954 SCR 779	**relied on**	**Para 8**
2004 (4) Suppl. SCR 334	**relied on**	**Para 9**
AIR 1994 SC 2258	**relied on**	**Para 10**
2004 (5) Suppl. SCR 648	**relied on**	**Para 10**

AIR 1922 Pat. 489	**referred to**	**Para 22**
AIR 1934 All. 4	**referred to**	**Para 22**
AIR 1950 Bom.	**referred to**	**Para 22**
1977 (1) SCR 178	**relied on**	**Para 26**
1999 (1) SCR 1156	**relied on**	**Para 27**
2002 (1) Suppl. SCR 19	**relied on**	**Para 28**
1974 (3) SCR 882	**relied on**	**Para 28**
2001 (2) SCR 207	**relied on**	**Para 29**
1996 (5) Suppl. SCR 227	**relied on**	**Para 29**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 361-362 of 2005.

From the Judgment and Order dated 24.11.2003 of the High Court at Calcutta in Two Appeals being APO Nos. 346 & 347 of 1996.

Bijoy Kumar Jain for the Appellant.

Ashok H. Desai, K. Rajeev, Kuldeep S. Parihar, H.S. Parihar, Radha Rangaswamy for the Respondents.

The Judgment of the Court was delivered by

DR. B.S.CHAUHAN, J. 1. These appeals have been preferred against the judgment and final order dated 24.11.2003 passed by the High Court of Calcutta in APO Nos. 346 and 347, by way of which the High Court rejected the claim of the appellant to maintain the Company Petition filed under Sections 397 & 398 of the Companies Act, 1956 (hereinafter referred to as the 'Act 1956').

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

A. Shri S.K. Roy (Respondent No. 2) issued and allotted

30,000 shares of the Respondent No. 1 company to himself and his relatives, and being the majority share holder therein, hence acquired control over the respondent-company.

B. Shri Ajit Kumar Chatterjee (3.66% shares) and Shri Arghya Kusum Chatterjee (1.01% shares) filed Company Petition No. 222 of 1991 under Sections 397 and 398 of the Act 1956, before the High Court of Calcutta with the consent of M/s Bhagwati Developers Pvt. Ltd. (4.78% shares) (hereinafter referred to as 'the appellant') and Shri R.L. Gaggar (7.61% shares), alleging mis-management and oppression.

C. Respondent No. 2 contested the said Company Petition by raising the preliminary issue of maintainability, stating that the valid shares held by the petitioners and consenting parties therein, were valued at less than 10 per cent of the total shareholding, and thus, the petition itself was not maintainable. The Company Court Judge vide order dated 13/14.1.1992, dismissed the said Company Petition as not maintainable, allowing the aforementioned preliminary objection, without entering into the merits of the case.

D. Shri Ajit Kumar Chatterjee and Shri Arghya Kusum Chatterjee, both petitioners therein, filed two appeals being Nos. 40 and 35 of 1992 respectively, before the Division Bench of the Calcutta High Court challenging the dismissal of the Company Petition on the ground of maintainability. Both the appeals were consolidated and heard together.

E. On 16.11.1993, Shri Ajit Kumar Chatterjee joined the Board of Directors of the company and filed applications for withdrawal of the appeals. The Division Bench of the High Court, vide order dated 16.11.1993 allowed the said applications, and dismissed his appeal as withdrawn. A similar order was passed by the Division Bench on 18.11.1993 while allowing a similar application filed by Shri Arghya Kusum Chatterjee, and therefore, his appeal was also dismissed as withdrawn.

F. The appellant filed two applications before the Division Bench on 22.12.1993 for the purpose of recalling the order of dismissal of the said appeals, and for the transposition of the Chatterjee brothers as proforma respondents, whilst substituting the appellant as the sole appellant therein. The Division Bench, vide order dated 2.2.1995 dismissed the said application by a detailed judgment, labelling the appellant as a stranger having no *locus standi* whatsoever, and observing that as the appeal was no longer pending, the question of transposition of parties did not arise. Moreover, it was observed that there had been an inordinate delay in the filing of such an application.

G. Aggrieved, the appellant preferred S.L.P.(C) Nos. 19193 and 19217 of 1995 before this court, challenging the order dated 2.2.1995. This Court entertained the said petitions, granted leave, and disposed of the appeals vide judgment and order dated 26.4.1996, observing that the appellant may prefer independent appeals, challenging the judgment and order dated 13/14.1.1992, passed by the learned Single Judge, further stating that if such an appeal was infact filed, the same would not be dismissed by the Division Bench on grounds of limitation or *locus standi*. However, it would be open for Respondent No.2 to contend, that the ground upon which the Company Court Judge had dismissed the Company Petition, was indeed just, i.e. the respondent could defend the order passed by the Company Court Judge. Further, the effect of withdrawal of the appeals by Chatterjee brothers on the appeals filed by the appellant, would also be examined. Additionally, the dismissal of the appeals as withdrawn, preferred by Chatterjee brothers, would not come in the way of the appellant raising such contentions as are permissible and available to it in law. This Court disposed of the said appeals without expressing any opinion on merit.

H. In pursuance of the order dated 26.4.1996 passed by this Court, the appellant preferred appeal Nos. 346 and 347 of 1996, which have been dismissed vide impugned judgment and order dated 24.11.2003.

Hence, these appeals.

3. Shri Sunil Kumar Gupta, learned senior counsel appearing on behalf of the appellant, has submitted that the High Court, while dismissing the appeals filed by the appellant, failed to appreciate the judgment and order of this Court dated 26.4.1996, wherein this Court had held, that the issues of limitation and the *locus standi* of the appellant would not be questioned. The Division Bench of the High Court hence, ought not to have non-suited the appellants on the issue of *locus standi*. The Chatterjee brothers had withdrawn their appeals, and thus, the High Court has erred in its interpretation of the order of this Court in correct perspective, and has therefore, rendered the appellant remediless. Even if the said Company Petition had been withdrawn, the appellant with whose consent the Company Petition had been filed, was certainly entitled to revive the said Company Petition, and to challenge the order of the Company Court Judge before the Division Bench. It was not permissible for the Division Bench to dismiss the applications filed by the appellant without so much as going into the merits of the case, simply relying upon the earlier Division Bench judgment and order dated 16.11.1993. Such a course adopted by the High Court, has rendered the order of this Court dated 26.4.1996, a nullity. Thus, the appeals deserve to be allowed.

4. Per contra, Shri Ashok H. Desai, Shri Bhaskar P. Gupta, Shri Abhijit Chatterjee, Shri Jaideep Gupta, learned senior counsel appearing on behalf of the respondents, have opposed the appeal contending that Chatterjee brothers had withdrawn both their appeals, as well as Company Petition No. 222 of 1991. Therefore, it was not permissible for the appellant to move applications for impleadment and transposition. It is evident that such applications cannot be entertained where the Company Petition itself is not pending. Furthermore, the learned Single Judge had rightly held, that the present appellant and Shri R.L. Gaggar, the consenting parties, were neither

eligible nor competent to give such consent, as they did not possess valid shares. Moreover, one of them had given consent through the Power of Attorney holder, which is not in accordance with law. This Court, vide its order dated 26.4.1996 did not set aside the judgment and order of the High Court dated 16.11.1993. Thus, the same has rightly been relied upon by the High Court in its impugned judgment. The appeals are devoid of any merit, and are hence, 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 right to apply for the winding up of a company is available, provided that the applicant satisfies the requisite requirements under Sections 397, 398 and 399 of the Act 1956, with respect to holding 10% shares in the total share-holding of the company. It is not necessary that the petitioner(s) must hold the same individually. Such a winding up petition can even be filed after obtaining the consent of other shareholders, so as to meet the requirement of having an aggregate of 10 per cent out of the total share-holding.

7. The said application is maintainable under Section 397, where the affairs of the company are being conducted in a manner that is prejudicial to public interest, or in a manner that is oppressive with respect to any member or members of the company. (Vide: *M.S.D.C. Radharamanan v. M.S.D. Chandrasekara Raja & Anr.,* AIR 2008 SC 1738)

8. In *Rajahmundry Electric Supply Corporation Ltd. by its Vice-Chairman, Appanna Ranga Rao v. The State of Andhra,* AIR 1954 SC 251, this Court, while dealing with a case under Section 397 of the Act 1956 and Section 153(c) of the Indian Companies Act, 1913, which were analogous to the provisions of Section 397 of the Act 1956, held, that the issue of whether the petitioner had obtained consent of the members of the company in order to meet the requirements of holding 1/10th of the total shares, is to be examined in light of whether such a

number was infact attained and maintained on the actual date of presentation of the Company Petition in court, and in the event that a member later withdraws consent, the same would not affect either the right of the applicant-petitioner to proceed with the application, or the jurisdiction of the court to dispose of it on merits.

9. In *M/s. Dale and Carrington Invt. (P) Ltd. & Anr. v. P. K. Prathapan & Ors.,* AIR 2005 SC 1624, this Court dealt with the issue of transfer of shares without seeking the permission of the Reserve Bank etc. and held as under:

> *" On the question of locus standi the learned counsel for the respondent cited Rajahmundry Electric Supply Corporation Ltd. v. A. Nageshwara Rao and others, AIR 1956 SC 213, wherein it was held that the validity of a petition must be judged from the facts as they were at the time of its presentation, and a petition which was valid when presented cannot cease to be maintainable by reason of events subsequent to its presentation. In* ***S. Varadarajan v. Venkateswara Solvent Extraction (P) Ltd.*** *and others (1994) 80 Company Cases 693, a petition was filed by the applicant and four others under Sections 397 and 398 of the Companies Act. During the pendency of the petition, the four other persons who had joined the applicant in filing the petition sold their shares thereby ceasing to be shareholders of the company. It was held that the application could not be rejected as not maintainable on the ground that the four shareholders ceased to be shareholders of the company. The requirement about qualification shares is relevant only at the time of institution of proceeding. In* ***Jawahar Singh Bikram Singh v. Sharda Talwar*** *(1974) 44 Company Cases 552, a Division Bench of the Delhi High Court held that for the purposes of petition under Sections 397/ 398 it was only necessary that members who were already constructively before the Court should continue*

> *to proceedings. It is a case in which the petitioner who had filed a petition died during the pendency of the petition. While filing the petition he had obtained consent of requisite number of shareholders of the company, among them his wife was also there. The Court further observed that since wife of the petitioner was* ***already constructively a petitioner*** *in the original proceedings, by virtue of her having given a consent in writing, she was entitled to be transposed as petitioner in place of her husband."* (Emphasis added)

10. Section 399 of the Act 1956, neither expressly nor by implication requires, that the consent to be accorded therein, should be given by a member personally, as the same can also be given by the Power of Attorney holder of such a shareholder. Furthermore, the issue of consent must be decided on the basis of a broad consensus approach, in relation to the avoidance and subsistence of the case. The same must be decided on the basis of the form of such consent, rather on the substance of the same. There is hence, no need of written consent, or even of the consent being annexed with the Company Petition. (Vide: *P. Punnaiah & Ors. v. Jeypore Sugar Co. Ltd. & Ors.,* AIR 1994 SC 2258; and *J. P. Srivastava and Sons Pvt. Ltd. & Ors. v. M/s. Gwalior Sugar Co. Ltd. & Ors.,* AIR 2005 SC 83)

11. In view of the above, the case at hand is required to be considered in the light of aforesaid settled propositions of law, which provide that where the Company Petition is filed with the consent of the other shareholders, the same must be treated in a representative capacity, and therefore, the making of an application for withdrawal by the original petitioner in the Company Petition, would not render the petition under Sections 397 or 398 of the Act 1956, non-existent, or non-maintainable. The other persons, i.e., the constructive parties who provide consent to file the petition, are in fact entitled to be transposed as petitioners in the said case. Additionally, in case the

petitioner does not wish to proceed with his petition, it is not always incumbent upon the court to dismiss the petition. The court may, if it so desires, deal with the petition on merit without dismissing the same. Further, there is no requirement in law for the shareholder himself, to give consent in writing. Such consent may even be given by the power of attorney holder of the shareholder. If the shareholder who had initially given consent to file the Company Petition to help meet the requirement of 1/10th share holding, transfers the shares held by him, or ceases to be a shareholder, the same would not affect the maintainability and continuity of the petition.

12. The Company Court Judge dismissed the petition on merits, vide judgment and order dated 13/14.1.1992. Appeals were preferred, and the first appeal was withdrawn by Shri Ajit Kumar Chatterjee, vide order dated 16.11.1993.

13. The said application was also opposed by another appellant, namely, Shri Arghya Kusum Chatterjee. However, the court passed the following order:

> "In the instant case, as the applicant No. 1 goes out of the picture and the appeals in so far as the appellant No.1 stand dismissed for non-prosecution, the Company Petition is not maintainable and the appeals are also not maintainable in the same ground in view of the fact that with regard to two other appeals, one on the question of maintainability of the appeal and the other on the question of merit of the appeal. If the maintainability of the appeal could not be proceeded within that event the other appeal also could not be proceeded with.
>
> Accordingly, when one of the parties in appeals does not want to proceed with the appeals the Court has no jurisdiction to compel that party to continue with the appeals against his will. Further, if that party is allowed to withdraw from the appeals and if it is evident that the petition itself could not be maintainable in the absence of that party in that event the entire petition and/or the appeal shall fail and could not be proceeded with under the law. Accordingly, both the appeals stand dismissed as the same could not be proceeded with because of the facts and circumstances stated above. The applications filed today are allowed."

14. The aforesaid order makes it clear that the Division Bench has reasoned, that if a party is allowed to withdraw from the appeal, and it is evident that in the absence of such party, the petition itself could not be maintainable, then the entire petition and/or the appeal shall fail, and cannot be proceeded with under the law. Such an observation has been made by the Division Bench without examining the issue of maintainability of the Company Petition on merits.

15. Another Chatterjee brother, namely, Shri Arghya Kusum Chatterjee withdrew his Appeal No. 40 of 1992, vide order dated 18.11.1993. The Court observed, that in view of the order dated 16.11.1993, no order was necessary, for the reason that if one appeal fails, the other cannot be maintained. The court further held:

> "We place it on record that the appellant No. 2 does not wish to proceed with the above appeals and also prays for dismissal of the applications under Sections 397 and 398 of the Companies Act which stand dismissed by the order passed by the learned Trial judge. So, it is placed on record that both the appellant Nos. 1 and 2 do not wish to proceed with the appeals which were already dismissed by us for non – prosecution on 16th November, 1993.
>
> Accordingly, both the applications are disposed of."

16. Immediately after the said withdrawal of the appeals, the present appellant moved an application dated 22.12.1993, to recall the aforesaid orders dated 16.11.1993 and 18.11.1993, and for transposing the appellant in place of the

Chatterjee brothers, while making them proforma respondents. The said application was rejected by order dated 2.2.1995, on the premise that the petitioners, as well as the constructive parties, i.e., the consent givers had not obtained their share holding validly. The appeals filed by the Chatterjees had been withdrawn. Thus, in light of such a fact-situation, the question of entertaining any application for either the addition or transposition of parties, could not arise. The court further made a distinction between the present case and **Rajahmundry's** case, observing that the facts of the case at hand, were quite distinguishable from those in **Rajahmundry's** case, as in the latter, the consenting party had withdrawn its consent, while here, the constructive consenting party has withdrawn its case.

17. The appellant being aggrieved, preferred appeals before this Court, which were disposed of vide judgment and order dated 26.4.1996, giving liberty to the appellant to file an independent appeal against the order of the Company Court Judge dated 13/14.1.1992. Further, it was also open to the respondents to contend that the company petition itself was not maintainable for the reason given by the Company Court Judge, i.e. not having the requisite 10% share holding. The said order dated 26.4.1996, was passed at the behest of the respondents, with their consent, stating that they would not raise the issues of limitation, or of the *locus standi* of the appellant.

18. In view of the above, the appellant preferred the appeals which were dismissed vide impugned judgment and order dated 24.11.2003, relying upon an observation made by the Division Bench earlier, to the effect that, in view of the fact that the Chatterjee brothers had withdrawn their appeals, and that the Company Petition had been declared as not maintainable by the Company Court Judge, the question of entertaining any appeal with respect to the same, could not arise. After the withdrawal of the said appeals by the Chatterjees, the appellant did not have any right to proceed with the original application by any means, whatsoever.

19. The High Court in the impugned judgment, did not take into consideration the effect of the order of this Court dated 26.4.1996, and rendered the same a nullity, giving unwarranted weightage to the earlier orders of the Division Bench dated 16.11.1993 and 18.11.1993, for the reason that this Court, while passing an order on 26.4.1996, did not set aside those orders, and therefore, the same remained intact. Furthermore, the Court did not examine whether a petition filed in representative capacity can be withdrawn unilaterally by the party before the court, and what effect Order XXIII Rule 1 (5) CPC which provides that court cannot permit a party to withdraw such a case without the consent of the other parties, would have.

20. The courts have consistently held, that a suit filed in representative capacity also represents persons besides the plaintiff, and that an order of withdrawal must not be obtained by such a plaintiff without consulting the category of people that he represents. The court therefore, must not normally grant permission to withdraw unilaterally, rather the plaintiff should be advised to obtain the consent of the other persons in writing, even by way of effecting substituted service by publication, and in the event that no objection is raised, the court may pass such an order. If the court passes such an order of withdrawal, knowing that it is dealing with a suit in a representative capacity, without the persons being represented by the plaintiffs being made aware of the same, the said order would be an unjustified order. Such order therefore, is without jurisdiction. (Vide: *Mt. Ram Dei v. Mt. Bahu Rani,* AIR 1922 Pat. 489; *Mt. Jaimala Kunwar & Anr. v. Collector of Saharanpur & Ors.,* AIR 1934 All. 4; and *The Asian Assurance Co. Ltd. v. Madholal Sindhu & Ors.,* AIR 1950 Bom. 378.)

21. The relevant parts of the impugned order provided as under:

I. Now the crucial question comes for consideration that when it is established fact as evident from the reading of the order of the Hon'ble Supreme Court that there was no

existence of the original Company Petition since withdrawal of the Chatterjee brothers, can there be any existence of any appeal arising out of the said Company Petition and in our considered view the only answer to this crucial question must be in the negative.

II. According to the observation of the learned Single Judge the Company Petition was invalid and ineffective at the time of its institution, because, one of the Chatterjee brothers was not a "member" within the meaning of the Companies Act and at the same time one of the consenting parties namely, R.L. Gaggar had withdrawn his consent soon after filing of the original application and on both these counts, even if the Chatterjee brothers had not withdrawn, the Company Petition could not be accepted as a valid petition in the eye of law and we have already recorded that these findings of the learned Single Judge were upheld by the Division Bench while disposing of the petitions filed by the BDPL and even taking the risk of repetition it can be stated that the Hon'ble Supreme Court did not interfere with the findings of the Division Bench in this regard while recording its order dated 26th April, 1996.

III. We are of the view that the order of the previous Division Bench dated 16th November, 1993 and 2nd February, 1995 were not touched by the Hon'ble Supreme Court regarding recognition of the withdrawal of Chatterjee brothers both from the appeals as well as from the original Company Petition and in that background the present appellant being a consenting party, and that consent too not being above legal scrutiny, has no legal right to proceed with the present appeals without the original application out of which the appeals arose and which is non-existent in the eye of law.

And finally, it was held as under:

IV. Thus, for the reasons recorded hereinabove, we are of the view that the present appeals are not maintainable and on this ground alone the present appeals are liable to be dismissed and there is no requirement in the eye of law to enter into the other aspect of the matter touching maintainability of the original Company Petition.

22. In our humble opinion, the Division Bench has gravely erred in taking the aforesaid view, as the same renders the order of this Court dated 26.4.1996, a nullity. This Court had passed the order after hearing the present respondents on the basis of suggestions made, and concessions offered by them. It was in fact, suggested by the learned counsel appearing on behalf of the respondents, that if the appellant prefers such appeals in the High Court even now, the respondents shall not raise any objection on the ground of limitation, and that they would not also object on the ground of the *locus standi* of the consenting shareholders. Thus, the same makes it clear, that the right of maintenance of an appeal against the judgment of the learned Single Judge dated 2.2.1995, was in fact an offer made by the respondents themselves, with a further undertaking being provided by them with respect to the question of limitation and *locus standi* of the appellant, stating that the same would not be raised. What was granted to them, was only permission, to raise the contention that, as on the date of actual filing of the Company Petition before the company court Judge, the petitioners alongwith the consenting parties, had 10 per cent share holding out of the total stakeholding of the company .

The aforesaid terms of this Court have made it crystal clear, that this Court was entirely oblivious of the fact that there had been two orders passed by the Division Bench, permitting the withdrawal of the appeals and further, dismissing the application of the appellant for recalling the said orders. If this Court did not set aside the said orders, we fail to understand the purpose of asking the appellant to file an appeal against the judgment and order of the High Court dated 2.2.1995. Thus, by the

impugned order, the High Court has rendered the entire exercise undertaken by this Court, a futile one. In our humble opinion, the Division Bench has hence, erred gravely.

23. We do not find any force in the submissions made by Shri Desai, to the effect that in view of Rule 88(2) of the Rules 1959, the CPC had no application to the facts of the instant case. Rule 88(2) reads, that a petition under Sections 397 and/or 398 of the Act 1956, shall not be withdrawn without the leave of the court, and therefore, as per Shri Desai, the provisions of the CPC, as have been applied in the case on which Shri Gupta has relied upon, have no application in the instant case. Rule 6 reads as under:

> "Save as provided by the Act or by these rules the practice and procedure of the Court and the provisions of the Code so far as applicable, shall apply to all proceedings under the Act and these rules. The Registrar may decline to accept any document which is presented otherwise than in accordance with these rules or the practice and procedure of the Court."

24. It has been submitted by Shri Ashok H. Desai, learned senior counsel appearing on behalf of the respondents, that the phrase "so far as applicable", excludes the application of the CPC where a particular procedure is prescribed in the Rules itself, and as Rule 88(2) provides that any withdrawal will only be permitted with the leave of the court, no further requirement can be presumed.

25. We do not agree with such an interpretation, particularly with respect to a phrase, which has been considered by this Court time and again.

26. In *City Improvement Trust Board, Bangalore v. H. Narayanaiah etc. etc.,* AIR 1976 SC 2403, this Court held, that the aforesaid phrase means, "what is not either expressly provided for, or applicable by way of necessary implication, must be excluded".

27. Similarly, in the case of *Maktool Singh v. State of Punjab,* AIR 1999 SC 1131, this Court held, that this phrase means, that a court/authority can exercise power only to the extent that such powers are applicable. In other words, if there is an interdict against the applicability of the said provisions, the court cannot use such provisions.

28. If the interpretation given by the Division Bench of the High Court is accepted, it would not merely render the appellant remediless at whose instance, this Court had passed the order dated 26.4.1996, but would also defeat the doctrine embodied in the legal maxim, 'U*bi jus ibi idem remedium'* (where there is a right, there is a remedy). This Court dealt with the aforesaid doctrine in *Dhannalal v. Kalawatibai & Ors.,* AIR 2002 SC 2572 and held, that "if a man has a right, he must have the means to vindicate and maintain it, and also a remedy, if he is injured in the exercise and enjoyment of the said right, and that it is indeed, a vain thing to imagine a right without a remedy, for the want of a right and the want of a remedy, are reciprocal". (See also: *Smt. Ganga Bai v. Vijay Kumar & Ors.,* AIR 1974 SC 1126)

29. It was respondent no.1 who had suggested to this Court to dispose of the appeal filed by the appellant, while giving it liberty to file an appeal against the order of the Company Court Judge. Therefore, it was not permissible for respondent no.1 to agitate the issue with respect to the fact that as the Supreme Court had not set aside the orders dated 16.11.1993 and 18.11.1993, passed by the division bench of the Calcutta High Court, the same remained intact. Such an argument could not have been advanced by respondent no.1 before the division bench, in view of the legal maxim, '*Actus Curiae Neminem Gravabit* i.e. an act of Court shall prejudice no man'. This Court dealt with the said maxim in *Jayalakshmi Coelho v. Oswald Joseph Coelho,* AIR 2001 SC 1084, and explained its scope, observing:

"….where the order may contain something which is not mentioned in the decree would be a case of unintentional omission or mistake. Such omissions are attributable to the Court who may say something or omit to say something which it did not intend to say or omit. No new arguments or re-arguments on merits are required for such rectification of mistake."

The order of this Court dated 26.4.1996, if given strict literal interpretation, would render the appellant remediless, which is not permissible in law. (Vide: *Rameshwarlal v. Municipal Council, Tonk & Ors.,* (1996) 6 SCC 100).

30. In view of the above, we are of considered opinion that the Division Bench erred in holding that after the judgment of this Court dated 26.4.1996, it was permissible for the High Court to hold that the Company Petition under Sections 397/ 398 of the Act 1956, was non-existence in the eyes of law while placing reliance on the earlier judgments of the Division Bench of the High Court dated 16.11.1993 and 18.11.1993.

Thus, the appeals are allowed, the impugned judgment and order of the High Court dated 24.11.2003 is hereby set aside and the matters are remanded to be decided by the High Court of Calcutta afresh giving strict adherence to judgment of this Court dated 26.4.1996. While deciding the case afresh, the Division Bench shall not take note of the earlier judgments of the High Court dated 16.11.1993 and 18.11.1993.

As the matters are pending since long, in the facts and circumstances of the case, we request the Hon'ble High Court to decide the appeals expeditiously preferably within a period of six month from the date of filing of certified copy of this judgment and order before the High Court. There shall be no order as to costs.

K.K.T. Appeals allowed.

ASPI JAL & ANR.
v.
KHUSHROO RUSTOM DADYBURJOR
(Civil Appeal No.2908 of 2013)

APRIL 5, 2013

[CHANDRAMAULI KR. PRASAD AND V. GOPALA GOWDA, JJ.]

Code of Civil Procedure, 1908:

s.10 – Applicability of – Held: s.10 is not applicable where few of the matters in issue are common in both the suits – It is applicable when the entire subject matter in controversy is same – 'Matter in issue' does not mean any of the questions in issue – s.10 is not applicable in the facts and circumstances of the present case.

s.10 – Purpose and object of – Held: The basic purpose and underlying object of s.10 is to avoid the possibility of contradictory verdicts by two courts in respect of same relief, and to protect the defendant from multiplicity of proceedings.

Words and Phrases – 'Matter is issue' – Meaning of, in the context of s.10 CPC.

Appellant-Landlord filed suit against the respondent-tenant for his eviction on the ground of non-user for a continuous period of not less than six months immediately prior to institution of the suit. Small Causes Court stayed the proceedings of the suit u/s. 10 CPC till the disposal of previous two suits between the same parties in respect of the same premises on the grounds of *bona fide* requirement, and of non-user for several years before the institution of the suit. High Court confirmed the order. Hence the present appeal.

Allowing the appeal, the Court

HELD: 1.1. Where a suit is instituted in a court to which provisions of CPC apply, it shall not proceed with the trial of another suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties. For application of the provisions of Section 10 CPC, it is further required that the court in which the previous suit is pending is competent to grant the relief claimed. The use of negative expression in Section 10 CPC, i.e. "no court shall proceed with the trial of any suit" makes the provision mandatory and the Court in which the subsequent suit has been filed is prohibited from proceeding with the trial of that suit if the conditions laid down in Section 10 CPC are satisfied. [Para 11] [739-C-E]

1.2. In the present case, many of the matters in issue are common, including the issue as to whether the plaintiffs are entitled to recovery of possession of the suit premises, but for application of Section 10 of the Code, the entire subject-matter of the two suits must be the same. This provision will not apply where few of the matters in issue are common and will apply only when the entire subject matter in controversy is same. The matter in issue is not equivalent to any of the questions in issue. The eviction in the third suit has been sought on the ground of non-user for six months prior to the institution of that suit. It has also been sought in the earlier two suits on the same ground of non-user but for a different period. Though the ground of eviction in the two suits was similar, the same were based on different causes. The plaintiffs may or may not be able to establish the ground of non-user in the earlier two suits, but if they establish the ground of non-user for a period of six months prior to the institution of the third suit that may entitle them the decree for eviction. Therefore, the

provisions of Section 10 CPC is not attracted in the facts and circumstances of the case. [Para 13] [741-B-F]

1.3. The test for applicability of Section 10 CPC is whether on a final decision being reached in the previously instituted suit, such decision would operate as *res-judicata* in the subsequent suit. If the answer is in affirmative, the subsequent suit is not fit to be stayed. Thus, when the matter in controversy is the same, it is immaterial what further relief is claimed in the subsequent suit. [Para 12] [740-G-H; 741-A]

2. The basic purpose and the underlying object of Section 10 of the Code is to prevent the Courts of concurrent jurisdiction from simultaneously entertaining and adjudicating upon two parallel litigations in respect of same cause of action, same subject matter and the same relief. This is to pin down the plaintiff to one litigation so as to avoid the possibility of contradictory verdicts by two courts in respect of the same relief and is aimed to protect the defendant from multiplicity of proceeding. [Para 11] [739-E-F]

Health & Neuro Sciences vs. C. Parameshwara **(2005) 2 SCC 256;***Dunlop India Limited vs. A.A. Rahna and Anr.* **(2011) 5 SCC 778: 2011 (5) SCR 1080 – relied on.**

Case Law Reference:

(2005) 2 SCC 256	**relied on**	**Para 11**
2011 (5) SCR 1080	**relied on**	**Para 13**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2908 of 2013.

From the Judgment & Order dated 09.02.2012 of the High Court of Judicature at Bombay in Writ Petition No. 7653 of 2011.

Shyam Divan, Pratap Venugopal, Surekha Raman, Anuj Sharma, Gaurav Nair (for K.J. John & Co.) for the Appellants.

Harish N. Salve, K.V. Vishavanathan, Ajay Bharsava, Vanita Bhargava, Priyambada Mishra (for Khaitan & Co.) for the Respodent.

The following Judgment of the Court was delivered

JUDGMENT

1. The plaintiffs-petitioners, aggrieved by the order dated 9th February, 2012 passed by the Bombay High Court in Writ Petition No.7653 of 2011, affirming the order dated 6th July, 2011 passed by the Court of Small Causes at Mumbai, in R.A.E Suit No.173/256 of 2010 whereby it has stayed the proceedings in R.A.E. No.173/256 of 2010 till the decision in R.A.E. Suit No.1103/1976 of 2004 and R.A.E. Suit No.1104/1977 of 2004, have preferred this Special Leave Petition under Article 136 of the Constitution of India.

2. Leave granted.

3. The plaintiffs claim to be the owner of the building known as " Hanoo Manor" situate at Dadyseth 2nd Cross Lane in Chawpatty area of the city of Mumbai. According to the plaintiffs, in one of the flats of the said building admeasuring 1856.75 sq.ft. situate on the second floor, defendant's father, Rustom Dady Burjor (since deceased)was inducted as a tenant on a monthly rent of Rs.355/-. The plaintiffs filed a suit for eviction from the tenanted premises against the defendant being R.A.E. Suit No.1103/1976 of 2004(hereinafter to be referred to as the "First Suit") before the Small Causes Court on 6th November, 2004 on the ground of bona fide requirement for self occupation and acquisition of alternate accommodation by the defendant. The plaintiffs thereafter filed another suit being R.A.E. Suit No.1104/1977 of 2004 (hereinafter to be referred to as the "Second Suit") on the same day in the Small Causes Court for eviction of the defendant on the ground of

non-user for several years before the institution of the suit. The plaintiffs during the pendency of the aforesaid two suits, chose to file yet another suit bearing R.A.E. Suit No. 173/256 of 2010 (hereinafter to be referred to as the "Third Suit") on 22nd February, 2010 for eviction of the defendant on the ground of non-user for a continuous period of not less than six months immediately prior to the institution of the suit.

4. The defendant filed an application on 29th September, 2010 for stay of hearing of the third suit till final disposal of the first and second suits. The defendant made the aforesaid prayer inter alia stating that the parties in all the three suits are same as also the issues. It was further averred that the subject matter of all these suits are one and the same. According to the defendant, since the matter in issue in the third suit is substantially in issue in the earlier two suits, the trial of the third suit is liable to be stayed until the hearing and final disposal of the previously instituted first and second suits. The plaintiffs filed reply objecting to the defendant's prayer for stay of the third suit inter alia on the ground that the causes of action being different, the application filed by the defendant for stay of the third suit is fit to be rejected. The Court of Small Causes by its order dated 6th July, 2011, acceded to the prayer of the defendant and stayed the third suit till final decision in the earlier two suits. While doing so, the trial court observed as follows:

> "13. On bare reading of the pleading in both suits, it clearly appears that both suits are filed on the same ground i.e. non user. As, I discussed earlier one test of the applicability of Section 10 to a particular case is whether on the final decision being reached in the previous suit, such decision would operate as res-judicata in the subsequent suit. The object of the section is to prevent courts of concurrent jurisdiction from simultaneously trying two parallel suits in respect of the same matter in issue. Complete identity of the subject-matter is not necessary to attract the application of S.10 and if a matter directly and substantially in issue in a previously instituted suit is

also directly and substantially in issue in a later suit, then under S.10 the later suit shall be stayed."

5. Ultimately, the trial court came to the following conclusion and while staying the suit proceeded to observe as follows:

"15. .. .. But, in the present case, it is crystal clear from pleading that matter in issue in both suits is directly and substantially identical. Therefore, this is a fit case to invoke Section 10 of the Code of Civil Procedure."

6. The plaintiffs assailed the aforesaid order by way of a petition under Article 227 of the Constitution of India before the Bombay High Court. The High Court concurred with the findings and the conclusion of the trial court and dismissed the writ petition inter alia, observing as follows:

" 9. … Admittedly, the Petitioner has filed R.A.E. Suit No.1104/1977 of 2004 and R.A.E. Suit No. 173/256 of 2010 on the ground of nonuser, though the period is different. But, after perusing the plaints, it is crystal clear that issue involved in both the suits are similar. Therefore, in view of Section 10 of the Civil Procedure Code and judgment in the matter of Challapalli Sugar Pvt. Ltd. (Supra), it is necessary, in the interest of justice, subsequent suit filed by the Petitioner, i.e. R.A.E. Suit No.173/256 of 2010 to be stayed and the same is done by the Trial Court by giving detailed reasons. Therefore, I do not find any substance in the present Petition to interfere in the well reasoned order passed by the Trial Court dated 6th July, 2011."

7. Mr.Shyam Divan, Senior counsel appearing on behalf of the appellants submits that in the second suit, the plaintiffs have sought eviction on the ground of non-user of the suit premises for several years prior to the filing of the suits but in the third suit it has specifically been averred that "the defendant and his family has not been in use and occupation of the suit

premises for a continuous period of more than six months immediately prior to the institution of this suit without reasonable cause". Thus, according to Mr. Divan, the matter in issue in the third suit is non-user of the suit premises prior to six months from the date of institution of the said suit. He points out that the plaintiffs may fail in the earlier two suits by not establishing the non-user of the tenanted premises for a period of six months prior to the institution of those suits, yet, they can succeed in the third suit by proving the non-user of the suit premises by the defendants for six months prior to the institution of that suit. According to him, the matter in issue in the third suit being substantially different than the first two suits, the provisions of Section 10 of the Code of Civil Procedure, 1908 (hereinafter to be referred to as the "Code") is not attracted and hence, the trial court erred in staying the third suit till the disposal of the first two suits.

8. Mr. Harish N. Salve, Senior counsel appearing on behalf of the defendant, however, submits that the matter in issue in both the suits being non-user of the tenanted premises by the defendant, the trial court rightly held that the provisions of Section 10 of the Code is attracted and on that premise, stayed the third suit.

9. We have given our thoughtful consideration to the rival submissions and we find substance in the submission of Mr. Divan.

10. Section 10 of the Code which is relevant for the purpose reads as follows:

" 10. Stay of suit.- No Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or any other Court in India having jurisdiction to grant the relief claimed, or in any

Court beyond the limits of India established or continued by the Central Government and having like jurisdiction, or before the Supreme Court.

Explanation.- The pendency of a suit in a foreign Court does not preclude the Courts in India from trying a suit founded on the same cause of action."

11. From a plain reading of the aforesaid provision, it is evident that where a suit is instituted in a Court to which provisions of the Code apply, it shall not proceed with the trial of another suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties. For application of the provisions of Section 10 of the Code, it is further required that the Court in which the previous suit is pending is competent to grant the relief claimed. The use of negative expression in Section 10, i.e. "no court shall proceed with the trial of any suit" makes the provision mandatory and the Court in which the subsequent suit has been filed is prohibited from proceeding with the trial of that suit if the conditions laid down in Section 10 of the Code are satisfied. The basic purpose and the underlying object of Section 10 of the Code is to prevent the Courts of concurrent jurisdiction from simultaneously entertaining and adjudicating upon two parallel litigations in respect of same cause of action, same subject matter and the same relief. This is to pin down the plaintiff to one litigation so as to avoid the possibility of contradictory verdicts by two courts in respect of the same relief and is aimed to protect the defendant from multiplicity of proceeding. The view which we have taken finds support from a decision of this Court in *National Institute of Mental Health & Neuro Sciences vrs. C.Parameshwara,* (2005) 2 SCC 256 in which it has been held as follows:

" 8. The object underlying Section 10 is to prevent courts of concurrent jurisdiction from simultaneously trying two parallel suits in respect of the same matter in issue. The object underlying Section 10 is to avoid two parallel trials

on the same issue by two courts and to avoid recording of conflicting findings on issues which are directly and substantially in issue in previously instituted suit. The language of Section 10 suggests that it is referable to a suit instituted in the civil court and it cannot apply to proceedings of other nature instituted under any other statute. The object of Section 10 is to prevent courts of concurrent jurisdiction from simultaneously trying two parallel suits between the same parties in respect of the same matter in issue. The fundamental test to attract Section 10 is, whether on final decision being reached in the previous suit, such decision would operate as res-judicata in the subsequent suit. Section 10 applies only in cases where the whole of the subject-matter in both the suits is identical. The key words in Section 10 are "the matter in issue is directly and substantially in issue" in the previous instituted suit. The words "directly and substantially in issue" are used in contradistinction to the words "incidentally or collaterally in issue". Therefore, Section 10 would apply only if there is identity of the matter in issue in both the suits, meaning thereby, that the whole of the subject-matter in both the proceedings is identical."

12. In the present case, the parties in all the three suits are one and the same and the court in which the first two suits have been instituted is competent to grant the relief claimed in the third suit. The only question which invites our adjudication is as to whether "the matter in issue is also directly and substantially in issue in previously instituted suits". The key words in Section 10 are "the matter in issue is directly and substantially in issue in the previously instituted suit". The test for applicability of Section 10 of the Code is whether on a final decision being reached in the previously instituted suit, such decision would operate as res-judicata in the subsequent suit. To put it differently one may ask, can the plaintiff get the same relief in the subsequent suit, if the earlier suit has been dismissed? In our opinion, if the answer is in affirmative, the subsequent suit

is not fit to be stayed. However, we hasten to add then when the matter in controversy is the same, it is immaterial what further relief is claimed in the subsequent suit.

13. As observed earlier, for application of Section 10 of the Code, the matter in issue in both the suits have to be directly and substantially in issue in the previous suit but the question is what "the matter in issue" exactly means? As in the present case, many of the matters in issue are common, including the issue as to whether the plaintiffs are entitled to recovery of possession of the suit premises, but for application of Section 10 of the Code, the entire subject-matter of the two suits must be the same. This provision will not apply where few of the matters in issue are common and will apply only when the entire subject matter in controversy is same. In other words, the matter in issue is not equivalent to any of the questions in issue. As stated earlier, the eviction in the third suit has been sought on the ground of non-user for six months prior to the institution of that suit. It has also been sought in the earlier two suits on the same ground of non-user but for a different period. Though the ground of eviction in the two suits was similar, the same were based on different causes. The plaintiffs may or may not be able to establish the ground of non-user in the earlier two suits, but if they establish the ground of non-user for a period of six months prior to the institution of the third suit that may entitle them the decree for eviction. Therefore, in our opinion, the provisions of Section 10 of the Code is not attracted in the facts and circumstances of the case. Reference in this connection can be made to a decision of this Court in *Dunlop India Limited vrs. A.A.Rahna & Anr.* (2011) 5 SCC 778 in which it has been held as follows:

> "35. The arguments of Shri Nariman that the second set of rent control petitions should have been dismissed as barred by res judicata because the issue raised therein was directly and substantially similar to the one raised in the first set of rent control petitions does not merit

> acceptance for the simple reason that while in the first set of petitions, the respondents had sought eviction on the ground that the appellant had ceased to occupy the premises from June 1998, in the second set of petitions, the period of non-occupation commenced from September 2001 and continued till the filing of the eviction petitions. That apart, the evidence produced in the first set of petitions was not found acceptable by the appellate authority because till 2-8-1999, the premises were found kept open and alive for operation, The appellate authority also found that in spite of extreme financial crisis, the management had kept the business premises open for operation till 1999. In the second round, the appellant did not adduce any evidence worth the name to show that the premises were kept open or used from September 2001 onwards. The Rent Controller took cognizance of the notice fixed on the front shutter of the building by A.K.Agarwal on 1-10-2001 that the Company is a sick industrial company under the 1985 Act and operation has been suspended with effect from 1-10-2001; that no activity had been done in the premises with effect from 1-10-2001 and no evidence was produced to show attendance of the staff, payment of salary to the employees, payment of electricity bills from September, 2001 or that any commercial transaction was done from the suit premises. <u>It is, thus, evident that even though the ground of eviction in the two sets of petitions was similar, the same were based on different causes. Therefore, the evidence produced by the parties in the second round was rightly treated as sufficient by the Rent Control Court and the appellate authority for recording a finding that the appellant had ceased to occupy the suit premises continuously for six months without any reasonable cause.</u>"
>
> (Underlining ours)

14. In view of what we have observed earlier, the orders

passed by the trial court as affirmed by the High Court are vulnerable and therefore, cannot be allowed to stand.

15. Mr. Divan prays that direction may be issued to the trial court to hear all the suits together. We restrain ourselves from issuing such direction but give liberty to the parties if they so choose to make such a prayer before the trial court. Needless to state that in case such a prayer is made, the trial court shall consider the same in accordance with law.

16. In the result, the appeal is allowed and the impugned order of the trial court as affirmed by the High Court is set aside but without any order as to costs.

K.K.T. Appeal allowed.

LAL BAHADUR & ORS.

v.

STATE (NCT OF DELHI)

(Criminal Appeal No. 1794 of 2008)

APRIL 8, 2013

[P. SATHASIVAM AND M.Y. EQBAL, JJ.]

Penal Code, 1860 – ss.147/149/449/436/302/395/396 – Assassination of the Prime Minister of India – Communal riots – Violent mob attacks on Sikh community – Mob killing husband and father-in-law of PW1 and also looting articles – Acquittal of accused-appellants – Reversal of acquittal by High Court – Justification – Held: Justified –The witnesses consistently deposed with regard to the offence committed by the appellants and their evidence remained unshaken during their cross-examination – Mere marginal variation and contradiction in their statements not a ground to discard the testimony of the eye-witness who was none else but widow of one deceased – Further, relationship not a factor to affect credibility of a witness – Discovery of dead body of the victim not the only mode of proving the corpus delicti in murder – In fact, there are very many cases of such nature like the present one where the discovery of the dead body was impossible, especially when members of a particular community were murdered in such a violent mob attack on Sikh community in different places and the offenders tried to remove the dead bodies and also looted articles – High Court correctly appreciated the evidence and reversed the findings of the trial court.

Criminal Trial – Evidence – Appreciation – Assassination of the Prime Minister of India – Communal riots – Mob killing husband and father-in-law of PW1 – Delay in filing of FIR and in recording of the statements of witnesses

by the police – Held: Did not affect the prosecution case – Instant incident was not solitary, such incidents took place in almost all parts of the country – Circumstances of the case were extraordinary – The city was in turmoil and persons having witnessed crimes would naturally be apprehensive and afraid in coming forward to depose against the perpetrators, till things settled down; the State machinery was overworked; and in such circumstances, delay in recording the statements of witnesses cannot be a ground to reduce its evidentiary value or to completely ignore it – Further, witnesses prior to the incident were residents of the same area and knew the assailants and it was not the case of the appellants that the delay could have resulted in wrong identification of the accused – Penal Code, 1860 – ss.147/149/449/436/302/395/396.

Appeal – Appeal against acquittal – Power of the appellate Court to re-appreciate evidence – Held: The appellate court has full power to review the evidence upon which the order of acquittal is founded – High Court is entitled to re-appreciate the entire evidence in order to find out whether findings recorded by the trial court are perverse or unreasonable.

Riots followed the assassination of late Prime Minister Indira Gandhi on 31st October, 1984. A mob including appellant No. 1 alongwith appellant No. 2 allegedly attacked the house of PW1 and looted household articles. PW1 alongwith her husband and father-in-law took shelter at the residence of PW-5. On 3rd November, 1984, a mob of more than 500 persons, including and led by the appellants, came and attacked the house of PW-5. The appellants allegedly broke the windowpane and entered the house and set the house on fire. PW1's husband and father-in-law were burnt alive and their half burnt bodies were put in gunny bags. PW1's house was also burnt.

The trial court held that the prosecution failed to prove the charges levelled against the appellants beyond all reasonable doubt and acquitted them. The State preferred appeal before the High Court which reversed the findings of the trial court and convicted the accused-appellants under Sections 147/149/449/436/302/395/396, IPC, and therefore the present appeal.

Dismissing the appeal, the Court

HELD:1. The instant incident as alleged is not the solitary incident, but such incidents took place in almost all parts of the country, especially in Delhi where many innocent persons of one community had been murdered and their properties had been looted because of the assassination of the Prime Minister of this country, which took place on 31st October, 1984. After hearing the shocking news of assassination of the Prime Minister, thousands of people forming a mob in different areas and localities committed atrocities to the Sikh communities and they were murdered and set ablazed. Therefore, the evidence has to be appreciated carefully without going into the minor discrepancies and contradictions in the evidence. [Para 11] [758-D-F]

2. The High Court on the issue regarding delay in filing of FIR held that the circumstances of the present case are extraordinary as the country was engulfed in communal riots, curfew was imposed, Sikh families were being targeted by mobs of unruly and fanatic men who did not fear finishing human life, leave alone destroying/burning property. As regards recording of the statements of witnesses by the police on 30th November, 1984 after a delay of 27 days, the High Court observed that the city was in turmoil and persons having witnessed crimes would naturally be apprehensive and afraid in coming forward to depose against the perpetrators, till things

settled down; that the State machinery was overworked; and in such circumstances, delay in recording the statements of witnesses cannot be a ground to reduce its evidentiary value or to completely ignore it. The High Court further found that the witnesses prior to the incident were the residents of the same area and knew the assailants and it was not the case of the appellants that the delay could have resulted in wrong identification of the accused. The view expressed by the High Court is affirmed. [Paras 12, 13] [758-G-H; 759-A-C; 760-D]

3. The High Court re-appreciated the evidence of the witnesses in detail and meticulously examined the facts and circumstances of the case in its right perspective and recorded a finding that the prosecution has proved the case against the appellants. In an appeal against acquittal, the appellate court has full power to review the evidence upon which the order of acquittal is founded. The High Court is entitled to re-appreciate the entire evidence in order to find out whether findings recorded by the trial court are perverse or unreasonable. [Paras 16, 17] [762-E-F, G-H; 763-A]

Sanwat Singh & Ors. vs. State of Rajasthan **AIR 1961 SC 715: 1961 SCR 120 – relied on.**

4. The evidence of the witnesses cannot be brushed aside merely because of some minor contradictions, particularly for the reason that the evidence and testimonies of the witnesses are trustworthy. Not only that, the witnesses have consistently deposed with regard to the offence committed by the appellants and their evidence remain unshaken during their cross-examination. Mere marginal variation and contradiction in the statements of the witnesses cannot be a ground to discard the testimony of the eye-witness who is none else but the widow of the one deceased. Further,

relationship cannot be a factor to affect credibility of a witness. [Para 19] [763-G-H; 764-A-B]

State of Uttar Pradesh vs. Naresh & Ors. **(2011) 4 SCC 324: 2011 (4) SCR 1176 – relied on.**

5. Much stress has been given on behalf of the appellants on the non-recovery of the dead-bodies and the looted articles when the allegation is that after killing the persons they put the dead bodies into gunny bags. The aforesaid plea cannot in any way improve the case of the appellants. Discovery of dead body of the victim has never been considered as the only mode of proving the *corpus delicti* in murder. In fact, there are very many cases of such nature like the present one where the discovery of the dead body is impossible, specially when members of a particular community were murdered in such a violent mob attack on Sikh community in different places and the offenders tried to remove the dead bodies and also looted articles. In a murder case to substantiate the case of the prosecution it is not required that dead bodies must have been made available for the identification and discovery of dead body is not *sine qua non* for applicability of Section 299 of IPC. [Paras 14, 20, 21] [760-E-F; 765-C-D; 766-E-F]

Delhi Administration vs. Tribhuvan Nath and Ors. **(1996) 8 SCC 250: 1996 (1) Suppl. SCR 184 – relied on.**

Govindaraju vs. State of Karnataka **(2009) 14 SCC 236;** *Lokeman Shah & Anr. vs. State of West Bengal* **(2001) 5 SCC 235: 2001 (2) SCR 1095;** *Ramanand & Ors. vs. State of H.P.* **(1981) 1 SCC 511: 1981 (2) SCR 444 and** *Ram Bahadur @ Denny vs. State* **1996 Crl.L.J. 2364 – referred to.**

6. The finding of guilt recorded by the High Court has been challenged mainly on the basis of minor

discrepancies in the evidence. So far the instant case is concerned, those minor discrepancies would not go to the root of the case and shake the basic version of the witnesses when as a matter of fact important probabilities factor echoes in favour of the version narrated by the witnesses. [Para 22] [766-G-H]

Bharwada Bhoginbhai Hirjibhai vs. State of Gujarat **(1983) 3 SCC 217: 1983 (3) SCR 280 and** *Leela Ram (dead) through Duli Chand vs. State of Haryana & Anr.* **(1999) 9 SCC 525 1999 (3) Suppl. SCR 435 – relied on.**

7. On re-appraisal of the entire evidence of the prosecution witnesses including the eye-witnesses, namely, PW-1, PW-4, PW-5, PW-6, PW-7 it is found that their testimonies remained unshaken except some minor discrepancies which have to be ignored. On analysis of the facts and evidence on record, it is clear that the High Court correctly appreciated the evidence and reversed the findings of the trial court. [Paras 23, 24] [769-B-D]

Case Law Reference:

(2009) 14 SCC 236	**referred to**	**Para 9**
2001 (2) SCR 1095	**referred to**	**Para 9**
1981 (2) SCR 444	**referred to**	**Para 9**
1996 (1) Suppl. SCR 184	**relied on**	**Para 9**
1996 Crl.L.J. 2364	**referred to**	**Para 9**
1961 SCR 120	**relied on**	**Para 18**
2011 (4) SCR 1176	**relied on**	**Para 19**
1996 (1) Suppl. SCR 184	**referred to**	**Para 20**
1983 (3) SCR 280	**relied on**	**Para 22**
1999 (3) Suppl. SCR 435	**relied on**	**Para 22**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1794 of 2008.

From the Judgment and Order dated 27.08.2008 of the High Court of Delhi at New Delhi in Criminal Appeal No. 6 of 1992.

Prasoon Kumar, Kshitij Kumar, Deepak Chanderpal, V.K. Sidharthan for the Appellants.

Rakesh Khanna, ASG, J.S. Attri, Rashmi Malhotra, Sadhana Sandhu, Harsh Prabhakar, Seema Rao, Priyanka Bharihoke, Anil Katiyar for the Respondent.

The Judgment of the Court was delivered by

M.Y. EQBAL, J. 1. The present appeal has been filed under Section 379 of the Criminal Procedure Code, 1973 read with Section 2 of the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 1970 against the judgment and order dated 27th August, 2008 passed by the Delhi High Court in Criminal Appeal No. 6 of 1992 reversing the order of acquittal dated 31st October, 1990 passed by the Additional Sessions Judge, Delhi in Sessions Case No. 12 of 1988 and convicting the appellants under Sections 147/149/449/436/302/395/396 of the Indian Penal Code, 1860 and sentencing each of them to undergo rigorous imprisonment and fine under different sections of IPC.

2. During the pendency of this appeal, appellant No. 4 Ram Lal is stated to have died on 23rd May, 2011. Therefore, the appeal stands abated so far as he is concerned.

3. The case of the prosecution in brief is that Harjit Kaur (PW-1), a resident of House No. RZ-1/295, Geetanjali Park, West Sagarpur, New Delhi, apprehensive of harm to her family because of riots which followed the assassination of late Prime Minister Indira Gandhi on 31st October, 1984, had sent both her daughters and a son to her father Govind Singh's house at

BE-7, Hari Nagar, New Delhi. In her typed complaint (Ex. PW1/A) lodged on 7th November, 1984, she stated that a mob including appellant No. 1 Lal Bahadur *alias* Lal Babu along with appellant No. 2 Surender P. Singh and Charan, who lived in her neighbourhood, had attacked her house and looted household articles on 1st November, 1984 at about 9/9.30 a.m. Fearing threats of communal violence, the complainant Harjit Kaur and her family had taken shelter at the residence of Dr. Harbir Sharma (PW-5) who had his house opposite to that of the complainant and had remained there with her husband (Rajinder Singh) and father-in-law (Sardool Singh) for 2-3 days. On 3rd November, 1984, the appellants came to the house of Dr. Harbir Sharma in the morning and protested for having given shelter to the complainant's family and threatened that if the complainant and her family to whom shelter had been given were not handed over to them, they would burn the house. Thereupon, Dr. Harbir Sharma went out to get help from the Military. At about 9.00 a.m., a mob of more than 500 persons, including the appellants, came and attacked the house of Dr. Harbir Sharma where the complainant was hiding with her husband and father-in-law. The appellants were having one cane of oil and iron *sabbal* and were leading the mob. As per the complainant, her husband and father-in-law had taken shelter in one of the room on the ground floor and locked themselves, while the family of Dr. Harbir Sharma and she herself had gone upstairs to the roof. At the time the mob was assembling, the complainant was present on the roof of one of the neighbours of Dr. Harbir Sharma whose house was in the same row. As per complainant's testimony, the mob was armed with *sabbals, ballams, sariyas* and *lathis*. She stated that the appellants hit the door of the house with iron *sabbals* but the door could not be broken open. They thereupon broke the windowpane and entered the house and set the house on fire. The complainant's husband and father-in-law were burnt alive and their half burnt bodies were put in gunny bags. The complainant's house was also burnt. It is the prosecution's case that Sushil Kumar (PW-4) (brother-in-law of Dr. Harbir Sharma),

Dr. Harbir Sharma (PW-5), Jagdish (PW-6) and Mohar Pal (PW-7) also saw the house being set on fire and the deceased Rajinder Singh and Sardool Singh were being attacked with *sabbals*, burnt and their mortal bodies put into gunny bags. Sushil Kumar, on first seeing Dr. Sharma's house being put on fire, had rushed to call Dr. Sharma who had gone to call the police. Both of them rushed back to find the house being burnt by the appellants and Sardoor Singh as well as Rajinder Singh were killed. They saw the appellants using *dandas* to put the bodies of the deceased in gunny bags. However, some persons gathered there saved Dr. Sharma and his family members and he lodged the report on 5th November, 1984. As per the deposition of the complainant, after the mishap, with the help of one boy she went to Hari Nagar at her father's house and also to police station Janakpuri and after the help of Gorkha Regiment was provided she returned to Sagarpur on 3rd November, 1984 but she could not get the dead bodies of her husband and father-in-law and her entire house was burnt and the house of Dr. Sharma was also entirely burnt along with household articles. On 7th November, 1984, she made a complaint in Police Station Delhi Cantt. The FIR was registered on 9th November, 1984. On completion of the investigation, challan was filed against the accused-appellants and they were charged of having committed offences under various sections of IPC. In support of its case, the prosecution examined as many as nine witnesses. Each of the accused denied the incriminating circumstances put to them and stated that they have been falsely implicated because Dr. Harbir Sharma had enmity with them. However, none of the accused led any evidence in defence.

4. The trial court on consideration of testimony of the witnesses held that the prosecution has failed to prove the charges levelled against the appellants beyond all reasonable doubt and acquitted the accused appellants.

5. The trial court held firstly that delay in lodging the FIR

was not properly explained because the complainant (PW-1) had gone to Police Station Janakpuri on 3rd November, 1984 and sought military help from there with a view to recover dead bodies of her husband and father-in-law, but she had not lodged the report on 3rd November, 1984. Similarly, the court held that there was delay on the part of Dr. Harbir Sharma (PW-5) in making the complaint to the police on 5th November, 1984 for the incident of 3rd November, 1984. The trial court also noticed delay of 27 days in recording statements of PW-4, PW-6 and PW-7. Secondly, the trial court held that the complainant had made prevaricating statements regarding presence of two accused persons i.e. appellant No.2 Surender and appellant No. 3 Virender on 1st November, 1984 without any corroboration as also regarding putting of the half burnt dead bodies in the gunny bags on 3rd November, 1984, inasmuch as she had not named accused–appellant No. 4 (Ram Lal) and appellant No. 3 (Virender Singh) in her complaint (Ex.PW1/A), though they were identified in the court by her; and even in her statement recorded second time she had stated that she had not seen accused-appellant No. 2 Surender and appellant No. 3 Virender on 1st November, 1984 whereas in her first statement recorded on 21st April, 1986 she had stated that on 1st November, 1984 accused-appellant No. 1 Lal Bahadur, appellant No. 3 Virender and appellant No. 4 Ram Lal were amongst the persons who had looted her house. The trial court further noted that in her complaint (Ex. PW1/A), the complainant had mentioned that the half burnt bodies of her husband and father-in-law were put in gunny bags by the accused (Lal Babu, Surender and Charan) on 3rd November, 1984, whereas in her statement before the court she stated that she did not actually see the accused putting burnt dead bodies of deceased into gunny bags and she only heard saying the accused persons 'put half burnt dead bodies in the gunny bags'. Thirdly, the trial court noticed certain contradictions in the statements of eye-witnesses, namely, Sushil Kumar (PW-4), Dr. Harbir Sharma (PW-5), Jagdish (PW-6) and Mohar Pal (PW-7). The trial court noted that certain facts were not mentioned in the complaint

(Ex.PW-5/1) by PW-5 and the names of two accused Ram Lal and Virender also did not find mention therein. The trial court further observed on the basis of contradictions pointed out in the statements that PW-5 had not come back and witnessed the burning of his house as well as the beating and killing of deceased persons as deposed by him. Fourthly, the trial court observed that the prosecution witnesses PW-4, PW-6 and PW-7 were not the actual witnesses to the occurrence because had it been so, PW-5 would definitely have mentioned their names in Ex. PW5/1 and held that the possibility of PW-4, PW-6 and PW-7 being procured or to have been made to depose for PW-5 cannot be ruled out. The trial court thus held:

> "……. all these circumstances that delay of 11 days of lodging FIR Ex. PW1/A, the delay of 2 days in lodging complaint Ex.PW5/1, non-mention of the names of two accused Virender and Ram Lal in the FIR as well as in the complaint along with the element of interestedness on the part of PWs, coupled with the fact that statements of PW4, PW6 and PW7 have been recorded after an unjustified and long delay of 27 days, cast a suspicion upon the wrap and woof i.e. texture in the prosecution story and in my opinion the prosecution has not been able to establish its case against any of the accused beyond reasonable doubt.
>
> In view of my above discussion, I find that the prosecution has failed to prove its case beyond all shadows of doubt. Thus giving benefit of doubt, I acquit all the accused persons for the offences they have been charged. They are on bail, their bail bonds are cancelled. Sureties are discharged. …."

6. Against the judgment of the trial court, the State preferred an appeal before the High Court. The Division Bench reversed the above findings of the trial court and convicted the accused-appellants under Sections 147/149/449/436/302/395/396, IPC and sentenced each of them for the offences committed under aforementioned sections of IPC.

7. It is in these circumstances that the present appeal has been filed by the accused-appellants under Section 379 of the Code of Criminal Procedure read with Section 2 of the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 1970 against the judgment and order of the Delhi High Court reversing the order of acquittal passed by the trial court.

8. Mr. Prasoon Kumar, learned counsel for the appellant-accused persons assailed the impugned judgment passéd by the High Court as being illegal and perverse in law. Learned counsel firstly contended that the High Court has erred in law in appreciating the deposition of the eye-witnesses as the deposition of eye-witnesses is not above suspicion and is full of contradictions, inconsistencies and emblazonments and further the deposition made by the alleged eye-witnesses cannot be accepted as trustworthy and reliable. As per the observation of trial court, as regards the statements of eye-witnesses, namely, Dr. Harbir Sharma (PW-5), Sushil Kumar (PW-4), Jagdish (PW-6) and Mohar Pal (PW-7) it may be pointed out that there are certain contradictions in the statement of PW-5 and in his complaint Ex.PW-5/1. Learned counsel then contended that the High Court has not appreciated the contradictions in the deposition of PW-1 (Harjit Kaur). As per the complaint Ex. PW1/A and statement of PW-1, the incident had taken place on two dates i.e. on 1st November, 1984 and 3rd November, 1984. On 1st November, 1984, the accused Lal Babu, Surender and one Charan who has not been challaned by the police, having collected some other persons, came to her house and looted the household articles. In her statement, she has stated that she knew all the four accused persons as they were the residents of her locality and identified them in the deck, but she has not named accused Ram Lal and Virender in Ex.PW-1/A. PW-1 is the sole eye-witness regarding the incident which took place on 1st November, 1984 and other prosecution witnesses related to the incident dated 3rd November, 1984 as they have not testified to the incident dated 1st November, 1984. Besides this, PW-

1 has not named Ram Lal and Virender in her complaint to the police on the basis of which FIR was registered. She has also deposed that she furnished a list of articles looted by the mob from her house but the prosecution has neither placed any list of looted articles as alleged by PW-1 nor any recovery from any of the accused or from any place in respect of the looted articles has been effected by the Investigating Officer. Thus, there is no corroboration to the testimony of PW-1 regarding the incident of looting/dacoity, which took place on 1st November, 1984. Further, the High Court has failed to appreciate that ingredients of Section 390 IPC are not made out at all in the present case. The High Court did not appreciate the facts of the case because to convict a person in a case of dacoity, there must be a robbery committed in the first place. Further, the High Court erred in law by not appreciating the discrepancies/contradictions in the testimonies of Sushil Kumar (PW-4), Jagdish (PW-6) and Mohar Pal (PW-7), which were rightly appreciated by the trial court while passing the order of acquittal. PW-4 is co-brother (Sadhu) of PW-5. He has admitted in his cross-examination that he had worked as a compounder. According to PW-6, he saw all the accused persons putting the above mentioned two houses on fire, beating and killing the deceased and also putting the dead bodies of the deceased into gunny bags along with many other persons who were also present. He has stated that his statement was recorded within 4-5 days of the occurrence whereas in fact as per the statement of I.O. (PW-9) and as per record his statement was recorded on 30th November, 1984 i.e. after unexplained delay of about 27 days. Learned counsel submitted that there was no recovery of the dead bodies of deceased, namely, Rajinder Singh and Sardool Singh. Besides, the prosecution did not produce any vital/scientific piece of evidence on record before the trial court that any person was burnt alive on 3rd November, 1984 in the premises bearing No. RZ-3/295, Gitanjali Park, Sagarpur, New Delhi. The prosecution had ample opportunities to collect evidence from the place of alleged occurrence like ashes, blood stains etc. to prove the alleged killing and burning of two

persons alive. Learned counsel further contended that the High Court did not appreciate the fact that there was a delay of 07 days in lodging the FIR, as the alleged incident had taken place on two different dates i.e. 1st November, 1984 and 3rd November, 1984. As per the version of PW-1, Harjit Kaur, she went to call the police/military assistance on 3rd November, 1984 and she was present in Police Station Janakpuri, but it is an admitted fact that FIR was not lodged by her on 3rd November, 1984 itself. It was further submitted that the High Court also erred in not appreciating that the explanation as a reasoning for justification of delay is not only unjustified but also improper and imaginary one. The reason given by the High Court regarding delay in lodging the FIR is wrong and perverse to the facts and circumstances of the case. It is an admitted fact that PW-1 Harjit Kaur went to call the police and she came back from the police station in a military truck along with officials of Gorkha Regiment, she had enough time to narrate the whole incident to the police, so the denial of PW-1 that she did not narrate the whole incident to the police on 3rd November, 1984 is unbelievable and cannot be accepted in any manner whatsoever. Further contention is that the High Court failed to appreciate that the statement of eye-witnesses, PW-4, PW-6 and PW-7 were recorded after the unexplained delay of 27 days which is fatal to the prosecution case. This fact was meticulously considered by the trial court while acquitting the appellants from all the charges.

9. *Per contra*, Mr. Rakesh Khanna, learned Additional Solicitor General, firstly contended that the findings of fact recorded by the trial court and the conclusion arrived at are perverse in law and, therefore, the High Court in exercise of appellate power has rightly reversed the findings of the trial court. Learned ASG drew our attention to the testimonies of the prosecution witnesses and submitted that except minor discrepancies the prosecution has been able to prove the guilt of the accused beyond all reasonable doubts. On the question of appreciation of evidence and the consequence of non-

recovery of dead bodies, the learned ASG relied upon the decisions of this Court in *Govindaraju vs. State of Karnataka,* (2009) 14 SCC 236, *Lokeman Shah & Anr. vs. State of West Bengal,* **(**2001) 5 SCC 235 and *Ramanand & Ors. vs. State of H.P.,* (1981) 1 SCC 511. Learned ASG also put reliance on the decision of this Court in the case of *Delhi Administration vs. Tribhuvan Nath & Ors.,* (1996) 8 SCC 250 which case also related to the some instance of 1984 when Sikh communities were attacked and murdered, but the dead bodies were not recovered.

10. We have carefully considered the submissions of learned counsel on either side and analysed the testimonies of the witnesses. The various decisions relied upon by the counsel have also been considered by us.

11. At the very outset, we must take notice of the fact that the instant incident as alleged is not the solitary incident, but such incidents took place in almost all parts of the country, especially in Delhi where many innocent persons of one community had been murdered and their properties had been looted because of the assassination of the Prime Minister of this country, which took place on 31st October, 1984. After hearing the shocking news of assassination of the Prime Minister, thousands of people forming a mob in different areas and localities committed atrocities to the Sikh communities and they were murdered and set ablazed. Therefore, the evidence has to be appreciated carefully without going into the minor discrepancies and contradictions in the evidence.

12. The High Court on the first issue regarding delay in filing of FIR held that the circumstances of the present case are extraordinary as the country was engulfed in communal riots, curfew was imposed, Sikh families were being targeted by mobs of unruly and fanatic men who did not fear finishing human life, leave alone destroying/burning property. As regards recording of the statements of witnesses by the police on 30th November, 1984 after a delay of 27 days, the High Court

observed that the city was in turmoil and persons having witnessed crimes would naturally be apprehensive and afraid in coming forward to depose against the perpetrators, till things settled down; that the State machinery was overworked; and in such circumstances, delay in recording the statements of witnesses cannot be a ground to reduce its evidentiary value or to completely ignore it. The High Court further found that the witnesses prior to the incident were the residents of the same area and knew the assailants and it was not the case of the appellants that the delay could have resulted in wrong identification of the accused.

13. As regards contradictions in the testimony of various witnesses, the High Court observed as under :

> "19. ……. Harjit Kaur had mentioned that her house was looted by a mob comprising, inter alia, of Lal Babu and Surinder. Her subsequent mentioning of names of other respondents does not appear to be an improvement of such importance that her entire eye witness account which finds corroboration by other witnesses can be overlooked. At best here a doubt may arise only with regard to complicity of Virender and Ram Lal (it seems to have mistakenly typed as Surinder in ….. trial court judgment) because later she had identified the other respondents Virender and Ram Lal also as having participated in looting her house.
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> xxx xxx xxx
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> 23. It is no doubt true that the entire case of the prosecution hinges upon the neighbours and the widow of the victim, who may be interested in securing conviction of the accused persons but no rule of law prescribes that conviction cannot be based on the testimony of such witnesses. The only requirement of law is that the testimony of those witnesses must be cogent and credible. Here it

> is apposite to extract the substance of the testimony of PWs. …….
>
> xxx xxx xxx
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> 27. On reading of the evidence of above witnesses, we find that the testimonies of the witnesses are trustworthy. This we say so on account of the fact that their evidence has been consistent and they have also remained unshaken during their cross examination. Thus, we do not find any reason to discard the evidence of these witnesses in totality. They do not vary in any manner on any material fact and if there are any discrepancies, the same are trivial, immaterial and could not be made the basis of the acquittal."

We fully endorse the view expressed by the High Court and reject the contentions raised by the appellants.

14. On the contention of the appellants that dead bodies were never recovered and found and as such there is no evidence with regard to the fact that they were ever killed and that too by the accused, the High Court referring to *Rama Nand & Ors. vs. State of H.P.,* (1981) 1 SCC 511 and *Ram Bahadur @ Denny vs. State,* 1996 Crl.L.J. 2364, observed that it is well settled law that in a murder case to substantiate the case of the prosecution it is not required that dead bodies must have been made available for the identification and discovery of dead body is not *sine qua non* for applicability of Section 299 of IPC.

15. As regards independence of witnesses or their procurement or their interestedness, the High Court observed that the factors pointed out by the trial court merely bring out a relation of doctor patient or pupil association but do not show that all witnesses had colluded against the accused with some ulterior motives. With regard to the allegation of enmity, no evidence was found to have been led. The High Court on this

issue found that "there is no suggestion of animosity or inimical relationship with Harjit Kaur. There would be no reason for Dr. Harbir Sharma to procure the witnesses for Harjit Kaur. The only interest of Dr. Harbir Sharma could have been to claim compensation for the burning of the house, which was available in any case as the burning of the house was an admitted position. Besides this, each one of them was resident of the same area and they were natural witnesses and not planted ones. The High Court while allowing the appeal of the State thus observed:

> "40. …… we are of the view that the evidence of even one eye witness was sufficient in itself to implicate the respondents, namely, Surinder, Virender, Ram Lal and Lal Bahadur for the crime committed by them on 01.11.1984 & 03.11.1984. Here, we have four eye witnesses, who have seen, with their own eyes, the gruesome murder of the deceased persons.
>
> 41. We are also not convinced that the delay in filing FIR or delay in recording the statements of PW4, PW6 and PW7 has vitiated the trial. Mere delay in examination of the witnesses for few days cannot in all cases be termed to be fatal so far as the prosecution case is concerned when the delay is explained. There may be several reasons. Admittedly, the instant case relates to the riots, which took place on account of the assassination of late Mrs. Indira Gandhi, which led to the complete breakdown of the law and order machinery. Chaos and anarchy permeated every nook and corner of the city. In the above circumstances, we feel that the delay has been satisfactorily explained. Whatever be the length of delay, the court can act on the testimony of the witnesses if it is found to be reliable. Further, the allegations of non-independent witnesses and animosity of Dr. Sharma with the respondents cannot cast doubts on the eyewitness account of Harjit Kaur."

> xxx xxx xxx
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> 43. It is not an ordinary routine case of murder, loot and burning. It is a case where the members of one particular community were singled out and were murdered and their properties were burnt and looted. Such lawlessness deserved to be sternly dealt with as has been said by the Supreme Court in *Surja Ram vs. State of Rajasthan,* 1997 CRLJ 51, the Court has also do keep in view the society's reasonable expectation for appropriate deterrent punishment confining to the gravity of the offence and consistent with the public abhorrence for the heinous crime committed by the accused. The sentence has to be deterrent so as to send a message for future.
>
> 44. The crime's punishment comes out of the same root. The accused persons should have no cause for complaint against it. Their sin is the seed. The terrible terror created by them is a cause for concern for the society. Courts are empowered by the statute to impose effective penalties on the accused as well as even on those who are their partners in the commission of the heinous crime."

16. Thus it is clear that the High Court re-appreciated the evidence of the witnesses in detail and meticulously examined the facts and circumstances of the case in its right perspective and recorded a finding that the prosecution has proved the case against the appellants.

17. The contention of Mr. Kumar, learned counsel appearing for the appellants is that as the trial court after having appreciated the evidence in detail acquitted the appellants, the High Court normally should not have taken a different view. We are unable to accept the contentions made by the learned counsel. It is well settled proposition that in an appeal against acquittal, the appellate court has full power to review the evidence upon which the order of acquittal is founded. The High Court is entitled to re-appreciate the entire evidence in order

to find out whether findings recorded by the trial court are perverse or unreasonable.

18. The law has been well settled by a 3-Judge Bench judgment of this Court in the case of *Sanwat Singh & Ors. vs. State of Rajasthan* AIR 1961 SC 715 (para 9)**,** wherein this Court observed:

> "The foregoing discussion yields the following results: (*1*) an appellate court has full power to review the evidence upon which the order of acquittal is founded; (*2*) the principles laid down in *Sheo Swarup's case, 61 Ind. App 398: (AIR 1934 PC 227 (2),* afford a correct guide for the appellate court's approach to a case in disposing of such an appeal; and (*3*) the different phraseology used in the judgments of this Court, such as, (*i*) "substantial and compelling reasons", (*ii*) "good and sufficiently cogent reasons", and (*iii*) "strong reasons", are not intended to curtail the undoubted power of an appellate court in an appeal against acquittal to review the entire evidence and to come to its own conclusion; but in doing so it should not only consider every matter on record having a bearing on the questions of fact and the reasons given by the court below in support of its order of acquittal in its arriving at a conclusion on those facts, but should also express those reasons in its judgment, which lead it to hold that the acquittal was not justified".

19. So far as the contradictions and inconsistencies in the evidence of the prosecution witnesses, as pointed out by the counsel for the appellants, are concerned, we have gone through the entire evidence and found that the evidence of the witnesses cannot be brushed aside merely because of some minor contradictions, particularly for the reason that the evidence and testimonies of the witnesses are trustworthy. Not only that, the witnesses have consistently deposed with regard to the offence committed by the appellants and their evidence

remain unshaken during their cross-examination. Mere marginal variation and contradiction in the statements of the witnesses cannot be a ground to discard the testimony of the eye-witness who is none else but the widow of the one deceased. Further, relationship cannot be a factor to affect credibility of a witness.

In the case of *State of Uttar Pradesh vs. Naresh & Ors.* (2011) 4 SCC 324, this Court observed:-

> "**30.** In all criminal cases, normal discrepancies are bound to occur in the depositions of witnesses due to normal errors of observation, namely, errors of memory due to lapse of time or due to mental disposition such as shock and horror at the time of occurrence. Where the omissions amount to a contradiction, creating a serious doubt about the truthfulness of the witness and other witnesses also make material improvement while deposing in the court, such evidence cannot be safe to rely upon. However, minor contradictions, inconsistencies, embellishments or improvements on trivial matters which do not affect the core of the prosecution case, should not be made a ground on which the evidence can be rejected in its entirety. The court has to form its opinion about the credibility of the witness and record a finding as to whether his deposition inspires confidence.
>
> > "*9*. Exaggerations per se do not render the evidence brittle. But it can be one of the factors to test credibility of the prosecution version, when the entire evidence is put in a crucible for being tested on the touchstone of credibility." (Ed: As observed in Bibhuti Nath Goswami v. Shiv Kumar Singh (2004) 9 SCC 186 p. 192.
>
> Therefore, mere marginal variations in the statements of a witness cannot be dubbed as improvements as the same may be elaborations of the statement made by the

witness earlier. The omissions which amount to contradictions in material particulars i.e. go to the root of the case/materially affect the trial or core of the prosecution's case, render the testimony of the witness liable to be discredited. [Vide *State* v. *Saravanan*, (2008) 17 SCC 587, *Arumugam* v. *State (2008) 15 SCC 590*, *Mahendra Pratap Singh* v. *State of U.P. (2009) 11 SCC 334,* and *Sunil Kumar Sambhudayal Gupta (Dr.)* v. *State of Maharashtra*. (2010) 13 SCC 657.]

20. Much stress has been given by the learned counsel on the non-recovery of the dead-bodies and the looted articles when the allegation is that after killing the persons they put the dead bodies into gunny bags. The aforesaid plea cannot in any way improve the case of the appellants. This Court in the case of *Delhi Administration vs. Tribhuvan Nath and Ors.,* (1996) 8 SCC 250, has considered the same issue as raised by the appellants herein. In that case, the accused were prosecuted for committing murder and throwing the dead body into drains or setting it ablaze. Their properties were looted and their houses were burnt because of the assassination of Prime Minister in 1984. After re-appreciation of the evidence, this Court held as under:-

"5. If the evidence of the aforesaid PWs is read as a whole, which has to be, what we found is that on 1-11-1984, at first around 11 a.m., a mob of about 200 people came to Block No. P-1, Sultan Puri, which then had 30 to 35 jhuggies. Deceased Himmat Singh and Wazir Singh used to live in those jhuggies. The mob which came around 11 a.m. was said to have been armed with iron rods and sticks; but then it was not causing any damage. Rather, it was being advised by this mob that the persons staying in jhuggies should get their hair cut if they wanted to save their lives. The inmates felt inclined to accept this advice and they were in the process of cutting their hair. But then another mob came which, according to PW 11,

consisted of 200-250 persons — this number has been given as 1000-1200 by PW 2. According to PW 4 the mob consisted of 100 persons. PW 8 did not give the number. We are really not concerned with the number as such. Suffice it to say that the mob was a big one. This mob caused havoc and the members of this mob too were armed with iron rods and sticks. It is at the hands of this mob that, according to the aforesaid PWs, Himmat Singh and Wazir Singh lost their lives. Not only this, to believe PW 4, her son Wazir Singh was burnt to death and thrown into the adjoining nullah. PW 2 also had stated about the mob throwing the murdered persons in the adjoining nullah. As thousands of persons have been so dealt with, it would be too much to expect production of corpus delicti. We have mentioned about this aspect at this stage itself because one of the reasons which led the High Court to acquit the respondents is non-production of corpus delicti. We are afraid the High Court misread the situation; misjudged the trauma caused."

21. It is well settled that discovery of dead body of the victim has never been considered as the only mode of proving the *corpus delicti* in murder. In fact, there are very many cases of such nature like the present one where the discovery of the dead body is impossible, specially when members of a particular community were murdered in such a violent mob attack on Sikh community in different places and the offenders tried to remove the dead bodies and also looted articles.

22. As noticed above, the finding of guilt recorded by the High Court has been challenged by the learned counsel mainly on the basis of minor discrepancies in the evidence. So far the instant case is concerned, those minor discrepancies would not go to the root of the case and shake the basic version of the witnesses when as a matter of fact important probabilities factor echoes in favour of the version narrated by the witnesses. This Court in the case of *Bharwada Bhoginbhai Hirjibhai vs. State*

of Gujarat, (1983) 3 SCC 217 held that much importance cannot be attached to minor discrepancies on the following reasons:-

"(*1*) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen.

(*2*) Ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details.

(*3*) The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind, whereas it might go unnoticed on the part of another.

(*4*) By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape-recorder.

(*5*) In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guess-work on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the time-sense of individuals which varies from person to person.

(*6*) Ordinarily a witness cannot be expected to recall accurately the sequence of events which takes place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on.

(*7*) A witness, though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross-examination made by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The sub-conscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him — Perhaps it is a sort of a psychological defence mechanism activated on the spur of the moment."

In the case of *Leela Ram (dead) through Duli Chand vs. State of Haryana & Anr.,* (1999) 9 SCC 525, this Court observed:-

"**11.** The Court shall have to bear in mind that different witnesses react differently under different situations: whereas some become speechless, some start wailing while some others run away from the scene and yet there are some who may come forward with courage, conviction and belief that the wrong should be remedied. As a matter of fact it depends upon individuals and individuals. There cannot be any set pattern or uniform rule of human reaction and to discard a piece of evidence on the ground of his reaction not falling within a set pattern is unproductive and a pedantic exercise.

12. It is indeed necessary to note that one hardly comes across a witness whose evidence does not contain some exaggeration or embellishment — sometimes there could even be a deliberate attempt to offer embellishment and sometimes in their over anxiety they may give a slightly exaggerated account. The court can sift the chaff from the grain and find out the truth from the testimony of the witnesses. Total repulsion of the evidence is unnecessary. The evidence is to be considered from the point of view of trustworthiness. If this element is satisfied, it ought to

inspire confidence in the mind of the court to accept the stated evidence though not however in the absence of the same."

23. We have re-appraised the entire evidence of the prosecution witnesses including the eye-witnesses, namely, PW-1 Harjit Kaur, PW-4 Sushil Kumar, PW-5 Dr. Harbir Sharma, PW-6 Jagdish Kumar, PW-7 Mohar Pal and found that their testimonies have remained unshaken except some minor discrepancies which have to be ignored.

24. In view of the aforesaid analysis of the facts and evidence on record, we reach the inescapable conclusion that the High Court correctly appreciated the evidence and reversed the findings of the trial court.

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

B.B.B. Appeal dismissed.

MANOJ H. MISHRA
v.
UNION OF INDIA & ORS.
(Civil Appeal No. 2969 of 2013)

APRIL 09, 2013

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

Labour Law – Misconduct – Removal – Propriety – Appellant, workman and trade union leader, at an Atomic power project – Accident at the project due to heavy rains – Appellant wrote letter to Editor of a vernacular newspaper narrating about the incident and also highlighting serious lapses on the part of the project authorities in regard to functioning of the project and the imminent danger to it – Removal of appellant on ground that he unauthorisedly communicated to the Press, official information concerning the project; made statement, which amounted to criticism of the project management or casting of aspersion on the integrity of its authorities and enabled the press to create a news story creating embarrassment to the project as well as to the State authorities – Punishment imposed on the appellant – Held: Was not disproportionate – Appellant without any justification assumed the role of vigilante – Action of appellant was not merely to highlight shortcomings in the organization – Appellant indulged in making scandalous remarks by alleging that there was widespread corruption within the organization – Such allegations clearly had a deleterious effect throughout the organization apart from casting shadows of doubts on the integrity of the entire project – Conduct of appellant did not fall within the high moral and ethical standard required of a bona fide "whistle blower" – Employees working within the highly sensitive atomic organization are sworn to secrecy and have to enter into a confidentiality agreement – Appellant failed to maintain the

standards of confidentiality and discretion as required – No injustice much less any grave injustice done to the appellant.

Labour Law – Departmental Enquiry – Admission by delinquent workman – Closure of enquiry proceedings – Removal – Plea for re-opening of the enquiry – Rejected by the Appellate as well as the Revisional Authority – High Court declined to reopen the issue – On appeal, held: Once the Enquiry Officer had declined to accept the conditional admission made by the appellant-delinquent, it was open to him to deny the charges – But he chose to make an unequivocal admission, instead of reiterating his earlier denial as recorded in preliminary hearing – Extraordinary jurisdiction u/Article 136 cannot be exercised for re-opening the entire issue at this stage – Such power reserved to enable the Supreme Court to prevent grave miscarriage of justice – It is normally not exercised when the High Court has taken a view that is reasonably possible – On facts, appellant failed to demonstrate any perversity in the decision rendered by the High Court – He cannot now be permitted to resile from the admission made before the Enquiry Officer – Constitution of India, 1950 – Article 136.

Corruption – Prevention of – Informer – "Whistle blower" – Who is – Held: Every informer cannot automatically be said to be a bonafide "whistle blower" – "Whistle blower" would be a person who possesses the qualities of a crusader – His honesty, integrity and motivation should leave little or no room for doubt – Primary motivation for action of a person to be called a "whistle blower" should be to cleanse an organization – It should not be incidental or byproduct for an action taken for some ulterior or selfish motive – On facts, the appellant-delinquent did not fulfill the criteria for being granted the status of a "whistle blower".

The appellant was a workman at Kakarapar Atomic Power Project (KAPP) at Surat, Gujarat. He was also the General Secretary of the recognized trade Union of

KAPP. There was an accident at the said Atomic power project due to heavy rains, when flood water entered into it and more than 25 feet of the turbine adjacent to the Nuclear reactors was submerged under water.

The appellant wrote a letter to the Editor of a vernacular newspaper 'Gujarat Samachar' narrating about the said incident and also highlighting serious lapses on the part of the authorities in regard to functioning of the project and the imminent danger to KAPP.

The respondent authorities placed the appellant under suspension, in contemplation of disciplinary proceedings. The appellant was served with a charge sheet for - a) unauthorisedly communicating to the Press, official information concerning the Kakrapar Atomic Power Project; b) making statement, which amounted to criticism of the Project management or casting of aspersion on the integrity of its authorities; and c) establishing contacts with the Press correspondent and feeding him with vital information which came into his possession in the course of his duty as a workman in the Project, and thereby enabling the press to create a news story about the Project creating embarrassment to the Project as well as to the State authorities.

The appellant categorically admitted all the charges leveled against him before the Enquiry Officer. In view of the admission, the Enquiry Officer closed the enquiry proceedings. The charges were held to be proved against the appellant. Acting on the enquiry report, the Disciplinary Authority ordered the removal of the appellant from service of KAPP.

The order was upheld by the Appellate as well as the Revisional authority. Thereafter, the order was challenged by way of a writ petition which was dismissed by a Single

Judge of the High Court. LPA against the judgment of the Single Judge was dismissed by the Division Bench. All these orders were challenged in the present appeal.

The question which arose for consideration in the present appeal was whether the punishment imposed on the appellant was shockingly disproportionate to the misconduct.

Dismissing the appeal, the Court

HELD:1. In view of the admissions made by the appellant, no evidence was adduced before the Enquiry Officer by either of the parties. Once the Enquiry Officer had declined to accept the conditional admission made by the appellant, it was open to him to deny the charges. But he chose to make an unequivocal admission, instead of reiterating his earlier denial as recorded in preliminary hearing. The appellant cannot now be permitted to resile from the admission made before the Enquiry Officer. The plea to re-open the enquiry has been rejected by the Appellate as well as the Revisional Authority. Thereafter, it was not even argued before the Single Judge. The submission was confined to the quantum of punishment. In LPA, the Division Bench declined to reopen the issue. In such circumstances, this Court is not inclined to exercise extraordinary jurisdiction under Article 136 for reopening the entire issue at this stage. Such power is reserved to enable this Court to prevent grave miscarriage of justice. It is normally not exercised when the High Court has taken a view that is reasonably possible. The appellant has failed to demonstrate any perversity in the decisions rendered by the Single Judge or the Division Bench of the High Court. [Para 27] [792-F-H; 793-A-B]

2.1. It cannot be said that the appellant was acting as a "whistle blower". It is a matter of record that the

appellant is educated only upto 12th standard. He is neither an engineer, nor an expert on the functioning of the Atomic Energy Plants. Apart from being an insider, the appellant did not fulfill the criteria for being granted the status of a "whistle blower". One of the basic requirements of a person being accepted as a "whistle blower" is that his primary motive for the activity should be in furtherance of public good. In other words, the activity has to be undertaken in public interest, exposing illegal activities of a public organization or authority. The conduct of the appellant does not fall within the high moral and ethical standard that would be required of a bona fide "whistle blower". [Paras 28, 33] [793-C; 797-C-F]

2.2. The appellant without any justification assumed the role of vigilante. He was merely seeking publicity. The newspaper reports as well as the other publicity undoubtedly created a great deal of panic among the local population as well as throughout the State of Gujarat. Every informer cannot automatically be said to be a bonafide "whistle blower". A "whistle blower" would be a person who possesses the qualities of a crusader. His honesty, integrity and motivation should leave little or no room for doubt. It is not enough that such person is from the same organization and privy to some information, not available to the general public. The primary motivation for the action of a person to be called a "whistle blower" should be to cleanse an organization. It should not be incidental or byproduct for an action taken for some ulterior or selfish motive. [Para 34] [797-F-H; 798-A-B]

2.3. The action of the appellant was not merely to highlight the shortcomings in the organization. The appellant had indulged in making scandalous remarks by alleging that there was widespread corruption within the organization. Such allegations would clearly have a

deleterious effect throughout the organization apart from casting shadows of doubts on the integrity of the entire project. It is for this reason that employees working within the highly sensitive atomic organization are sworn to secrecy and have to enter into a confidentiality agreement. The appellant had failed to maintain the standard of confidentiality and discretion which was required to be maintained. This is not a case of 'glaring injustice'. The punishment imposed on the appellant is not 'so disproportionate to the offence as to shock the conscience' of this Court. No injustice much less any grave injustice has been done to the appellant. [Paras 35, 36] [798-B-E, F-G]

Gujarat Steel Tubes Ltd. & Ors. vs. Gujarat Steel Tubes Mazdoor Sabha & Ors. **(1980) 2 SCC 593: 1980 (2) SCR 146 – distinguished.**

Ranjit Thakur vs. Union of India & Ors. **(1987) 4 SCC 611: 1988 (1) SCR 512;** *Parivartan & Ors. vs. Union of India & Ors.* **[Order of Supreme Court in W.P.(C) No.93 of 2004 alongwith W.P.(C)No.539 of 2003];** *Indirect Tax Practitioners' Association vs. R.K. Jain* **(2010) 8 SCC 281 and** *R.K. Jain vs. Union of India* **(1993) 4 SCC 119: 1993 (3) SCR 802 – referred to.**

Case Law Reference:

1980 (2) SCR 146	**distinguished**	**Para 18**
1988 (1) SCR 512	**referred to**	**Para 20, 36**
(2010) 8 SCC 281	**referred to**	**Para 21, 28**
1993 (3) SCR 802	**referred to**	**Para 30**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2969 of 2013.

From the Judgment & Order dated 14.07.2009 of the High Court of Gujarat at Ahmedabad in LPA No. 1041 of 2007 in SCA No. 2115 of 1997.

Prashant Bhushan, Shamik Sanjanwala, Pyoli, Kailash Pandey, K.V. Sreekumar for the Appellant.

Pravin H. Parekh, Suman Yadav, Ritika Sethi, Abhishek Vinod Deshmukh (for Parekh & Co.) for the Respondents.

The Judgment of the Court was delivered by

SURINDER SINGH NIJJAR,J. 1. Leave granted.

2. This appeal is directed against the judgment and order dated 14th July, 2009 rendered in Letters Patent Appeal No.1041 of 2007 by the Division Bench of the High Court of Gujarat at Ahmedabad confirming the judgment of the learned Single Judge dated 31st January, 2007 in Special Civil Application No.2115 of 1997. On 11th May, 2010, this Court issued notice limited to the question of award of punishment. In the High Court, before the learned Single Judge, the learned counsel for the appellant made only one submission that looking to the allegations and the charges proved against the appellant and the penalty of removal imposed upon the appellant is disproportionate to the misconduct. However, in the Letters Patent Appeal, a draft amendment was moved by the appellant seeking to challenge the order of removal from service on the ground that the acts committed by the appellant did not constitute misconduct. The application for amendment was rejected.

3. We may very briefly notice the relevant facts for deciding the limited issue as to whether the punishment imposed on the appellant is shockingly disproportionate to the misconduct.

4. On 14th October, 1991, the appellant, who had studied upto 12th standard, was appointed as Tradesman/B Class III post at Kakarapar Atomic Power Project (KAPP) at Surat,

Gujarat, a public sector enterprises. He was placed on probation for two years in accordance with the statutory rules. It is his case that on completion of the probation period, he is deemed to be confirmed w.e.f. 14th October, 1993. Thereafter, on 17th December, 1993, he was elected as General Secretary of the recognized Union of Class III and Class IV of KAPP, called Kakarapar Anumathak Karamchari Sangthan. It is the claim of the appellant that until his resignation from the primary membership of the aforesaid Union on 22nd September, 1995 at the instance of the Managing Director of the Nuclear Power Corporation (respondent No.2), he acted as the General Secretary of the Union. He was a popular Union leader who always won elections with more than 3/4th majority. On 3rd May, 1994, he was declared a protected workman along with others. He claims that as the General Secretary of the Union, he was very active and always made extra efforts to see that the genuine demands of the members of the Union are accepted by the respondents. As a representative of the Union, he was regularly in contact with the Station Director, KAPP (respondent No.4). As a consequence of the Union activities, the relationship of the appellant with respondent No.4 were sour. The appellant, however, maintained working relationship with the respondents. It is also the claim of the appellant that during the monsoon season, there was heavy rain during the night of 15th June, 1994 and water at Kakarapar Dam had risen beyond the danger level. As a result, the Dam authorities had to open the flood gates. In normal circumstances, Kakarapar lake would receive the Dam water through a canal which is an interlink. The water of the lake is used by the respondents' authorities for power generation. However, on the night of 15th July, 1994, it was the flood water, which entered in the Kakarapar lake and within no time it had also entered into the plant. Before the next morning, more than 25 feet of the turbine which is adjacent to the Nuclear reactors was submerged under water. In fact, the entire record room and computer room were washed away. That apart, some of the barrels containing nuclear wastes were also washed away by the flood water. On

16th July, 1994, the respondent authorities declared an emergency, and started taking preventive measures.

5. It is the claim of the appellant that questions were being raised by many people as to why and how the flood water could not be prevented from entering into the turbines and other areas of the plant. Therefore on 18th June, 1994, the appellant wrote a letter to the Editor, Gujarat Samachar, Surat narrating in the Gujarati language about the aforesaid incident. A translated copy of the letter has been placed at Annexure: P1 to the Special Leave Petition and reads as under :-

"Date: 18.06.1994

To,
The Editor,
Gujarat Samachar,
Surat.

In the Kankarapar on 16.06.94 there was water filled in, due to this reason about 25 to 30 feet water was filled in the Kankarapar, due to this reason the machines lying in the Atomic Centre shut down Unit No.1 several machines have moved back, and if this same unit No.1 was in the running condition then the situation would have been very grave, the Unit No.2 is not yet started. On 16.06.94 night there was water filled in the Pali Mahi Scheme, but some engineers in the department who were present at night in Pali they did not find it important to take any action due to this reason the water level went on rising slowly and the situation became so worse that there was emergency declared and the employees were sent away, the staff that was left behind there was no proper facility for food and water made, the employees leader Manojbhai Mishra says that all this is a result of grave corruptions. The department has incurred expenses worth lakhs of rupees and several big canals were made, but the same were not managed properly therefore due to ….illigible….field engineer section thousands of rupees were expended and in the

building the situation was very grave and due to this reason although there were thousand crores rupees expended on motor, pump, piping all of which is drowned.

The employees leader Manojbhai Mishra has stated that in the department there are no arrangements made for meeting with the natural calamities, and as a result of which this situation was created. Manojbhai Mishra has further stated that this is not any cloth mill, sugar mill or any paper mill but it is a valuable asset of the country of India and it is an atomic reactor. Manojbhai Mishra says that a high level committee inquiry should be immediately initiated in respect to the Kakarapar Atomic Centre and take strict action against the erring officer, so that in future no such accident may take place.

Thanking you,

Yours faithfully,
Sd/-
[Manojbhai Mishra]
General Secretary Employee Union"

6. The appellant points out that he did not disclose any official information which he could have received during his official duty. He claims that the facts narrated in the letter were of public knowledge and a matter of public concern. This is evident from the fact that every newspapers, politicians, members of legislative assembly and other citizens expressed their concern regarding the safety of the nuclear project and as to how the said incident could have happened. The appellant had narrated the facts relating to the water logging so that in future this type of incident may not occur. The appellant relies on a newspaper Anumukti dated 22nd June, 1994 entitled "Paying the Price for Honesty and Courage". This article points out that although mercifully no great disaster took place the event did highlight the lax attitude towards safety of the nuclear power plant authorities. The article points out some of the glaring irregularities. After pointing out the irregularities, the

article concludes:-

"All this shows a criminal negligence on part of designers, operations and regulators of nuclear power in the country. And yet nobody is likely to suffer any adverse consequences at all. Nobody except Shri Manoj Mishra – the man who blew the whistle".

xx xx xx

"Mishra was immediately suspended from work for the crime of talking to the press and his suspension continues even today, five months after the event. While all those who displayed singular dereliction of duty continued merrily along, the one man who put the interest of the country above his own selfish interest has been made to suffer as an example to others that in the nuclear establishment the only 'leaks' that matter are leaks of authentic information."

7. The appellant claims that it was only after the news was published on the 22nd June, 1994 that people outside and even the nuclear establishment in Bombay took cognizance of the event. The Station Superintendent made a "dash" to Surat and issued a statement along with the District Collector of Surat assuring all and sundry that all was well under control. The appellant claims that his honest approach was, however, not appreciated by the Management and in fact he was singled out for action, instead of taking action against erring officials on account of negligence. He had only performed his duty in alerting the authorities to the imminent danger to KAPP.

8. As a 'reward', the respondent authorities placed him under suspension by an order dated 5th July, 1994, in contemplation of disciplinary proceedings for major penalty. On 4th August, 1994, the appellant was served with the following charge sheet:-

"Article I: That Shri Manoj Mishra, while functioning as Tradesman/B in the Kakrapar Atomic Power Project, vide

his letter on 18-6-1994 to the Editor, 'Gujarat Samachar' newspaper, Surat, unauthorisedly communicated with the Press.

Article II: That the said Shri Manoj Mishra, while functioning as Tradesman/B in the aforesaid project, in the letter dated 18-6-1994 written by him to the Editor, Gujarat Samachar made certain statement or expressed certain opinions, which amounted to criticism of the Project management or casting of aspersion on the integrity of its authorities.

Article III: That the said Shri Manoj Mishra, while functioning as Tradesman/B in the aforesaid project, though his letter dated 18-6-1994, he wrote to the Editor of the Gujarat Samachar unauthorisedly communicated to the Press official information concerning the Kakrapar Atomic Power Project.

Article IV: That the said Shri Manoj Mishra, while functioning as Tradesman/B in the aforesaid project established contact with a Press correspondent to feed information enabling the press to create news story about the Project containing inflammatory and misleading information causing embarrassment to, and damaging the reputation of the Project and the NPCIL.

Article V: That the said Shri Manoj Mishra, while functioning as Tradesman/B in the aforesaid project, established contacts with the Press correspondent and fed him with vital information which has come into his possession in the course of his duty as Tradesman/B in the Project, enabling the press to create a news story about the Project creating embarrassment to the Project as swell as to the State authorities. Shri Manoj Mishra has thus committed breach of oath of secrecy which he took at the time of joining the Project."

9. The appellant appeared before the Enquiry Officer on

20th December, 1995, when his Defence Assistant (for short 'DA') made the following statement:-

> **"**DA. Shri Manoj Mishra met M.D. on 18.12.95 regarding the enquiry. He made appeal to M.D. on 22.9.95 and referring to this Shri Mishra enquired with M.D. As to what was his decision on his appeal. M.D. informed Shri Mishra that a lenient view will be taken, if he accepts the charge. I also met him today and he assured similarly to me also. In view of the above facts, Shri Mishra admits all the charges levelled against him and accordingly requests closure of the proceedings. We now request the I.O. also to take a lenient view of the case."

10. The Enquiry Officer, however, declined to accept the conditional admission with the following observations:-

> "I.O. Such admissions in the inquiry are not valid. Your meeting M.D. is an extraneous matter with which I am Inquiry Officer is not concerned. Further I also would not like you to admit the charges on reasons other than facts. I therefore, request you to categorically tell me whether on your own you admit the charges or not."

11. In response to the aforesaid request of the Enquiry Officer, the appellant, i.e., C.O. stated thus :-

> "C.O. I admit the charges. I request the inquiry to be closed."

12. In view of the aforesaid admission, the Enquiry Officer closed the enquiry proceedings. The charges were held to be proved against the appellant. Acting on the aforesaid enquiry report by order dated 30th March, 1996, the Disciplinary Authority ordered the removal of the appellant from service of KAPP w.e.f. afternoon of 30th March, 1996. The appellant was informed that an appeal lies against the aforesaid order with the Station Director, KAPP within a period of 45 days from the

date of the issue of the order. The appeal filed by the appellant was dismissed. The appellant thereafter preferred a revision application before respondent No. 3, which was also dismissed.

13. The appellant challenged the aforesaid order by way of a Special Civil Application No. 2115 of 1997. The aforesaid writ petition was dismissed by learned Single Judge. The appellant preferred LPA No. 1041 of 2007 against the aforesaid judgment of the learned Single Judge, which was dismissed by the Division Bench on 14th July, 2009. All these orders have been challenged before this Court in the present appeal.

14. We have heard the learned counsel for the parties.

15. Mr. Prashant Bhushan, learned counsel appearing for the appellant submitted that the appellant had only done his duty as an enlightened citizen of this country in highlighting the serious lapses on the part of the authorities that could have resulted in a catastrophic accident. Learned counsel pointed out that seriousness of the accident which took place at KAPP is evident from the fact that it is mentioned in the Audit Report submitted by the department of the Atomic Energy to the Government on the safety of Indian Nuclear Installation. Learned counsel further pointed out that power supply to the KAPP could be restored only at 1510 hrs. on 16th June, 1994. Some part of the plant could be restarted only on 17th June, 1994 at 10.25 am. The report clearly indicates that during the incident Site Emergency was declared at 11.00 a.m. and terminated at 5.00 p.m. on 16th June, 1994. The Audit Report clearly indicates that the valuable feedback arising out from the three incidents which were reviewed, which indicated the incident at KAPS led to strengthening the design of the nuclear power stations in the country. Therefore, according to the learned counsel, instead of being punished, the appellant ought to have been rewarded for doing his duty as an enlightened citizen of this country. Learned counsel further pointed out that once the internal

emergency had been declared, respondent Nos. 2 to 4 were under obligation to alert the Collector and District Magistrate, Surat, SDM of Vyara, Mandvi, Olpad, DSP (rural), Surat about the emergency situation. However, the KAPP authority did not alert the authorities of the district administration on 16th June, 1994. In fact the District Authority visited the site only on 23rd June, 1994 after the new stories were published in the local dailies on 22nd June, 1994. Mr. Prashant Bhushan has made a reference to the letter dated 2nd July, 1994, in which the Disciplinary Authority has informed the appellant that:

> "As a result of the appearing of the highly inflammatory news stories in the press, the authorities of the District Administration had to rush to the Plaint Site on 23.6.1994 to ascertain the veracity of the story and to take corrective measures for removing the apprehensions caused all around on account of the news story. The project authorities too had to rush to the District Headquarters on 23.6.1994 for taking appropriate immediate action to issue clarificatory information to the Press. All these could have been avoided had Shri Manoj Mishra and his accomplices behaved themselves in the responsible manner and desisted themselves from interacting with the press and passed on distorted information.
>
> Since the action on the part of Shri Manoj Mishra and his accomplices has caused serious difficulties to the various authorities, apart from causing irreversible damage to the reputation of the establishment and called in the question the integrity of some of its own employees, the District Administration Authorities have called upon the Project Management to investigate into the entire episode and take action to bring to book the culprits."

16. Mr. Prashant Bhushan submitted that if the aim of the appellant was to seek publicity, he could have gone to the press on 16th June, 1994 or the latest on 17th June, 1994. The appellant only talked to the reporters when they were at plant

site to cover the situation. He had talked to the press in his capacity as the General Secretary of KAKS. Learned counsel pointed out that the appellant only wrote to the letter dated 18th June, 1994 to the Editor of Gujarat Samachar, when he saw that the concerned authorities were acting negligently. Mr. Bhushan further submitted that the appellant has been misled into admitting the charges levelled against him as he was verbally assured by respondent No. 4 that he would be dealt with leniently, if he admits all the charges. Keeping in view the facts that the appellant had acted in the best interest of nuclear facility and to prevent a catastrophic accident having disastrous result like Fukushima accident, the appellant could not be said to be guilty of any misconduct. Mr. Bhushan further submitted that the information given by the appellant was not, in any manner, confidential information to invite any Disciplinary Proceedings or punishment. The appellant was, in fact, in the position of a "whistle blower" and he is to be given full protection by the Court. Learned counsel pointed out that radio activity would continue for a long time even after a nuclear reactor is shut down, therefore, the fuel rods have to be kept cool for a very long time and sometimes even for years. The incident which took place on the night of 15th June, 1994 was very serious. The power failure could have had devastating effect. Therefore, the civil authorities had to be alerted forthwith, as the population in the entire area would have to be evacuated. Instead of taking timely preventive measures, the atomic centre merely tried to keep the incident concealed. Merely because the damage caused by the flood was ultimately controlled is not a ground to conclude that it would not have led to a major catastrophe. The appellant had only alerted the Civil Authorities, which was required to be mandatorily done by the respondents, under the rules. Mr. Bhushan reiterated that the description of the incident given by the authorities themselves clearly shows that ultimately action was taken on a war footing to control the flood situation at the site. Various officers were contacted and it was on their action the situation was brought under control. Learned counsel also reiterated the Extracts from Manual on

Emergency Preparedness for KAPS Volume I Part II, Page 3 and Action Plan for Site Emergency. He brought to our notice, in particular, that on hearing the emergency signal and/or on getting information of the same through telephone (or any other means), the Director shall immediately proceed to the main control room. He is required to alert Collector and District Magistrate, Surat, SDM of Vyara, Mandvi, Olpad, DSP (rural), Surat. Under Clause 5 of the aforesaid extracts from Manual. The authorities are required to depute one Assistant Health Physicist to the assembly areas for general contamination and radiation checks. Arrangements have to be made for transportation of injured person/persons to the Hospital after providing First Aid. Arrangements had to be made for evacuation of the site personnel, if required. Since none of that was being done, the appellant acted as a "whistle blower" and alerted the Press.

17. Mr. Bhushan makes a reference to the letter dated 2nd July, 1994 of the Senior Manager (P & IR) to the appellant as President of KAKS in which it was alleged that "the story which appeared in Gujarat Samachar created panic among the people residing in areas nearby the Project in particular and the State of Gujarat in general as also the State Administration, thereby causing spread of disinformation and bringing disrepute to the Project, which was raised doubts about the safety of the Project and integrity of the Project Authorities".

18. Learned counsel, therefore, submitted that the learned Single Judge as well as the Division Bench have committed a serious error in not accepting the plea of the appellant that the punishment was disproportionate to the misconduct. Learned counsel submitted that when exercising the jurisdiction under Article 226 of the Constitution of India, the High Court is not bound by any technicalities and is required to do substantial justice where glaring injustice demands affirmative action. He submitted that in the circumstances ends of justice would be met in case the punishment of removal is substituted by the

punishment of stoppage of three increments without cumulative effect. He relies on *Gujarat Steel Tubes Ltd. & Ors. Vs. Gujarat Steel Tubes Mazdoor Sabha & Ors.,*[1] in which this Court held as under:-

> "While the remedy under Article 226 is extraordinary and is of Anglo-Saxon vintage, it is not a carbon copy of English processes. Article 226 is a sparing surgery but the lancet operates where injustice suppurates. While traditional restraints like availability of alternative remedy hold back the court, and judicial power should not ordinarily rush in where the other two branches fear to tread, judicial daring is not daunted where glaring injustice demands even affirmative action. The wide words of Article 226 are designed for service of the lowly numbers in their grievances if the subject belongs to the court's province and the remedy is appropriate to the judicial process".

19. Relying on the aforesaid observations, he submits that the High Court has failed to exercise the jurisdiction vested in it under Article 226 of the Constitution of India. The Singe Judge, even having noticed the principle that the Court can interfere with the decision of the Disciplinary Authority, if it seems to be illegal or suffers from procedural impropriety or is shocking to the judicial conscience of the Court, erroneously failed to apply the same to the case of the appellant.

20. The punishment imposed on the appellant suffer from all the vices of irrationality, perversity and being shockingly disproportionate and ought to have been set aside and substituted by a lesser punishment. In support of the submissions, he relies on *Ranjit Thakur Vs. Union of India & Ors.,*[2] in which this Court held as under:-

"25. Judicial review generally speaking, is not directed

1. (1980) 2 SCC 593.
2. (1987) 4 SCC 611.

against a decision, but is directed against the "decision-making process". The question of the choice and quantum of punishment is within the jurisdiction and discretion of the court-martial. But the sentence has to suit the offence and the offender. It should not be vindictive or unduly harsh. It should not be so disproportionate to the offence as to shock the conscience and amount in itself to conclusive evidence of bias. The doctrine of proportionality, as part of the concept of judicial review, would ensure that even on an aspect which is, otherwise, within the exclusive province of the court-martial, if the decision of the court even as to sentence is an outrageous defiance of logic, then the sentence would not be immune from correction. Irrationality and perversity are recognised grounds of judicial review. In Council of Civil Service Unions v. Minister for the Civil Service9 Lord Diplock said:

> "Judicial review has I think developed to a stage today when, without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'. That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of 'proportionality' which is recognised in the administrative law of several of our fellow members of the European Economic Community;. . ."

21. On the same proposition, the learned counsel has relied on a number of judgments, but it is not necessary to make a reference to them as the ratio of law laid down in the aforesaid cases have only been reiterated. Learned counsel

submitted that on 21st April, 2004, Ministry of Personnel, Public Grievances and Pension issued a Notification for the protection of "whistle blowers" in terms of the order of this Court in *Parivartan & Ors. Vs. Union of India & Ors.*, Writ Petition (C) No. 93 of 2004 along with Writ Petition (C) No. 539 of 2003 recording the murder of Shri Satyendra Dubey. He also relied on judgment of this Court in *Indirect Tax Practitioners' Association Vs. R.K. Jain*[3] in support of his submission, that the appellant had acted as "whistle blower" ought not to have been punished.

22. Mr. Parekh seriously disputes the version of events as narrated by the learned counsel for the appellant. He submits that on 16th June, 1994, as a result of the overflow, the flood water entered into parts of the plants and, therefore, precautionary actions were to be taken. Therefore, follow up exercises were being diligently carried out when everyone was busy in tackling the situation to save Atomic Power Plant, the appellant, using the official telephone contacted the following members of the media:-

(i) 623375-The Editor, Gujarat Samachar, Surat

(ii) 20760- Shri Vilasbhai Soni, Press Reporter, Sandesh, Vyare

(iii) 30225-Hasmuklal and Company, Sardar Chowk, Bardoli.

23. On 18th June, 1994, at about 11.30 a.m., the appellant telephoned the pass section of CISF and told Mr. A. Srikrishna, CISF Constable, that a person asking for him will come to pass section. The Constable was told to tell the person to wait for the appellant. After the press reporter arrived, the appellant met him in his official quarters. Thereafter, the appellant wrote the letter to the Daily Gujarat Newspaper having the largest circulation in Gujarat. Relying on the aforesaid, the newspaper

3. (2010) 8 SCC 281.

published the news. Soon thereafter on 22nd June, 1994, another news story appeared in Gujarat Samachar with the title that "Half of Gujarat would have exploded on June 15". In this news story, it was stated that "at the same time chances of an accident damaging not only Surat district but, the whole of Gujarat and being totally demolished within seconds have been saved". According to Mr. Parekh, the aforesaid story contained false and defamatory allegations of "*blatant corruption going on in the organization*". It gave *false* and *distorted* and *inflammatory information* about the Project, raising serious doubts about the safety and security of the Nuclear Power Plant. The aforesaid news story was capable of creating extreme panic among the public of Gujarat. After satisfying himself with the safety situations, the District Collector in his capacity as Director of Site Emergency Plan of KAPS gave a press release to that effect. Similarly, the Station Director also issued a press release to diffuse the panic situation created by the news item released by the appellant in his own name and signature. These clarifications were published in the Gujarat Samachar on 23rd June, 1994. On 5th July, 1994, respondent No. 2 appointed a Committee to investigate the role of the appellant behind the aforesaid media reports. Based on the preliminary reports, the Disciplinary Authority placed the appellant under suspension, in contemplation of disciplinary proceedings to be initiated against him for major penalty. The statement of imputation of misconduct of misbehaviour in support of charges were served on the appellant on 4th August, 1994. An Inquiry Officer was appointed on 26th December, 1994. At the primary hearing in the enquiry, the appellant denied all the charges. His choice of Mr. P.B. Sharma as Defense Assistant was accepted. He was given inspection of all the documents, he was also asked to submit his list of witnesses. The appellant had stated that the list of witnesses would be submitted after consulting his Defense Assistant. On 9th October, 1995, the hearing of the inquiry was adjourned on the ground that the appellant had submitted an appeal to NPCIL. On 20th December, 1995, the appellant admitted all the charges leveled against him in toto

and accordingly the inquiry was closed on such admission of the charges.

24. Mr. Parekh further submitted that the appellant having admitted all the charges levelled against him can not be permitted to resile from the same on the ground that any assurance of leniency were made to him by the respondents. He further submitted that the appellant has been non-suited at every stage. Even this Court had only issued notice with regard to the question of punishment. He points out that the appellant is correct in saying that he is not an employee of a cloth mill or sugar mill, he was an employee of the highly sensitive Atomic Centre. He was required to maintain highest degree of confidentiality at the time of the incident. The appellant, instead of assisting the control of flood situation, was busy giving disinformation to the press. He submitted that under the rules and regulations applicable at the Atomic Centre, press can not be contacted by any employee other than the Specified Officer. This is so as the workers in the nuclear power facility are a special category of employees. They are required to maintain a very high standard with regard to confidentiality to prevent the leakage of very sensitive information. Mr. Parekh emphatically denied the claim of the appellant that he is a "whistle blower". At the time when the water was entering into the nuclear plant the appellant made three telephone calls to the Media divulging the information which he was not permitted to give. The appellant had even informed the constable on duty to keep one of the news reporters outside on 18th June, 1994 when the emergency was at its highest. Mr. Parekh further pointed out that a mere perusal of the charges which have been admitted by the appellant would clearly show that the punishment is not only justified but in fact rather lenient. The respondents in fact had the option to prosecute the appellant but he has only been proceeded against the departmentally. Mr. Parekh also submitted that most of the submissions made by Mr. Bhushan and the documents relied upon in support of the submissions were never a part of the record before the High Court.

According to the learned senior counsel, the appellant does not deserve any leniency and the appeal deserves to be dismissed.

25. We have considered the submissions made by the learned counsel very anxiously.

26. We have noted in detail the submissions made by Mr. Bhushan, though strictly speaking, it was not necessary in view of the categorical admission made by the appellant before the Enquiry Officer. Having admitted the charges understandably, the appellant only pleaded for reduction in punishment before the High Court. The learned Single Judge has clearly noticed that the counsel for the appellant has only submitted that the punishment is disproportionate to the gravity of the misconduct admitted by the appellant. The prayer made by the appellant before the Division Bench in the LPA for amendment of the grounds of appeal to incorporate the challenge to the findings of guilt was rejected.

27. In our opinion, the learned Single Judge and the Division Bench have not committed any error in rejecting the submissions made by the learned counsel for the appellant. We are not inclined to examine the issue that the actions of the appellant would not constitute a misconduct under the Rules. In view of the admissions made by the appellant, no evidence was adduced before the Enquiry Officer by either of the parties. Once the Enquiry Officer had declined to accept the conditional admissions made by the appellant, it was open to him to deny the charges. But he chose to make an unequivocal admission, instead of reiterating his earlier denial as recorded in preliminary hearing held on 26th December, 1994. The appellant cannot now be permitted to resile from the admission made before the Enquiry Officer. The plea to re-open the enquiry has been rejected by the Appellate as well as the Revisional Authority. Thereafter, it was not even argued before the learned Single Judge. Learned counsel had confined the submission to the quantum of punishment. In LPA, the Division

Bench declined to reopen the issue. In such circumstances, we are not inclined to exercise our extraordinary jurisdiction under Article 136 for reopening the entire issue at this stage. Such power is reserved to enable this Court to prevent grave miscarriage of justice. It is normally not exercised when the High Court has taken a view that is reasonably possible. The appellant has failed to demonstrate any perversity in the decisions rendered by the Single Judge or the Division Bench of the High Court.

28. Having examined the entire fact situation, we are unable to accept the submission of Mr. Bhushan that the appellant was acting as a "whistle blower". This Court in the case of *Indirect Tax Practitioners' Association* (supra) has observed as follows:-

> "At this juncture, it will be apposite to notice the growing acceptance of the phenomenon of whistleblower. A whistleblower is a person who raises a concern about the wrongdoing occurring in an organisation or body of people. Usually this person would be from that same organisation. The revealed misconduct may be classified in many ways; for example, a violation of a law, rule, regulation and/or a direct threat to public interest, such as fraud, health/safety violations and corruption. Whistleblowers may make their allegations internally (for example, to other people within the accused organisation) or externally (to regulators, law enforcement agencies, to the media or to groups concerned with the issues)."

29. Before making the aforesaid observations, this Court examined in detail various events which had taken place over a long period of time in which, the respondent, Editor of the Law Journal, Excise Law Times had participated. A Contempt Petition was filed by the appellant association against the respondent on the ground that he wrote an editorial in the issue dated 1st June, 2009 of the Journal, which amounted to criminal contempt under Section 2(c) of the Contempt of Courts Act,

1971. In the editorial, the respondent appreciated the steps taken by the new President of CESTAT to cleanse the administration. However, at the same time, he highlighted the irregularities in transfer and posting of some members of the Tribunal. He had pointed out that one particular member, Mr. T.K. Jayaraman had been accommodated at Bangalore by transferring another member from Bangalore to Delhi in less than one year of his posting. Apart from this, he had also criticized some of the orders passed by the bench comprising of Mr. T.K. Jayaraman, which were adversely commented upon by the High Court of Karnataka and Kerala. In spite of this, the appellant contended that, by highlighting the irregularities and blatant favoritism shown to Mr. T. K. Jayaraman, Mr. R.K. Jain was trying to scandalize the functioning of CESTAT and lower its esteem in the eyes of the public. It was pointed out that the article in which the aforesaid statements have been made, was in breach of the undertaking filed in this Court in Contempt Petition (Crl.) No. 15 of 1997. In these proceedings, the respondent had given an undertaking on 25th August, 1998, to abide by the advise given by his senior counsel that in future whenever there are any serious complaints regarding the functioning of CEGAT, the proper course would be to first bring those matters to the notice of the Chief Justice of India, and/or the Ministry of Finance and await a response or corrective action for a reasonable time before taking any other action. During the pendency of the aforesaid contempt case, the respondent had written a number of detailed letters to the Finance Minister and other higher authorities in the Government of India highlighting the specific cases of irregularities, malfunctioning and corruption in CESTAT. After the notice of contempt was discharged, the respondent wrote two more letters to the Finance Minister on the same subject and also pointed out how the appointment and posting of Mr. T.K. Jayaraman, Member CESTAT was irregular. He wrote similar letters to the Revenue Secretary; President, CESTAT; Registrar, CESTAT and the Central Board of Excise and Customs. Since no cognizance of the aforesaid letters were

taken by any of the five authorities, the respondent wrote the editorial in which he made the comments, which led to the filing of the Contempt Petition by the appellant.

30. This Court took notice of the conduct and the credentials of the respondent. It is noticed that the respondent is not a novice in the field of Journalism. For decades, he had been fearlessly using his pen to highlight malfunctioning of CEGAT and its successor CESTAT. In his letter dated 26th December, 1991 written to the then Chief Justice of India, he complained that CEGAT is without a president for last over six months, which has adversely affected the functioning of the Tribunal. After an in depth analysis of the relevant constitutional provisions, this Court gave certain suggestions for improving the functioning of CEGAT and other Tribunals constituted under Articles 323A and 323B. [See *R.K. Jain Vs. Union of India,* (1993) 4 SCC 119]. It was pointed out that the allegations made by Mr. R.K. Jain having regard to the working of CEGAT are grave and the authorities can ill afford to turn a "Nelson's eye" to those allegations made by a person who is fairly well conversant with the internal working of the Tribunal.

31. After noticing the aforesaid observations in the earlier case, this Court in the case of *Indirect Tax Practitioners' Association* (supra), pointed out that respondent was very conscious of the undertaking filed in the earlier Contempt Petition and this is the reason why before writing the editorial, he sent several communications to the functionaries concerned, to bring to their notice the irregularities in the functioning of CESTAT. The Court notices that *"The sole purpose of writing those letters was to enable the authorities concerned to take corrective measures but nothing appears to have been done by them to stem the rot. It is neither the pleaded case of the appellant nor any material has been placed before this Court to show that the Finance Minister or the Revenue Secretary, Government of India had taken any remedial action in the context of the issues raised by the respondent. Therefore, it is not possible to hold the respondent guilty of violating the*

undertaking given to this Court."

32. This Court upon meticulously taking note of the entire fact situation observed that the editorial written by the respondent was not intended to demean CESTAT as an institution or to scandalize its functioning. Rather, the object of the editorial was to highlight the irregularities in appointment, posting and transfer of members of CESTAT and instances of abuse of the quasi judicial powers. It was further observed that the editorial highlighted the unsatisfactory nature of the orders passed by the particular bench of Mr. T.K. Jayaraman was a member. The orders had been set aside by the High Courts of Karnataka and Kerala as well as by this Court. In these circumstances, this Court observed:-

> **"38.** It is not the appellant's case that the facts narrated in the editorial regarding transfer and posting of the members of CESTAT are incorrect or that the respondent had highlighted the same with an oblique motive or that the orders passed by the Karnataka and Kerala High Courts to which reference has been made in the editorial were reversed by this Court. Therefore, it is not possible to record a finding that by writing the editorial in question, the respondent has tried to scandalise the functioning of CESTAT or made an attempt to interfere with the administration of justice.
>
> **41.** One of the most interesting questions with respect to internal whistleblowers is why and under what circumstances people will either act on the spot to stop illegal and otherwise unacceptable behaviour or report it. There is some reason to believe that people are more likely to take action with respect to unacceptable behaviour, within an organisation, if there are complaint systems that offer not just options dictated by the planning and controlling organisation, but a choice of options for individuals, including an option that offers near absolute confidentiality. However, external whistleblowers report misconduct on outside persons or entities. In these cases,

depending on the information's severity and nature, whistleblowers may report the misconduct to lawyers, the media, law enforcement or watchdog agencies, or other local, State, or federal agencies.

42. In our view, a person like the respondent can appropriately be described as a whistleblower for the system who has tried to highlight the malfunctioning of an important institution established for dealing with cases involving revenue of the State and there is no reason to silence such a person by invoking Articles 129 or 215 of the Constitution or the provisions of the Act."

33. In our opinion, the aforesaid observations are of no avail to the appellant. It is a matter of record that the appellant is educated only upto 12th standard. He is neither an engineer, nor an expert on the functioning of the Atomic Energy Plants. Apart from being an insider, the appellant did not fulfill the criteria for being granted the status of a "whistle blower". One of the basic requirements of a person being accepted as a "whistle blower" is that his primary motive for the activity should be in furtherance of public good. In other words, the activity has to be undertaken in public interest, exposing illegal activities of a public organization or authority. The conduct of the appellant, in our opinion, does not fall within the high moral and ethical standard that would be required of a bona fide "whistle blower".

34. In our opinion, the appellant without any justification assumed the role of vigilante. We do not find that the submissions made on behalf of the respondents to the effect that the appellant was merely seeking publicity are without any substance. The newspaper reports as well as the other publicity undoubtedly created a great deal of panic among the local population as well as throughout the State of Gujarat. Every informer can not automatically be said to be a bonafide "whistle blower". A "whistle blower" would be a person who possesses the qualities of a crusader. His honesty, integrity and motivation should leave little or no room for doubt. It is not enough that such

person is from the same organization and privy to some information, not available to the general public. The primary motivation for the action of a person to be called a "whistle blower" should be to cleanse an organization. It should not be incidental or byproduct for an action taken for some ulterior or selfish motive.

35. We are of the considered opinion that the action of the appellant herein was not merely to highlight the shortcomings in the organization. The appellant had indulged in making scandalous remarks by alleging that there was widespread corruption within the organization. Such allegations would clearly have a deleterious effect throughout the organization apart from casting shadows of doubts on the integrity of the entire project. It is for this reason that employees working within the highly sensitive atomic organization are sworn to secrecy and have to enter into a confidentiality agreement. In our opinion, the appellant had failed to maintain the standard of confidentiality and discretion which was required to be maintained. In the facts of this case, it is apparent that the appellant can take no advantage of the observations made by this Court in the case of *Indirect Tax Practitioners' Association* (supra). This now brings us to the reliance placed by the appellant on the judgment in the case of *Gujarat Steel Tubes Case* (supra). In our opinion, the ratio in the aforesaid judgment would have no relevance in the case of the appellant. We are not satisfied that this is a case of 'glaring injustice'.

36. In our opinion, the punishment imposed on the appellant is not 'so disproportionate to the offence as to shock the conscience' of this Court. The observations of this Court in *Ranjit Thakur* (supra) are also of no avail to the appellant. No injustice much less any grave injustice has been done to the appellant.

37. We see no merit in the appeal and the same is hereby dismissed.

B.B.B. Appeal dismissed.

STATE OF KERALA

v.

ABDUL ALI

(Special Leave Petition (Civil) No. 13802 of 2006 etc.)

APRIL 10, 2013

[G.S. SINGHVI AND KURIAN JOSEPH, JJ.]

Kerala Preservation of Trees Act, 1986 – ss.2(e), 4 and 5 – Notification u/s.5 providing total prohibition of cutting of trees – Plea that the forest in question, being not a 'Private Forest' within meaning of s.2(f)(1)(i) of Kerala Private Forests (Vesting and Assignment) Act, 1971, could not be brought under purview of the Notification u/s.5 of Preservation of Trees Act – Held: Explanation II u/s.5 of Preservation of Trees Act is a piece of legislation by reference – Therefore, the definition of 'Private Forest' under the Vesting and Assignment Act is to be taken for 'Private Forest' u/s.5 of the Preservation of Trees Act – The forest in question were covered by Madras Preservation of Private Forests Act, 1949 – Since the definition of 'Private Forest' u/s.2(f)(1)(i) excludes the forests on which Madras Preservation of Private Forests Act was applicable, the forest in question would not be covered u/s.2(f)(1)(i) of Vesting and Assignment Act and consequently would also not be covered under the provisions of Preservation of Trees Act – Hence cannot be notified u/s.5 of Preservation of Trees Act – However, the trees specified u/s.2(e) of Preservation of Forest Act would not fall outside the purview of s.4, whereby no tree or its branch would be cut without previous permission (in writing), of the authorized officer – Kerala Private Forests (Vesting and Assignment) Act, 1971 – s.2(f)(1)(i) – Madras Preservation of Private Forests Act, 1949.

T.N. Godavarman Thirumulkpad vs. Union of India and Ors. **(1997) 2 SCC 267 : 1996 (9) Suppl. SCR 982 – referred to.**

Case Law Reference:

1996 (9) Suppl. SCR 982 referred to Para 25

CIVIL APPELLATE JURISDICTION : Special Leave Petition (Civil) No. 13802 of 2006.

From the Judgment & Order dated 31.03.2006 of the High Court of Kerala at Ernakulam in OP No. 3252 of 2003.

WITH

SLP (C) No. 1380 of 2007.

SLP (C) No. 26236 of 2008.

K. Padmanabhan Nair, Mohan Kumar B.R. Subramonium Prasad, Siddhartha Dave, A Raghunath, B.V. Deepak for the appearing parties.

The Order of the Court was delivered

KURIAN, J. 1. Whether the land which is not a private forest as defined under The Kerala Private Forests (Vesting and Assignment) Act, 1971 can be brought under the teeth of The Kerala Preservation of Trees Act, 1986, is the moot question arising for consideration in these cases.

2. The Kerala Private Forests (Vesting and Assignment) Act, 1971 (hereafter referred to as 'the Vesting and Assignment Act') was enacted to provide for the vesting in the Government of private forests in the State of Kerala and for the assignment thereof to agriculturists and agricultural labourers for cultivation. It is stated in the preamble that private forests in the State of

Kerala are agricultural lands and that the Government wanted to utilize such agricultural lands so as to increase agricultural production and promote welfare of the agricultural production in the State. It may be noted that private forests were exempted from the purview of The Kerala Land Reforms Act, 1963, in the matter of ceiling.

3. 'Private forest' has been defined under Section 2(f) of the Vesting and Assignment Act. The provision reads as follows:

"2(f) "private forest" means

(1) in relation to the Malabar district referred to in sub-section (2) of Section 5 of the State Reorganization Act, 1956 (Central Act 37 of 1956)-

(i) any land which the Madras Preservation of Private Forest Act, 1949 (Madras Act XXVII of 1949), applied immediately before the appointed day excluding-

(A) lands which are gardens or nilams as defined in the Kerala Land Reforms Act, 1963 (1 of 1964).

(B) lands which are used principally for the cultivation of tea, coffee, cocoa, rubber, cardamom or cinnamon and lands used for any purpose ancillary to the cultivation of such crops or for the preparation of the same for the market.

Explanation:- Lands used for the construction of office buildings, godowns, factories, quarters for workmen, hospitals, schools and playgrounds shall be deemed to be lands used purposes ancillary to the cultivation of such crops;

(C) lands which are principally cultivated with cashed or other fruit bearing trees or are principally cultivated and any other agricultural crop and

(D) sites of buildings and land appurtenant to and necessary for the convenient enjoyment or use of such buildings;

(ii) any forest not owned by the Government, to which the Madras Preservation of private Forests Act, 1949 did not apply, including waste lands which are enclaves within wooded areas.

(2) in relation to the remaining areas in the State of Kerala any forest not owned by the Government including waste lands which are enclaves within wooded areas.

Explanation:- For the purpose of this clause, a land shall be deemed to be waste land notwithstanding the existence thereon of scattered trees or sbrubs (*sic shrubs)*;"

(Emphasis supplied)

4. Section 3 of the Vesting and Assignment Act provides for the vesting of the private forests in the Government. In this Act, 10th May, 1971 has been noted as "appointed day". The provision reads as follows:

"3. Private forests vest in Government.-

(1) Notwithstanding anything contained in any other law for the time being in force, or in any contract or other document but subject to the provisions of sub-sections (2) and (3), with effect on and from the appointed day, the ownership and possession of all private forests in the State of Kerala shall by virtue of this Act, stand transferred to and vested in the Government free from all encumbrances, and the right, title and interest of the owner or any other person in any private forest shall stand extinguished.

(2) Nothing contained in sub-section (1) shall apply in

respect of so much extend of land comprised in private forests held by an owner under his personal cultivation as is within the ceiling limit applicable to him under the Kerala Land Reforms Act, 1963 (1 of 1964) or any building or structure standing thereon or appurtenant thereto.

Explanation:- For the purposes of this sub-section, 'cultivation' includes cultivation of trees or plants of any species.

(3) Nothing contained in sub-section (1) shall apply in respect of so much extent of private forests held by an owner under a valid registered document of title executed before the appointed day and intended for cultivation by him, which together with another lands held by him to which Chapter III of the Kerala Land Reforms Act, 1963, is applicable, does not exceed the extent of the ceiling area applicable to him under Section 82 of the said Act.

(4) Notwithstanding anything contained in the Kerala Land Reforms Act, 1963, private forests shall, for the purposes of sub-section (2) or sub-section (3), be deemed to be lands to which Chapter III of the said Act is applicable and for the purposes of calculating the ceiling limit applicable to an owner, private forests shall be deemed to be 'other dry lands' specified in Schedule II to the said Act."

(Emphasis supplied)

5. The Kerala Preservation of Trees Act, 1986 (hereinafter referred as "the Preservation of Trees Act") was introduced in order to provide for preservation of trees in the State of Kerala. The Statement of Objects and Reasons for introducing the Preservation of Trees Act, to the extent relevant, reads as follows:

"Indiscriminate felling and destruction of trees in the State have been brought to the notice of Government and it is feared that it may result in quick denudation of the forest growth and consequent soil erosion, land slides, flood etc. This is also detrimental to ecological balance. Of late, felling of trees and destruction of flora and fauna are reported to be on the increase. As there was no effective law to prevent this tendency, it was decided to enact a law for imposing restrictions on the cutting of trees in the State and regulating cultivation in the hill areas of the State…"

(Emphasis supplied)

6. Section 2(e) of the Preservation of Trees Act has defined a "tree". To quote:

"(e) "tree" means any of the following species of trees, namely:—

Sandalwood (Santalum album), Teak (Tectona grandis), Rosewood (Dalbergia latifolia), Irul (Xylia Xylocarpa), Thempavu (Terminalia tomantosa), Kampakam (Hopea parviflora), Chempakam (Michelia Chempaca), Chadachi (Grewia tilliaefolia), Chandana vempu (Cedrela toona), Cheeni (Tetrameles nudiflora).

(Emphasis supplied)

7. Section 4 of the Preservation of Trees Act provides for restriction regarding cutting, etc., of trees. The provision reads as follows:

"**4. Restriction regarding cutting, etc., of trees.-**

(1) No person shall, without the previous permission in writing of the authorised officer cut, uproot or burn, or cause to be cut, uprooted or burnt any tree.

(2) The permission under sub-section (1) shall not be refused if-

(a) the tree constitutes a danger to life or property; or

(b) the tree is dead, diseased or windfallen:

Provided that where permission to cut a tree is granted on the ground specified in clause (a) or clause (b), the authorised officer shall impose as a condition for the grant of such permission the effective regeneration of an equal number of the same or other suitable species of trees; or

(c) such cutting is to enable the owner of the land in which the tree stands to use the area cleared or the timber cut for the construction of a building for his own use.

(3) No person shall cut or otherwise damage, or cause to be cut or otherwise damaged, the branch of any tree:

Provided that the provisions of this sub-section shall not be deemed to prevent the pruning of any tree as required by ordinary agricultural or horticultural practices.

(4) No person shall, without the previous permission in writing of the authorised officer, destroy any plant or any tree or do any act which diminishes the value of any such plant.

(5) Nothing contained in sub-section (1) or sub-section (2) or sub-section (3) or sub- section (4) shall apply in respect of any tree or plant in the compound of any residential building:

Provided that where such compound exceeds one hectare in extent, the provisions of this sub-section shall apply only in respect of an extent of one hectare immediately surrounding the residential building.

(6) Notwithstanding anything contained in this section or in any judgment, decree or order of any court, the owner of any land shall have the right to cut or cause to be cut any tree, other than a tree as defined in clause (e) of Section 2, standing on such land, without obtaining a permission under this section."

(Emphasis supplied)

8. Section 5 of the Preservation of Trees Act provides for total prohibition of cutting of trees in the notified areas. The provision reads as follows:

"**5. Prohibition of cutting of tree in notified areas.-**

(1) Notwithstanding anything contained in any law for the time being in force, or in any Judgment, decree or order of any Court, tribunal or other authority, or in any agreement or other arrangement, Government may, with a view to preserving the tree growth in private forests or in the Cardamom Hills Reserve or in any other areas cultivated with cardamom, by notification in the Gazette direct that no tree standing in any such area specified in the notification shall be cut, uprooted, burnt or otherwise destroyed except on the ground that-

(a) the tree constitutes a danger to life or property; or

(b) the tree is dead, diseased or windfallen:

Provided that the provisions of this sub-section shall not be deemed to prevent the pruning of any tree as required by ordinary agricultural or horticultural practices.

(2) No person shall, without the previous permission in writing of the authorised officer, cut, uproot, burn or otherwise destroy or cause to be cut, uprooted,

burnt or otherwise destroyed any tree in any area specified in the notification under sub-section (1) on any of the grounds specified therein.

Explanation I:— For the purposes of this section, the term "tree" shall include any species of tree.

Explanation II:— For the purposes of sub-section (1), the expression "private forest" means any land which immediately before the 10th day of May, 1971, was a private forest as defined in the Kerala Private Forests (Vesting and Assignment) Act, 1971."

(Emphasis supplied)

9. A bare perusal of the provisions would clearly show that while the Vesting and Assignment Act is intended for vesting of private forests as on 10.05.2011 in the Government and, thereafter, for distribution of the same to the agricultural labourers whereas the Preservation of Trees Act is meant for regulating destruction of certain species of tree growth and for total prohibition of destruction of all species of tree growth in certain notified areas.

10. In the instant case, we are concerned with the issue relating to total prohibition. The crux of the arguments advanced on behalf of the land owners and virtually upheld by the High Court, is that their lands having been taken and declared to be not covered by the Vesting and Assignment Act and, hence, no notification on total prohibition of felling or uprooting of trees can be validly issued by the State. High Court had upheld that contention and, thus aggrieved, the State has come up in Appeal.

11. 23.33 acres of land belonging to the 1st Respondent herein was finally declared to be not covered by the provisions of the Vesting and Assignment Act as per the Division Bench decision of the High Court of Kerala dated 04.09.1981 in M.F.A.

No. 163/1977 (Annexure P1 in S.L.P. (C) No. 13802/2006). It was declared by the Court that:

"23.33 acres would be outside the purview of vesting. It is not to be taken as land to be vested."

12. Despite the declaration, an attempt was made by the Government as per Notification dated 08.07.1977 notifying that certain land out of the 23.33 acres would vest in the Government. That was challenged by the 1st Respondent in Original Petition No. 6867/1991 leading to Annexure R1-Judgment dated 15.03.2000. That Notification was quashed.

13. Both Annexure P1-Judgment in M.F.A. No. 163/1977 and Original Petition No. 6867/1991 have become final.

14. While restoring the land, a Notification under Section 5 dated 09.01.2001 of the Preservation of Trees Act was also issued prohibiting total felling of trees in the area. That was challenged by the respondent in Original Petition No. 3252/2003 before the High Court which was disposed of by a Division Bench of the Court as per the impugned Judgment dated 31.03.2006. The High Court has taken the view that:

"There is a clear finding by the Division Bench in M.F.A. No. 163 of 1977 that 23.33 acres of land would be outside the purview of the vesting and therefore only those land which falls within the definition of the Vesting Act, 1971 would fall within sub-section (1) of Section 5 of the Kerala Preservation of Trees Act. In such circumstances, we are of the view. Notification Ext.P2 issued by the Government cannot be sustained so far as plots VFC 130, 132 and 134 of Kumaranallor Village, Kozhikode taluk owned by the petitioner are concerned."

(Emphasis supplied)

15. Special Leave Petition (C) No. 1380/2007 arises from the Judgment of the Division Bench of the High Court dated

07.03.2006 in Writ appeal No. 1449/2003. In that case also, the Division Bench has taken the view that land covered by notification issued under Section 5 of the Preservation of Trees Act was not a private forest or a cardamom plantation and, hence, it is impermissible for the State to issue a notification under Section 5.

16. Special Leave Petition (C) No. 26236/2008 arises from Judgment dated 19.01.2007 and the High Court followed the impugned Judgment in Special Leave Petition (C) No. 13802/2006.

17. On behalf of the State of Kerala, it is contended that the Kerala Preservation of Trees Act has to be purposively interpreted. A notification issued under Section 5 of the Act for prohibiting the destruction of trees has an overriding effect on all other enactments, judgments, decrees, etc. Still further, it is contended that Section 5 is applicable to all the private forests as they stood before 10.05.1971.

18. Learned counsel appearing for the Respondents contented that the State is not justified in raking up such issues before this Court since those had already attained finality before the High Court in other proceedings. It is submitted that a notification under Section 5 for total prohibition of destruction of all species of trees can be issued only in respect of private forest or cardamom hills reserve or an area cultivated with cardamom.

19. In the cases before us, there is no case for the State that the disputed lands are part of the cardamom hills reserve or there is any cardamom cultivation. Thus, the question is whether the land is a private forest or not.

20. Explanation II under Section 5 of the Preservation of Trees Act is a piece of legislation by reference. The definition of "private forest" under the Vesting and Assignment Act is to

be taken for private forest under Section 5 of the Preservation of Trees Act.

21. Section 2(f) of the Vesting and Assignment Act has defined "private forest" to mean 'any land coming under the purview of The Madras Preservation of Private Forests Act, 1949; any forest not owned by the Government and not covered by The Madras Preservation of Private Forests Act, 1949; and any remaining forest area not owned by Government including waste lands which are enclaves within wooded areas'.

22. However, there are four exclusions under Section 2(f)(1)(i) of the Act and they are: -

(1) The lands which are gardens or nilams as defined in the Kerala Land Reforms Act, 1963.

(2) Lands which are principally cultivating tea, coffee, cocoa, rubber, cardamom or cinnamon and lands used for ancillary purposes to such cultivation and for preparation of the products for market.

(3) Lands which are principally cultivated with cashed or other fruit bearing trees or any other agricultural crop and

(4) Building sites and lands appurtenant for convenient enjoyment of such buildings.

23. It is not in dispute that the disputed lands in all these three cases were in the erstwhile Malabar district referred to in sub-section (2) of Section 5 of The State Reorganization Act, 1956 where The Madras Preservation of Private Forests Act, 1949 (hereinafter referred to as 'The Madras Preservation of Private Forests Act') was applicable. The said legislation was enacted in 1949 in order to:

"prevent the indiscriminate destruction of private forests

and interference with customary and prescriptive rights therein and for certain other purposes."

24. Section 1(2) of the Act provides for the application of the Act, which, to the extent relevant, reads as follows:

"1(2) It applies –

(i) to private forests in the districts of Malabar and South Kanara having a contiguous area exceeding 100 acres."

25. In all the three cases before us, the stand of the State before the Forest Tribunal and otherwise on facts also is that The Madras Preservation of Private Forests Act, 1949 was applicable in these cases since the forests had a contiguous area exceeding 100 acres. Therefore, indisputably, The Madras Preservation of Private Forests Act, 1949 was applicable in these cases. However, Vesting and Assessment Act, 1971 has excluded certain lands from the purview of definition of "private forest" under Section 2(f)(1)(i) of the Act. In all the three cases, the finding on the exclusion has attained finality also. The contention on behalf of the State that despite such exclusion, The Madras Preservation of Private Forests Act, 1949 is applicable to any forest not owned by the Government including waste lands, in terms of Section 2(f)(1)(ii) of the Act, we are afraid that the contention cannot be appreciated. Three pre-conditions are required for bringing a forest under the purview of Section 2(f)(1)(ii): -

(i) It must be a forest,

(ii) It is not owned by the Government and

(iii) It must be a forest to which The Madras Preservation of Private Forests Act, 1949 is not applicable.

All these are to be read cumulatively. Though there are

disputes on facts as to the nature of the growth, we will assume for a moment that the disputed land is a forest coming within the purview of definition of "forest" made by this Court in *T.N. Godavarman Thirumulkpad vs. Union of India and others.*[1] Even then, the requirements of the Statute will not be met. Though the forest is not owned by the Government, it is a case where, it is not disputed also, The Madras Preservation of Private Forests Act, 1949 is applicable, being private forest in the district of Malabar having contiguous area exceeding 100 acres. Thus, it is clear that the disputed lands in these cases have expressly been excluded from the purview of private forest and that it is not otherwise covered by the said definition under Section 2(f)(1) of the Vesting and Assignment Act, 1971.

26. The prohibition of cutting of trees in notified areas under Section 5 of The Kerala Preservation of Trees Act, 1986 would be permissible only if the land is either a private forest or a part of cardamom hills reserve or the land is cultivated with cardamom or if it is forest not owned by Government and not covered by The Madras Preservation of Private Forests Act, 1949. As already noted by us here above, there is no case for the Respondents that it is part of cardamom hills reserve or that the land is cultivated with cardamom. The only dispute is with regard to the classification of the land as private forest. Since the area has been expressly excluded from the purview of private forest as defined under the provisions of The Kerala Preservation of Trees Act, 1986 and since it is not covered by Section 2(f)(1)(ii) of the Vesting and Assignment Act, the Government cannot notify the area for the purpose of total prohibition of trees under Section 5 of The Kerala Preservation of Trees Act, 1986.

27. However, we may incidentally make a reference to the regulatory provision under the Preservation of Trees Act. While Section 5 provides for total prohibition of cutting of any species of trees, Section 4 is only a regulatory provision restricting the

1. (1997) 2 SCC 267.

destruction of trees specified under Section 2(e) of the Act. We make it clear that merely because the lands of the Respondents are being taken out of the purview of Section 5 that does not mean that they will also be outside the purview of Section 4. In other words, as far as those trees specified under Section 2(e) are concerned, they will still be governed by the restrictions imposed under Section 4 of the Act. No such tree or its branch shall be cut without previous permission in writing of the authorized officer and the permission shall only be in the contingencies provided for under sub-section (2), viz.:

(a) the tree constitutes a danger to life or property; or

(b) the tree is dead, diseased or windfallen; or

(c) the timber is only to enable the owner of the land for construction of a building for his own use.

28. Subject to the above observations, the Special Leave Petitions are dismissed.

29. There is no order as to costs.

K.K.T. SLPs disposed of.

VENKATARAJA & ORS.

v.

VIDYANE DOURERADJAPERUMAL (D) THR.LRS. & ORS.

(Civil Appeal Nos. 7605-7606 of 2004)

APRIL 10, 2013

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

Specific Relief Act, 1963 – s.34, proviso – Suit filed by appellants for declaration of title to property without seeking consequential relief of possession – Maintainability – Held: Where defendant is not in physical possession, and not in a position to deliver possession to the plaintiff, it is not necessary for the plaintiff in a suit for declaration of title to property, to claim possession – However, in the instant case, respondent nos.3 to 10 were tenants, residing in the suit property and definitely in a position to deliver the possession – Respondent nos. 3 and 10 being admittedly in possession of the suit property, the appellants/plaintiffs had to necessarily claim the consequential relief of possession of the property – Suit filed by the appellants/plaintiffs was not maintainable, as they did not claim such consequential relief – To say that the appellants would be entitled to file independent proceedings for eviction of said respondents under a different statute, would amount to defeating the provisions of Or.II, r.2 CPC as well as the proviso to s.34 – Code of Civil Procedure, 1908 – Or.II, r.2 – Specific Relief Act 1877 – s.42.

Specific Relief Act, 1963 – s.34, proviso – Purpose of – Held: The very purpose of the proviso to s.34, is to avoid multiplicity of proceedings, and also loss of revenue of court fees.

The predecessor-in-interest of the appellants filed suit in the Civil Court for declaration that he had a proper

title to the suit property (situated in the erstwhile French territory of Pondicherry) and for declaration that the sale deed dated 16-7-1959 executed by 'T', a Hindu widow, in favour of the defendant-'V' was null and void as 'T' had only a life estate and not an absolute title, to alienate the property.

Though the trial court decided the question of title in favour of the appellant/plaintiff, it found that the appellant/plaintiff had filed the suit only for declaration of his right to the suit property, and since he had not asked for consequential relief of delivery of possession, the suit was held to be not maintainable and was dismissed.

The Appellate Court held that 'T' had sold only her life estate in the suit property, as she was only a life estate holder and further that, as the appellant/plaintiff had filed a suit for declaration in respect of the suit property in which there were tenants, it was not necessary for the appellant to claim any consequential relief for the reason that after obtaining such a declaration, appropriate relief could be claimed under Pondicherry Non-Agricutural Kudiyiruppudars (Stay of Eviction Proceedings) Act of 1980.

The respondents/defendants filed second appeals before the High Court. During the pendency of the appeals, defendant-'V' sold the suit property to respondent nos.1 to 3. By the impugned judgment, the High Court held that 'T' had acquired absolute title over the property; that as defendant-'V' had purchased the suit property from 'T' vide sale deed, she had become the rightful owner, and also that, in view of the defendant-'V' having been in possession of the suit property for over than 10 years, she had perfected the title to the suit property by prescription, under the provisions of the French Civil Code and as a consequence thereof, the suit

for declaration was not maintainable without seeking the relief of possession.

The instant appeals therefore raised issues regarding: 1) the interpretation of French Hindu Law, as to whether a Hindu widow having only a life estate, can be considered the absolute owner of a property, thus competent to transfer the said property; and secondly 2) whether the suit was not maintainable as the appellant/plaintiff had not sought any consequential relief.

Dismissing the appeals, the Court

HELD:

Issue no.1

1. In view of the fact that the counsel appearing on behalf of the respondents, has fairly conceded that such a Hindu widow could not acquire the absolute title, there is no occasion to enter into that controversy. Even otherwise, the finding recorded by the High Court is not based on any evidence, and no reason has been given by it to reverse the findings recorded by the trial court as well as the First Appellate Court that 'T' was only the life estate holder. The High Court erred in recording such a finding. [Para 11] [827-E-F]

Issue no.2 - Whether the suit is maintainable if the consequential relief is not asked for?

2.1. In the case of *Deo Kuer*, this Court considered the provisions of Section 42 of the Specific Relief Act 1877, (analogous to Section 34 of the Act 1963), and held, that where the defendant was not in physical possession, and not in a position to deliver possession to the plaintiff, it was not necessary for the plaintiff in a suit for declaration of title to property, to claim the possession.

The facts in the case of *Deo Kuer* are quite distinguishable from the facts of this case, as in that case, the tenants were not before the court as parties. In the instant case, respondent nos. 3 to 10 are tenants, residing in the suit property. The said respondents were definitely in a position to deliver the possession. Therefore, to say that the appellants would be entitled to file an independent proceedings for their eviction under a different statute, would amount to defeating the provisions of Order II Rule 2 CPC as well as the proviso to Section 34 of the Act 1963. Thus, the First Appellate Court, as well as the High Court failed to consider this question of paramount importance. [Paras 13 & 15] [828-B-C; G-H; 829-A-B]

2.2. The very purpose of the proviso to Section 34 of the Act 1963, is to avoid the multiplicity of the proceedings, and also the loss of revenue of court fees. When the Specific Relief Act, 1877 was in force, the 9th Report of the Law Commission of India, 1958, had suggested certain amendments in the proviso, according to which, the plaintiff could seek declaratory relief without seeking any consequential relief, if he sought permission of the court to make his subsequent claim in another suit/ proceedings. However, such an amendment was not accepted. There is no provision analogous to such suggestion in the Act of 1963. [Para 16] [829-B-D]

2.3. A mere declaratory decree remains non-executable in most cases generally. However, there is no prohibition upon a party from seeking an amendment in the plaint to include the unsought relief, provided that it is saved by limitation. However, it is obligatory on the part of the defendants to raise the issue at the earliest. [Para 17] [829-D-E]

2.4. It is evident that the suit filed by the appellants/ plaintiffs was not maintainable, as they did not claim

consequential relief. The respondent nos. 3 and 10 being admittedly in possession of the suit property, the appellants/plaintiffs had to necessarily claim the consequential relief of possession of the property. Such a plea was taken by the respondents/defendants while filing the written statement. The appellants/plaintiffs did not make any attempt to amend the plaint at this stage, or even at a later stage. The declaration sought by the appellants/ plaintiffs was not in the nature of a relief. A worshipper may seek that a decree between the two parties is not binding on the deity, as mere declaration can protect the interest of the deity. The relief sought herein, was for the benefit of the appellants/plaintiffs themselves. [Para 18] [830-B-E]

Deo Kuer & Anr. v. Sheo Prasad Singh & Ors. **AIR 1966 SC 359: 1965 SCR 655 – distinguished.**

Vinay Krishna v. Keshav Chandra & Anr. **AIR 1993 SC 957: 993 (3) Suppl. SCC 129;** *Parkash Chand Khurana etc. v. Harnam Singh & Ors.* **AIR 1973 SC 2065: 1973 (3) SCR 802;** *State of M.P. v. Mangilal Sharma* **AIR 1998 SC 743: 1997 (6) Suppl. SCR 662;** *Muni Lal v. The Oriental Fire & General Insurance Co. Ltd. & Anr.* **AIR 1996 SC 642: 1995 (5) Suppl. SCR 42;** *Shakuntla Devi v. Kamla & Ors.* **(2005) 5 SCC 390 – relied on.**

Sunder Singh Mallah Singh Sanatan Dharam High School Trust v. Managing Committee, Sunder Singh Mullah Singh Rajput High School **AIR 1938 PC 73 and *Humayun Begam v. Shah Mohammad Khan* AIR 1943 PC 94 – referred to.**

Case Law Reference:

1965 SCR 655	**distinguished**	**Paras 13, 15**
AIR 1938 PC 73	**referred to**	**Para 13**
AIR 1943 PC 94	**referred to**	**Para 13**

1993 (3) Suppl. SCC 129	**relied on**	**Para 14**
1973 (3) SCR 802	**relied on**	**Para 17**
1997 (6) Suppl. SCR 662	**relied on**	**Para 17**
1995 (5) Suppl. SCR 42	**relied on**	**Para 17**
(2005) 5 SCC 390	**relied on**	**Para 17**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 7605-7606 of 2004.

From the Judgment & Order dated 12.12.2003 of the High Court of Judicature at Madras in Second Appeal Nos. 1536 and 1537 of 1991.

R. Venkataramani, V.G. Pragasam, S.J. Aristotle, Prabu Ramasubramanian, Supriya Garg, Neelam Singh, Shodhan Babu for the Appellants.

R. Balasubramonium, B. Karuna Karan, Krishna Dev, Senthil Jagadeesan, Sony Bhatt, M.A. Chinnasamy, K. Krishna Kumar, S. Muthu Krishnan for the Respondents.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. These appeals have been preferred against the impugned judgment and order dated 12.12.2003 passed by the High Court of Madras in Second Appeal Nos. 1536-1537 of 1991, by way of which the common judgment and decree passed by the First Additional District Judge in A.S. No. 198 of 1983 and A.S. No. 43 of 1988 were set aside, and the suit O.S. No. 58 of 1982, was dismissed, holding that the suit filed by the plaintiff, father of the appellant herein, is not maintainable.

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

A. The suit property i.e. House No. 9/39, Savaripadayatchi

Street, Nellithope, Pondicherry, originally belonged to the deceased appellant/great grandfather Vengadachala Naicker, son of Ayyamperumal Naicker. He donated the above-mentioned suit property on 13.12.1896 in favour of his minor grandsons Radja Row and Kichnadji Row, both sons of Ponnusamy Naicker, and the said donation deed was registered on 18.1.1897. In the deed, it was provided that the donees/grandsons would only have a life estate, and that after their death, only their male legal heirs shall be entitled to the suit property, with the right of alienation.

B. In view of the fact that the donees were minors at that time, their father Ponnusamy Naicker was appointed as the guardian, in the said deed.

C. The donee Kichandji Row died issueless and hence, the other donee Radja Row became the full usufructuary owner of the suit property. Radja Row also died leaving behind his wife Thayanayagy Ammalle and his son Kannussamy Row. The said Kannussamy Row died issueless leaving behind his mother Thayanayagy Ammalle and Kuppammal his wife. After the death of Kuppammal, Thayanayagy Ammalle became the sole inheritor of the property. Thayanayagy Ammalle subsequently executed a sale deed dated 16.7.1959 in favour of Vedavalliammalle, the first defendant.

D. As per the terms of the donation deed dated 13.12.1896, after the death of Kannusamy Row, the suit property could only devolve upon his male legal heirs. Since the deceased Radja Row did not have any issue, the suit property had to go to the sole male reversioner and surviving heir, i.e. Radja Row's cousin brother Ramaraja, being the grandson of the donor Vengadachala Naicker.

E. On the basis of the aforesaid plaints, the appellant/plaintiff filed a suit against the said first defendant Vedavalliammalle before the erstwhile French Court of the Tribunal of First instance, for a direction that the plaintiff was in

fact, the heir of the deceased Radja Row, and also for a direction to the first defendant to not waste the suit property.

F. Immediately, after filing the said suit, the French Colony of Pondicherry was merged with the Union of India. The Hindu Succession Act, 1956 (hereinafter referred to as the 'Act 1956), had been extended to the Union Territory of Pondicherry w.e.f. 1.10.1963.

G. The suit filed by the appellant/plaintiff was decided vide judgment and decree dated 18.8.1965, wherein it was held that since Thayanayagy Ammalle was still alive, the claim of the appellant/plaintiff was premature. However, in the said suit, an observation was made that the appellant/plaintiff was the legal heir to the deceased Radja Row.

H. Aggrieved, Vedavalliammalle/first defendant preferred an appeal against the said judgment. However, Thayanayagy Ammalle did not press the appeal, with regard to the finding of the court as to whether the appellant/plaintiff was a legal heir to the deceased Radja Row, and contested only the appointment of the Commissioner, who had been appointed to determine whether any repairs were necessary, in respect of the suit property.

I. The appellate court allowed the appeal vide judgment dated 2.2.1970, only to the extent of holding that no repairs were necessary for the suit property. The said Thayanayagy Ammalle died on 30.5.1978. It was at this juncture, that the claim of the appellant over the suit property was not accepted by the opposite parties. The first defendant Vedavalliammalle and her husband, the second defendant, thereafter leased out the suit property in favour of the 3rd to 9th defendants on 30.5.1979, and were receiving rent for the same henceforth.

J. Defendant No.10 Jeyaraman, who was the husband and father of respondent nos. 4 and 5 respectively, purchased the

suit property from defendant no.1 vide registered sale deed dated 26.4.1980.

K. The deceased-plaintiff i.e. father of the appellants, filed suit O.S. No. 58 of 1982, in the Civil Court of Pondicherry for declaration that he was the legal heir of the deceased Radja Row, and thus had a proper title to the suit property and for declaration that the sale deed dated 16.7.1959 executed by Thayanayagy Ammalle in favour of Vedavalliammal, was null and void as she had only a life estate and not an absolute title, to alienate the property.

L. The said suit was contested by respondents/defendants and it was decided on 7.10.1983, by the Civil Court, which held that:

(a) Since Kannussamy Row had died before the introduction of the Hindu Succession Act, and considering the Hindu Law applicable in the French Territory of Pondicherry, after the death of the sole male heir to the suit property, the wife and the mother of the legal heir would have only usufructuary right over the suit property and not an absolute title.

(b) As per the above customary Hindu Law applicable in 1959, the vendor Thayanayagy Ammalle had only a usufructuary right over the property, and not the absolute right to alienate the same.

(c) Therefore, the reversionary male heir was entitled to inherit the property, being the sole heir of the original donor.

(d) The defendants/respondents had not acquired the title by way of possession/prescription.

(e) The suit was not barred by *res-judicata*.

Though the court decided the question of title in favour of

the appellant/plaintiff, the trial court found that the appellant/ plaintiff had filed the suit only for declaration of his right to the suit property, and since he had not asked for consequential relief of delivery of possession, the suit was held to be not maintainable and was dismissed.

M. Aggrieved, the appellant/plaintiff filed an appeal challenging the said judgment and order dated 7.10.1983, before the court of the District Judge, and the said appeal was allowed vide judgment and decree dated 13.4.1989, observing that the sale deed had been executed by Thayanayagy Ammalle in favour of defendant no. 1 on 16.7.1959, prior to the extension of the Hindu Succession Act to Pondicherry on 1.10.1963. The result of the same was that she had sold only her life estate in the suit property, as she was only a life estate holder and upon her death, the property devolved on the sole living reversionary. Further, it was held that, as the appellant/plaintiff had filed a suit for declaration in respect of the suit property in which there were tenants, it was not necessary for the appellant to claim any consequential relief for the reason that after obtaining such a declaration, appropriate relief could be claimed under Pondicherry Non-Agricutural Kudiyiruppudars (Stay of Eviction Proceedings) Act of 1980 (hereinafter referred to as the 'Act 1980'). There was thus, no need for a separate prayer for recovery of possession, as the same could be asked only under the Special Enactment.

N. Being aggrieved, the respondents/defendants filed second appeals before the High Court, and it was during the pendency of the said appeals, that Vedavalliammal sold the suit property to respondent nos. 1 to 3 on 31.3.1993. In view thereof, they were also impleaded in the appeal as respondents. The said appeals were decided by impugned judgment and order dated 12.12.2003, wherein the High Court had held, that Thayanayagy Ammalle had acquired the absolute title over the property. As the first defendant Vedavalliammal had purchased the suit property from the absolute owner Thayanayagy Ammalle

vide sale deed dated 11.7.1959, she had become the rightful owner, and the said sale deed was not null and void. Also, in view of the fact that the said Vedavalliammal had been in possession of the suit property for over than 10 years, she had perfected the title to the suit property by prescription, under the provisions of French Civil Code and as a consequence thereof, the suit for declaration was not maintainable without seeking the relief of possession.

Hence, these appeals.

3. Shri R. Venkataramani, learned senior counsel appearing for the appellants has submitted that the High Court had committed an error by holding that Thayanayagy Ammalle had acquired an absolute title over the suit property, and that by selling the suit property to Vedavalliammalle, who had purchased the suit property from her, vide sale deed dated 16.7.1959, Vedavalliammalle, had become the absolute owner of the suit property and that the sale deed (Ext. A-4) was not null and void.

The courts below have recorded a finding that Thayanayagy Ammalle was only a life estate holder and thus, had not acquired an absolute title. The High Court has not given any reason whatsoever, for reversing the said finding of fact. The said finding is perverse being based on no evidence. In case such a finding goes, the sale deed dated 16.7.1959 could not confer any title on the purchaser, Vedavalliammalle. More so, the High Court had not correctly framed the substantial question of law, rather it had framed entirely irrelevant issues, such as, the prescription and issue of limitation. The High Court had committed an error by holding that the suit for declaration was not maintainable without seeking any consequential relief, when the First Appellate Court has rightly held, that in a case where the property had been in the possession of the tenants, and where there were other means to recover the possession, there was no need for seeking any consequential relief in that aspect. Thus, the appeals deserve to be allowed.

4. Per contra, Shri R. Balasubramaniam, learned senior counsel appearing for the respondents, has opposed the appeals contending that seeking consequential relief was necessary in order to maintain the suit for declaration as per the proviso to Section 34 of the Special Relief Act, 1963 (hereinafter referred to as the 'Act 1963'). The pleadings taken by the parties suggest, that the respondents had been in physical possession of the property alongwith their tenants. They were in exclusive possession of the same. Therefore, as no consequential relief had been sought, the suit was not maintainable. More so, the question of limitation was very relevant and has rightly been dealt with by the High Court. 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 record.

6. Ramaraja claiming himself to be the reversioner, had filed a suit against the purchaser Vedavalliammalle, which was decided in 1965, and the issue of nature of title, with respect to whether the interest of Thayanayagy Ammalle was merely usufructuary or absolute, was considered. The court had then come to the conclusion vide judgment and decree dated 29.11.1965, that the same was pre-mature, as the suit could not have been filed during the life time of Thayanayagy Ammalle. In the suit O.S. No. 58 of 1982, undoubtedly, the contesting respondents had also been shown as the residents of the suit property, and relief had been claimed only for declaration that the plaintiff was the legal heir of the deceased Kannussamy Row, the great grandson of Venkatachala Naicker, having title to the suit property, and further, for declaration that the sale deed dated 16.7.1959 was null and void.

In para 4 of the written statement, it has been mentioned that the respondents/defendants were living in the suit property **alongwith defendant Nos. 3 to 9, their tenants**. In view of the pleadings taken by the parties, a large number of issues were framed by the trial court, including whether the plaintiff was

the legal heir of the deceased Kannussamy Row; whether the sale deed dated 16.7.1959 was null and void; and whether the plaintiff was entitled for the declaration, as prayed for.

7. The trial court held, that Thayanayagy Ammalle had not acquired absolute right and that the plaintiff therein was thus, the reversioner. The sale deed dated 16.7.1959 was void. However, as the property was in the **possession of the respondents/defendants**, and consequential relief of delivery of possession was not asked for, the suit was not maintainable.

8. Being aggrieved, the parties filed cross appeal suit Nos. 198/83, 21/88 and 43/88. All the aforesaid appeal suits were disposed by a common judgment of the First Appellate Court, and the said court held, that Vedavalliammalle was not residing in the suit property as she was residing somewhere, and had rented the house to three different tenants, with a total strength of about 26 members. Therefore, defendant no.1 was not in possession of the suit property even as early as 1969, and therefore, defendant no.10 also did not have possession of the suit property.

In view of the fact that the tenants could have been evicted subsequently by the appellant/plaintiff, resorting to the provisions of the Act 1980, which had been extended upto 31.3.1990, the suit was maintainable, and the trial court ought not to have dismissed the said suit on the ground that appellant/plaintiff had not sought consequential relief of recovery of possession.

9. The High Court having considered various points involved therein held, that as per Article 2265 of the French Civil Code 1908, a person who had acquired an immovable property in good faith, and under an instrument which was on the face of it capable of conferring a title, would perfect his title by prescription to the land in ten years, in the district of the Court of Appeal, when the owner lives in the same district as

that in which the land lies, and in twenty years if the true owner lives outside such district.

Admittedly, the first defendant Vedavalliammalle had purchased the suit property from the absolute owner Thayanayagy Ammalle, as per sale deed dated 16.7.1959. Thus, she had become the rightful owner, said sale deed being not null and void.

10. These appeals have raised the questions regarding the interpretation of French Hindu Law, as to whether a Hindu widow having only a life estate, can be considered the absolute owner of a property, thus competent to transfer the said property; and secondly whether the suit was maintainable as the appellant/plaintiff had not sought any consequential relief.

11. So far as the issue no.1 is concerned, undoubtedly, the Act 1956 was extended to the Union Territory of Pondicherry only, at a much later stage. Various judgments of the French courts and the Madras High Court dealing with the issue have been cited before us, but in view of the fact that Shri R. Bala Subramaniam, learned senior counsel appearing on behalf of the respondents, has fairly conceded that such a Hindu widow could not acquire the absolute title, there is no occasion for us to enter into that controversy. Even otherwise, the finding recorded by the High Court is not based on any evidence, and no reason has been given by it to reverse the findings recorded by the trial court as well as the First Appellate Court that Thayanayagy Ammalle was only the life estate holder. We hold that the High Court has erred in recording such a finding.

12. So far as the issue of adverse possession is concerned, in our humble opinion, the High Court had no occasion to deal with the same, in view of the earlier judgment of the trial court, wherein in 1965, it had been held that the suit filed by the appellant/plaintiff was pre-mature, as he could not file the same during the life time of Thayanayagy Ammalle.

13. Thus, the only relevant issue on which the judgment hinges upon is, whether the suit was maintainable without seeking any consequential relief.

In *Deo Kuer & Anr. v. Sheo Prasad Singh & Ors.* AIR 1966 SC 359, this Court dealt with a similar issue, and considered the provisions of Section 42 of the Specific Relief Act 1877, (analogous to Section 34 of the Act 1963), and held, that where the defendant was not in physical possession, and not in a position to deliver possession to the plaintiff, it was not necessary for the plaintiff in a suit for declaration of title to property, to claim the possession. While laying down such a proposition, this Court placed reliance upon the judgments of Privy Council in *Sunder Singh Mallah Singh Sanatan Dharam High School Trust v. Managing Committee, Sunder Singh Mullah Singh Rajput High School,* AIR 1938 PC 73; and *Humayun Begam v. Shah Mohammad Khan,* AIR 1943 PC 94.

14. In *Vinay Krishna v. Keshav Chandra & Anr.,* AIR 1993 SC 957, this Court while dealing with a similar issue held:

> *"……It is also now evident that she was not in exclusive possession because admittedly Keshav Chandra and Jagdish Chandra were in possession. There were also other tenants in occupation.* ***In such an event the relief of possession ought to have been asked for****. The failure to do so undoubtedly bars the discretion of the Court in granting the decree for declaration."* (emphasis added)

15. The facts in the case of *Deo Kuer* (Supra) are quite distinguishable from the facts of this case, as in that case, the tenants were not before the court as parties. In the instant case, respondent nos. 3 to 10 are tenants, residing in the suit property. The said respondents were definitely in a position to deliver the possession. Therefore, to say that the appellants would be entitled to file an independent proceedings for their

eviction under a different statute, would amount to defeating the provisions of Order II Rule 2 CPC as well as the proviso to Section 34 of the Act 1963. Thus, the First Appellate Court, as well as the High Court failed to consider this question of paramount importance.

16. The very purpose of the proviso to Section 34 of the Act 1963, is to avoid the multiplicity of the proceedings, and also the loss of revenue of court fees. When the Specific Relief Act, 1877 was in force, the 9th Report of the Law Commission of India, 1958, had suggested certain amendments in the proviso, according to which, the plaintiff could seek declaratory relief without seeking any consequential relief, if he sought permission of the court to make his subsequent claim in another suit/proceedings. However, such an amendment was not accepted. There is no provision analogous to such suggestion in the Act 1963.

17. A mere declaratory decree remains non-executable in most cases generally. However, there is no prohibition upon a party from seeking an amendment in the plaint to include the unsought relief, provided that it is saved by limitation. However, it is obligatory on the part of the defendants to raise the issue at the earliest. (Vide: *Parkash Chand Khurana etc. v. Harnam Singh & Ors.,* AIR 1973 SC 2065; and *State of M.P. v. Mangilal Sharma,* AIR 1998 SC 743).

In *Muni Lal v. The Oriental Fire & General Insurance Co. Ltd. & Anr.,* AIR 1996 SC 642, this Court dealt with declaratory decree, and observed that "mere declaration without consequential relief does not provide the needed relief in the suit; it would be for the plaintiff to seek both reliefs. The omission thereof mandates the court to refuse the grant of declaratory relief."

In *Shakuntla Devi v. Kamla & Ors.,* (2005) 5 SCC 390, this Court while dealing with the issue held:

> *"……a declaratory decree simpliciter does not attain finality if it has to be used for obtaining any future decree like possession. In such cases, if suit for possession based on an earlier declaratory decree is filed, it is open to the defendant to establish that the declaratory decree on which the suit is based is not a lawful decree."*

18. In view of the above, it is evident that the suit filed by the appellants/plaintiffs was not maintainable, as they did not claim consequential relief. The respondent nos. 3 and 10 being admittedly in possession of the suit property, the appellants/plaintiffs had to necessarily claim the consequential relief of possession of the property. Such a plea was taken by the respondents/defendants while filing the written statement. The appellants/plaintiffs did not make any attempt to amend the plaint at this stage, or even at a later stage. The declaration sought by the appellants/plaintiffs was not in the nature of a relief. A worshipper may seek that a decree between the two parties is not binding on the deity, as mere declaration can protect the interest of the deity. The relief sought herein, was for the benefit of the appellants/plaintiffs themselves.

As a consequence, the appeals lack merit and, are accordingly dismissed. There is no order as to costs.

B.B.B. Appeals dismissed.

MOHAN LAL & ANR
v.
STATE OF PUNJAB
(Criminal Appeal No (s).878-879 of 2011 ETC.)

APRIL 11, 2013

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

Penal Code, 1860 – s.376(2)(b, (g) and 366 – Gang rape – Of student – By teachers – Convicted by courts below u/ s.3762)(g) and 366 and sentenced to 10 years RI and fine – Held: Accused rightly convicted – Since the accused were public servants and the prosecutrix being a student in their custody, provisions of s.376(2)(b) are also applicable – There being fiduciary relationship between the accused and the prosecutrix, provisions of s.114-A of Evidence Act are attracted – Thus there is presumption against any consent by the prosecutrix and the accused have not rebutted that presumption – Considering the relationship between the accused and prosecutrix, life imprisonment should have been proper punishment – But in the circumstances that State has not come in appeal and Special Leave Petition of another accused was dismissed by Supreme Court, the Court is not in a position to issue notice for enhancement of punishment – Evidence Act, 1872 – s.114-A.

Raju and Ors. vs. State of Madhya Pradesh **(2008) 15 SCC 133: 2008 (16) SCR 1078;** *Ranjit Hazarika vs. State of Assam* **(1998) 8 SCC 635 – relied on.**

Avinash Nagra vs. Navodaya Vidyalaya Samiti and Ors. **(1997) 2 SCC 534: 1996 (7) Suppl. SCR 105;** *Vijay @ Chinee vs. State of Madhya Pradesh* **(2010) 8 SCC 191: 2010 (8) SCR 1150 – referred to.**

Code of Criminal Procedure, 1973 – s.309(1) Proviso –

rape case – Speedy trial – A procedure which does not ensure a reasonably quick trial, cannot be regarded as 'reasonable', 'fair' or 'just' and it will fall foul of Article 21 – It is duty of the court not to adjourn the proceedings for such a long period, giving an opportunity to the accused to persuade or force the witnesses – In the instant case, the trial court went against the spirit of law by recording the statement of the prosecutrix on five different dates – Constitution of India, 1950 – Article 21.

Lt. Col. S.J. Chaudhary vs. State (Delhi Administration) **AIR 1984 SC 618: 1984 (2) SCR 438;** *Akil @ Javed vs. State of NCT of Delhi* **(2012) 1 SCALE 709;** *Mohd. Khalid vs. State of West Bengal* **(2002) 7 SCC 334: 2002 (2) Suppl. SCR 31;** *Maneka Gandhi vs. Union of India and Anr.* **AIR 1978 SC 597: 1978 (2) SCR 621;** *Abdul Rehman Antulay and Ors. vs. R.S. Nayak and Anr.* **AIR 1992 SC 1701: 1991 (3) Suppl. SCR 325;** *Vakil Prasad Singh vs. State of Bihar* **AIR 2009 SC 1822: 2009 (1) SCR 517;** *Shri Sudarshanacharaya vs. Shri Purushottamacharya and Anr.* **(2012) 9 SCC 241 – relied on.**

State of U.P. vs. Shambhu Nath Singh **(2001) 4 SCC 667: 2001 (2) SCR 854;** *N.G. Dastane vs. Shrikant S. Shivde* **(2001) 6 SCC 135: 2001 (3) SCR 442 – referred to.**

Witnesses:

Protection of witnesses – It is duty of prosecution and Investigating Officer to ensure that witnesses are examined in such a manner that their statement must be recorded at the earliest, and they should be assured full protection, so as to prevent them from being hostile.

Hostile witness – Evidentiary value of – Held: Statement of hostile witness can also be examined to the extent it supports the prosecution case.

Case Law Reference:

1984 (2) SCR 438	**relied on**	**Para 13**
(2012) 1 SCALE 709	**relied on**	**Para 13**
2002 (2) Suppl. SCR 31	**relied on**	**Para 14**
2001 (2) SCR 854	**referred to**	**Para 14**
2001 (3) SCR 442	**referred to**	**Para 14**
1978 (2) SCR 621	**relied on**	**Para 15**
1991 (3) Suppl. SCR 325	**relied on**	**Para 15**
2009 (1) SCR 517	**relied on**	**Para 15**
(2012) 9 SCC 241	**relied on**	**Para 15**
1996 (7) Suppl. SCR 105	**referred to**	**Para 17**
2010 (8) SCR 1150	**referred to**	**Para 19**
2008 (16) SCR 1078	**relied on**	**Para 20**
(1998) 8 SCC 635	**relied on**	**Para 20**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal Nos. 878-879 of 2011.

From the Judgment & Order dated 03.12.2010 of the High Court of Punjab & Haryana at Chandigarh in Criminal Appeal Nos. 1009-SB & 1031-SB 2000.

WITH

Crl.A. No. 884 of 2011.

V.K. Jhanji, Manoj Swarup, Anup Kumar, Rutwik Panda, Jyoti Mendiratta, Debasis Misra for the Appellants.

Srajita Mathur, Kuldip Singh for the Respondent.

The following Order of the Court was delivered

O R D E R

1. These appeals have been preferred against the impugned judgment and order dated 3.12.2010 passed by the High Court of Punjab & Haryana at Chandigarh in Criminal Appeal Nos. 1009-SB of 2000, 1031-SB of 2000 and 1080-SB of 2010, by way of which the High Court has affirmed the judgment and order dated 25.09.2000 passed by the Additional Sessions Judge, Fatehgarh Sahib, Punjab in Sessions Case No. 15T/98/22.12.95, by way of which the learned trial court has convicted the appellants along with others, namely, Ranjit Singh and Smt. Jasbir Kaur for the offences punishable under Section(s) 376(2)(g) and 366 of Indian Penal Code, 1860 (hereinafter referred to as the 'IPC'), and awarded sentence of 10 years to each of them and fine of Rs.2000/- and Rs. 3,000/- respectively, and in default of payment of fine, to undergo further RI for one year and six months respectively.

2. The facts and circumstances leading to filing of these appeals are that, one Manjit Kaur (PW-1), who was a student of class X had gone along with 15-16 other girls from her school to attend sport meet at Fatehgarh Sahib. All those 15-16 girls had been walking to reach Fatehgarh Sahib. In the meanwhile, Balbir Singh, the Director of Physical Education, asked Manjit Kaur, prosecutrix (hereinafter referred to as 'Prosecutrix') that she should sit on the scooter of Mohan Lal Verma, one of the appellants herein. She was not initially willing to go along with Mohan Lal Verma on his scooter, but she was threatened by Balbir Singh-appellant, and thus under the pressure and force, she sat on the scooter of Mohan Lal Verma. When Mohan Lal Verma reached near petrol pump of Machlian, he stopped the scooter and pretended to repair it. Ranjit Singh, also a teacher in the same school and who had also been convicted by the Trial Court and the High Court, and whose SLP has been dismissed vide order dated 18.3.2011, arrived there on cycle and Mohan Lal Verma-appellant forced Manjit Kaur to sit on

his cycle. As she had no other option, she sat on the cycle of Ranjit Singh who, after reaching Gurdwara Jyoti Sarup told her that he had to give some message to his sister, and that she should accompany him. Manjit Kaur was not willing and resisted to a certain extent but she was persuaded/forced to accompany Ranjit Singh. Both went to the house of Jasbir Kaur. By this time, Mohan Lal Verma, Amarjit Singh and Balbir Singh had already reached the place. Manjit Kaur was offered tea by Jasbir Kaur and thereafter, she pushed her into the room where Ranjit Singh committed rape upon her in the presence of other persons as a result of which she became unconscious.

3. Darbara Singh (PW-3), father of the prosecutrix lodged the FIR, though at a later stage, i.e. after one week, in the police station. The matter was investigated, charge sheet was filed against all these persons and after conclusion of the trial, the trial court convicted all the aforesaid appellants as well as Ranjit Singh and Jasbir Kaur, and awarded sentence referred to hereinabove. The High Court, while hearing their appeals, acquitted only Jasbir Kaur and maintained the conviction and sentence of other persons, hence these appeals.

4. Shri V.K. Jhanji, learned senior counsel and Shri Manoj Swarup, advocate appearing for the appellants had raised a large number of issues pointing out various discrepancies in the case of prosecution. The prosecutrix (PW-l), her mother, Smt. Jaswant ?Kaur (PW-2) and her father, Darbara Singh (PW-3) were examined, but since PW-3 died during the trial, he could not be cross-examined by the defence, and as such his evidence could not be relied upon. Undoubtedly, PW-1 and PW-2 supported the case of the prosecution but in the last resiled from the same.

5. We have gone through their depositions and it is clear that in the earlier part of their evidence, both the witnesses had clearly implicated all these accused. The FIR could not be lodged immediately after the incident, as there was no one in the family to support their cause. Smt. Jaswant Kaur (PW-2)

had to send a telegram to her husband and it is only after he reached their place, that FIR was lodged. The victim was examined on several dates within the period of two years and she had been consistent throughout, that rape had been committed upon her. However, her father died during the trial and it may be because of his death that both the prosecutrix and her mother had resiled to a certain extent from the prosecution case. Naturally, when the protective shield of their family had withered away, the victim and her mother could have come under immense pressure from the appellants. The trial Court itself has expressed its anguish as to how the accused had purposely delayed and dragged the examination of the prosecutrix and finally succeeded in their nefarious objective when the father of the prosecutrix died and the prosecutrix resiled on the last date of her cross-examination. The appellants belonged to a well-to-do family, while the prosecutrix came from poorest state of the society. Thus, a sudden change in their attitude is understandable

6. Legally, a witness has no obligation whatsoever unless they agree to testify. The only real moral (and legal) obligation is that if they agree to testify to what they witnessed, it must be the truth as they saw it.

But the community has a legal and moral responsibility to respond to criminal victimization in order to preserve order and protect the community. Victims and witnesses of crime are essential partners in this community effort. Without their participation and cooperation as a citizen, the criminal justice systems cannot serve the community.

7. A witness is a responsible citizen. It is his duty to support the case of the prosecution and should depose what he knows about the case. In the instant case, it is shocking that the mother of the prosecutrix had turned hostile and she repeatedly told the court that there had been some talks of compromise. In a case where an offence of this nature had been committed, we fail to understand as to how there can be a compromise

between the parties. The conduct of the mother herself is reprehensible.

8. It is a settled legal proposition that statement of a hostile witness can also be examined to the extent that it supports the case of the prosecution. The trial court record reveals a very sorry state of affairs, inasmuch as no step had ever been taken by the prosecution or the Investigating Officer, to prevent the witnesses from turning hostile, as it is their solemn duty to ensure that the witnesses are examined in such a manner that their statement must be recorded, at the earliest, and they should be assured full protection.

9. There is nothing on record, not even a suggestion by the appellants to the effect that the victim had any motive or previous enmity with the appellants, to involve them in this case. Unfortunately, the trial court went against the spirit of law, while dealing with such a sensitive case of rape of a student by her teachers, by recording the statement of prosecutrix on five different dates. Thus, a reasonable inference can be drawn that defence had an opportunity to win her mother.

10. Also, the manner in which the trial court conducted the trial is shocking, especially in view of the provisions of Section 309(1) of the Code of Criminal Procedure, ?1973 (hereinafter referred to as the 'Cr.PC'), which reads as under:-

> "309 (1) - In every inquiry or trial the proceedings shall be held as expeditiously as possible, and in particular, when the examination of witnesses has once begun, the same shall be continued from day to day until all the witnesses in attendance have been examined, unless the Court finds the adjournment of the same beyond the following day to be necessary for reasons to be recorded:
>
> Provided that when the inquiry or trial relates to an offence under sections 376 to 376D of the Indian Penal Code (45 of 1860), the inquiry or trial shall, as far as possible, be completed within a period of two months from the date of commencement of the examination of witnesses".

11. The said proviso has been added by amendment vide Act 5 of 2009 w.e.f. 31.12.2009, but even otherwise, it was the duty of the trial court not to adjourn the proceedings for such a long period giving an opportunity to the accused to persuade or force, by any means, the prosecutrix and her mother to turn hostile.

12. Giving recognition to the principle of speedy trial, sub-sec (1) of section 309 Cr.P.C., envisages that when the examination of witnesses has once begun, the same shall be continued from day to day, until all the witnesses in attendance have been examined. Speedy and expeditious trial and enquiry were envisaged under section 309 Cr.P.C.

13. In *Lt. Col. S.J. Chaudhary v. State (Delhi Administration)* AIR 1984 SC 618, it was held that it is most expedient that the trial before the Court of Session should proceed and be dealt with continuously from its inception to its finish. Not only will it result in expedition, it will also result in the elimination of manoeuvre and mischief. It will be in the interest of both the prosecution and the defence that the trial proceeds from day-to-day. It is necessary to realise that Sessions cases must not be tried piece-meal. Once the trial commences, except for a very pressing reason which makes an adjournment inevitable, it must proceed *de die in diem* until the trial is concluded. (See also: *Akil @ Javed v. State of NCT of Delhi,* 2012 (11) SCALE 709).

14. In *Mohd. Khalid v. State of West Bengal,* (2002) 7 SCC 334, this court held that when a witness is available and his examination-in-chief is over, unless compelling reasons are there, the trial court should not adjourn the matter on the mere asking. While deciding the said case, the court placed great emphasis on the provisions of Section 309 Cr.P.C. and placed

reliance on the earlier judgment in *State of U.P. v. Shambhu Nath Singh,* (2001) 4 SCC 667; and *N.G. Dastane v. Shrikant S. Shivde,* (2001) 6 SCC 135. In the said case, this court has deprecated the practice of the courts adjourning the cases without examination of witnesses when they are in attendance. The trial court should realize that witness is a responsible citizen who has some other work to attend for eking out a livelihood, and a witness cannot be told to come again and again just to suit the convenience of the advocate concerned. Seeking adjournments for postponing the examination of witnesses without any reason, amounts to dereliction of duty on the part of the advocate as it tantamounts to harassment and hardship to the witnesses. Tactics of filibuster, if adopted by an advocate is also a professional misconduct.

15. No procedure which does not ensure a reasonably quick trial can be regarded as 'reasonable, fair or just' and it would fall foul of Article 21. (Vide: *Maneka Gandhi v. Union of India & Anr.,* AIR 1978 SC 597; *Abdul Rehman Antulay & Ors. v. R.S. Nayak & Anr.,* AIR 1992 SC 1701; *Vakil Prasad Singh v. State of Bihar,* AIR 2009 SC 1822; and *Shri Sudarshanacharaya v. Shri Purushottamacharya & Anr.* (2012) 9 SCC 241).

16. The appellants before us and Ranjit Singh were public servants being teachers in a government school, prosecutrix had been a student in their custody, therefore, provisions of Section 376(2)(b) IPC are applicable, and as it was a case of gang rape, provisions of Section 376(2) (g) IPC are attracted.

17. The requirement of education for girls and the functions of a teacher have been dealt with and explained at some length by this Court in *Avinash Nagra v. Navodaya Vidyalaya Samiti & Ors.,* (1997) 2 SCC 534, which read as follows:

"11. It is in this backdrop, therefore, that **the Indian society has elevated the teacher as "Guru Brahma, Guru Vishnu, Guru Devo Maheswaraha". As Brahma, the**

teacher creates knowledge, learning, wisdom and also creates out of his students, men and women, equipped with ability and knowledge discipline and intellectualism to enable them to face the challenges of their lives. **As Vishnu, the teacher is preserver of learning. As Maheswara, he destroys ignorance. Obviously, therefore, the teacher was placed on the pedestal below the parents. The State has taken care of service conditions** of the teacher and he owes dual fundamental duties to himself and to the society. As **a member of the noble teaching profession and a citizen of India he should always be willing, self-disciplined, dedicated with integrity to remain ever a learner of knowledge, intelligently to** articulate and communicate and imbibe in his students, as society duty, to impart education, to bring them up with discipline, inculcate to abjure violence and to develop scientific temper with a **spirit of enquiry and reform constantly to rise to higher levels in any walk of life nurturing constitutional ideals enshrined in Article 51-A so** as to make the students responsible citizens of **the country. Thus the teacher either individually or collectively as a community of teachers, should regenerate this dedication with a bent of spiritualism in broader perspective of the constitutionalism** with secular ideologies enshrined in the Constitution as an arm of the State to establish egalitarian social order under the rule of law. **Therefore, when the society has given such a pedestal, the conduct, character, ability and disposition of a teacher should be to transform the student into a disciplined citizen**, inquisitive to learn, intellectual to pursue in any walk of life with dedication, discipline and devotion with an enquiring mind but not with blind customary beliefs. The education that is imparted by the teacher determines the level of the student for the development, prosperity and welfare of the society. **The quality, competence and character of the teacher are,**

therefore, most significant to mould the calibre, character and capacity of the student for successful working of democratic institutions and to sustain them in their later years of life as a responsible citizen in different responsibilities. Without a dedicated and disciplined teacher, even the best education system is bound to fail. **It is, therefore, the duty of the teacher to take such care of the pupils as a careful parent would take of its children and the ordinary principle of vicarious liability** would apply where negligence is that of a teacher. The age of the pupil and the nature of the activity in which he takes part are material factors determining the degree and supervision demanded by a teacher.

12. ***It is axiomatic that percentage of education among girls, even after independence, is fathom deep due to independence , is fathom deep due to indifference on the part of all in rural India except some educated people, Education to the girl children is nations asset and foundation for fertile human resources and disciplined family management, apart from their*** *equal participation in socio-economic and political democracy.* ***Only of late, some middle-class people are sending the girl children to co-educational institutions under the care of proper management and to look after the welfare and safety of the girl. Therefore, greater responsibility is thrust on the management of the schools and colleges to protect the young children, in particular, the growing up girls, to bring them up in disciplined and dedicated pursuit of excellence. The teacher, who has been kept in charge, bears more added higher responsibility and should be more exemplary. His/her character and conduct should be more like Rishi and as loco parentis and such is the duty, responsibility and charge expected of a teacher*** *. The question arises whether the conduct of the appellant is befitting with such higher responsibilities and as he by*

his conduct betrayed the trust and forfeited the faith whether he would be entitled to the full-fledged enquiry as demanded by him? The fallen standard of the appellant is the tip of the iceberg in the discipline of teaching, a noble and learned profession; it is for each teacher and collectively their body to stem the rot to sustain the faith of the society reposed in them. Enquiry is not a panacea but a nail in the coffin….".(Emphasis added)

18. As there was a fiduciary relationship between the accused and the prosecutrix being in their custody and they were trustee, it became a case where fence itself eats the crop and in such a case the provisions of Section 114-A of the Indian Evidence Act, 1872 (hereinafter referred to as the 'Evidence Act') (which came into effect from 25.12.1983) are attracted. Undoubtedly it is a case which provides for a presumption against any consent in a case of rape even if the prosecutrix girl is major, however, every presumption is rebuttable, and no attempt had ever been made by any of the appellants or other accused to rebut the said presumption.

19. In *Vijay @ Chinee v. State of Madhya Pradesh* (2010) 8 SCC 191, this Court has placed very heavy reliance on the provisions of Section 114-A of the Evidence Act, making a reference that it came by an amendment in the year 1988 and further made an observation that the accused-appellants in that case did not make any attempt to rebut the said presumption. One of us (Justice B.S. Chauhan) has been the author of the said judgment. In fact, the provisions of Section 114A of the Evidence Act were not attracted in the facts of that case for the reason that the condition provided for its attraction were not available/attracted in that case.

20. The issue in respect of applicability of Section 114-A of the Evidence Act has been considered by this Court in *Raju & Others v. State of Madhya Pradesh* reported in (2008) 15 SCC 133, and while deciding the said case, reliance has been

placed on the judgment in *Ranjit Hazarika v. State of Assam,* (1998) 8 SCC 635, wherein this Court has held as under:-

> *"……Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. Why should the evidence of a girl or a woman who complains of rape or sexual molestation, be viewed with doubt, disbelief or suspicion? The court while appreciating the evidence of a prosecutrix may look for some assurance of her statement to satisfy its judicial conscience, since she is a witness who is interested in the outcome of the charge levelled by her, but there is no requirement of law to insist upon corroboration of her statement to base conviction of an accused. The evidence of a victim of sexual assault stands almost on a part with the evidence of an injured witness and to an extent is ever more reliable. Just as a witness who has sustained some injury in the occurrence, which is not found to be self-inflicted, is considered to be a good witness in the sense that he is least likely to shield the real culprit, the evidence of a victim of a sexual offence is entitled to great weight, absence of corroboration notwithstanding…."*

21. In view of the above, we are of the considered opinion that it was a fit case where the provisions of Section 114-A of the Evidence Act are attracted and no attempt had ever been made by any of the appellants or other accused to rebut the presumption. In such a case, we do not see any reason to interfere with the finding of fact recorded by the courts below.

22. So far as the conviction is concerned, as it was case of gang rape by teachers of their student, the punishment of 10 years rigorous imprisonment imposed by the trial court is shocking, considering the relationship between the parties. It was a fit case where life imprisonment could have been awarded to all the accused persons. Unfortunately, Smt. Jasbir Kaur had been acquitted by the High Court, and State of Punjab

did not prefer any appeal against the same. One of the accused, Ranjit Singh, had approached this court and his special leave petition has been dismissed. Thus, in such circumstances, we are not in a position even to issue notice for enhancement of the punishment to the accused.

23. In view of the above, appeals do not have any merit and accordingly are dismissed .

K.K.T. Appeals dismissed.

SMT. NEENA VIKRAM VERMA
v.
BALMUKUND SINGH GAUTAM & ORS.
(Civil Appeal No. 3840 of 2013)

APRIL 12, 2013

[H.L. GOKHALE AND MADAN B. LOKUR, JJ.]

Election Petition – Recrimination Petition – Filed by appellant – Application of respondent u/Or.VII, r.11 CPC for rejection of Recrimination Petition – Allowed by High Court, consequently leading to dismissal of Recrimination Petition – Appellant challenged the order – By consent order passed by Supreme Court, order of High Court set aside, and Recrimination Petition restored to the file of Election Petition – Subsequent application of respondent No.1 u/Or.VI, r.16 CPC for striking off certain pleadings from the Recrimination Petition – Allowed by High Court on ground that such pleadings were vague, vexatious, non-specific and without any material facts – Propriety – Held: Not proper – Once it is accepted by a party by consent that a particular petition (in the instant case the Recrimination Petition) is to be heard by the Court, by giving up the objection u/Or. VII, r.11, the very party cannot be subsequently permitted to seek the striking off the pleadings containing the cause of action under the garb that the pleadings containing the cause of action are unnecessary, vexatious or scandalous – No Court is expected to permit any matter to be raised which might and ought to have been made ground of defence or attack, once the same is relinquished by the party concerned – High Court ought to have noted this basic principle of any litigation – It could not have entertained the application u/Or. VI.6, r.16 when Supreme Court had restored the Recrimination Petition to the file of High Court by consent in order to decide it expeditiously – High Court to now proceed to decide the

Recrimination Petition expeditiously – Code of Civil Procedure, 1908 – Or. VI, r.16 and Or. VII, r.11 – Representation of Peoples Act, 1951 – s.97 – Conduct of Elections Rules, 1961 – r.63.

Election Petition – Verification – Defect in – Removal – Held: Defect in the verification in the matter of Election Petition can be removed in accordance with the principles of CPC, and that it is not fatal to the Election Petition.

In the General Elections to the Madhya Pradesh Legislative Assembly, the appellant was declared elected defeating the first respondent by one vote. Respondent No. 1 filed Election Petition challenging the election of the appellant on the ground of improper reception, refusal and rejection of votes under the provisions of Representation of Peoples Act, 1951. This was principally on the basis that the counting of the postal ballot was done in violation of Rule 63 of the Conduct of Elections Rules, 1961, to the benefit of the appellant. The appellant in turn filed a Recrimination Petition under Section 97 of the R.P. Act, 1951, principally raising two grounds: (a) in paragraph 3 that there were several criminal cases pending against the 1st respondent which he had not disclosed, and (b) in paragraph 4 that the first respondent had indulged into various corrupt practices.

Respondent No.1 thereafter filed an application under Order 7 Rule 11 of CPC for rejection of the Recrimination Petition on the ground that it did not disclose any cause of action. This was apart from filing the reply on merits to the Recrimination Petition. The High Court allowed the said application, consequently leading to the dismissal of the Recrimination Petition filed by the appellant. The appellant challenged this order before this Court, but by a consent order passed by this Court, the said order of the High Court was set aside, and the

Recrimination Petition was restored to the file of the Election Petition. Subsequently the High Court allowed the Election Petition, and set aside the election of the appellant, and directed the Recrimination Petition to be heard.

The appellant filed a statutory appeal before this Court against the order in the Election Petition under section 116 A of the R.P. Act, 1951. In the meanwhile, respondent No.1 filed an application under Order 6 Rule 16 for striking off the pleadings in paragraph 3 and 4 of the Recrimination Petition. This application was allowed by the impugned order which led to the present appeal.

Allowing the appeal, the Court

HELD:1.1. The application under Order 7 Rule 11 of CPC is required to be decided on the face of the plaint or the petition, whether any cause of action is made out or not. Once it is accepted by a party by consent that a particular petition (in the instant case the Recrimination Petition) is to be heard by the Court, by giving up the objection under Order 7 Rule 11, the very party cannot be subsequently permitted to seek the striking off the pleadings containing the cause of action under the garb that the pleadings containing the cause of action are unnecessary, vexatious or scandalous. One is expected to take all necessary pleas at the same time. The party concerned is expected to raise such a contention at the time of passing of the Court order (consent order in the present case) or seek the liberty to raise it at a later point of time that some of the pleadings are unnecessary or vexatious or scandalous. No Court is expected to permit any matter to be raised which might and ought to have been made ground of defence or attack, once the same is relinquished by the party concerned. The High Court ought to have noted this basic principle of any litigation. [Para 28] [867-C-F]

1.2. That apart, the objections raised in the present matter under Order 6 Rule 16 of CPC is based on the requirement of Section 83 of the R.P. Act, 1951 that the applicant is required to place material facts before the Court. As far as the allegation of criminality is concerned, sufficient material facts were placed on record alongwith the Recrimination Petition. Subsequently, a notice to admit facts was given, wherein, particulars of specific cases were given, wherein, the charge-sheets were filed for the charges which would result into imprisonment of 2 years or more, as required by section 33A of the R.P. Act, 1951. The respondent chose not to reply to this notice. In fact the High Court ought to have drawn an adverse inference, but he failed in doing so. [Para 29] [867-G-H; 868-A-B]

1.3. It has been held by this Court time and again that a defect in the verification in the matter of Election Petition can be removed in accordance with the principles of CPC, and that it is not fatal to the Election Petition. [Para 30] [868-D-E]

1.4. The order passed by the High Court in allowing the application of the first respondent under Order 6 Rule 16 of CPC was clearly untenable and bad in law. The High Court could not have entertained the application under Order 6 Rule 16 when this Court had restored the Recrimination Petition to the file of that Court by consent in order to decide it expeditiously. The High Court erred in holding that the pleadings in paragraph 3 and 4 of the Recrimination Petition were vague, vexatious, non-specific and without any material facts. The High Court will now proceed to decide the Recrimination Petition expeditiously. [Para 31] [869-F-H; 870-A]

K.K. Modi Vs. K.N. Modi & Ors. **1998 (3) SCC 573: 1998 (1) SCR 601;** *H.D. Revanna Vs. G. Puttaswamy Gowda and Ors.* **1999 (2) SCC 217: 1999 (1) SCR 198 and** *Ponnala*

Lakshmaiah Vs. Kommuri Pratap Reddy and Ors. **2012 (7) SCC 788: 2012 (6) SCR 851 – relied on.**

Murarka Radhey Shyam Ram Kumar v. Roop Singh Rathore and Anr. **AIR 1964 SC 1545: 1964 SCR 573 – followed.**

P.A. Mohammed Riyas Vs. M.K. Raghavan & Ors. **2012 (5) SCC 511: 2012 (4) SCR 56 – referred to.**

Sopan Sukhdeo Sable and Ors. v. Assistant Charity Commissioner and Ors. **2004 (3) SCC 137: 2004 (1) SCR 1004;** *Jyoti Basu and Ors. Vs. Debi Ghosal and Ors.* **1982 (1) SCC 691: 1982 (3) SCR 318;** *Mangani Lal Mandal Vs. Bishnu Deo Bhandari* **2012 (3) SCC 314: 2012 (1) SCR 527 and** *Azhar Hussain Vs. Rajiv Gandhi* **AIR 1986 SC 1253: 1986 SCR 782 – cited.**

Case Law Reference:

2004 (1) SCR 1004	**cited**	**Para 14**
1982 (3) SCR 318	**cited**	**Paras 16, 24**
2012 (1) SCR 527	**cited**	**Para 18**
2012 (4) SCR 56	**referred to**	**Paras 19, 26, 30**
1986 SCR 782	**cited**	**Paras 20, 24**
1998 (1) SCR 601	**relied on**	**Paras 27, 28**
1964 SCR 573	**followed**	**Para 30**
1999 (1) SCR 198	**relied on**	**Para 30**
2012 (6) SCR 851	**relied on**	**Para 30**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3840 of 2013.

From the Judgment & Order dated 05.12.2012 of the High Court of Madhya Pradesh bench at Indore in IA No. 7248 of 2012 in Election Petition No. 11 of 2009.

Ranjit Kumar, Pinki Anand, Navin Prakash, Sanjeev Nasiar, Ashish G.Chaturvedi, Natasha Sehrawat, Subramanium Prasad for the Appellant.

P.P. Rao, Arvind V. Savant, Varun K. Chopra, Rahul Kaushik, B.K. Satija, S.S. Khanduja, Yash Pal Dhingra, Mishra Saurabh for the Respondents.

The Judgment of the Court was delivered by

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

2. This petition for Special Leave seeks to challenge the order dated 5.12.2012 passed by a learned Single Judge of the Madhya Pradesh High Court (Bench at Indore) allowing the application filed by the first respondent under Order 6 Rule 16 of Code of Civil Procedure (CPC) being I.A No. 7248/2012 for striking off certain pleadings from the Recrimination Petition filed by the Appellant herein.

Facts leading to this petition are this wise:-

3. The General Elections to the Madhya Pradesh Legislative Assembly were notified by the Election Commission of India on 14.10.2008 and were held on 27.11.2008. The appellant herein contested the election from 201-Dhar (General) Constituency. She was declared elected on 9.12.2008 defeating the first respondent by one vote.

4. The respondent No. 1 filed Election Petition bearing No. 11 of 2009 before the High Court of Madhya Pradesh (Bench at Indore), challenging the election of the appellant on the ground of improper reception, refusal and rejection of votes under the provisions of Representation of Peoples Act, 1951 (R.P. Act, 1951 in short). This was principally on the basis that the counting of the postal ballot was done in violation of Rule 63 of the Conduct of Elections Rules, 1961, to the benefit of the appellant.

5. The appellant in turn filed a Recrimination Petition under Section 97 of the R.P. Act, 1951 within the time provided therefor, principally raising two grounds:

(a) paragraph 3 of the Recrimination Petition claimed that there were several criminal cases pending against the 1st respondent which he had not disclosed, and therefore his nomination was void and he cannot be declared to be elected,

(b) paragraph 4 thereof contended that the first respondent had indulged into various corrupt practices.

6. Respondent No.1 thereafter filed an application under Order 7 Rule 11 of CPC being I.A No. 8166 of 2009 for rejection of the Recrimination Petition on the ground that it did not disclose any cause of action. This was apart from filing the reply on merits to the Recrimination Petition. The appellant opposed I.A No. 8166 of 2009 by filing her reply. The High Court by its order dated 14.7.2011 allowed the said application, consequently leading to the dismissal of the Recrimination Petition filed by the appellant.

7. The appellant challenged this order by filing SLP (C) No. 28031 of 2011 which was converted into Civil appeal No. 1554 of 2012. By a consent order dated 2.2.2012 passed by this Court on that appeal, the said order dated 14.7.2011 passed by the High Court was set aside, and the Recrimination Petition was restored to the file of the Election Petition No. 11 of 2009.

8. It so transpired that subsequently the High Court by its judgment and order dated 19.10.2012 allowed the Election Petition No. 11 of 2009, and set aside the election of the petitioner herein. The High Court, therefore directed the Recrimination Petition to be heard.

9. We may note at this stage that the appellant has filed a statutory appeal against the judgment and order in the Election Petition No.11 of 2009 under section 116 A of the R.P. Act,

1951, which has been admitted by this Court on 8.11.2012. By virtue of an interim order passed therein, this Court has permitted the appellant to attend the Assembly, but without any right to cast vote and to receive any emoluments.

10. In the meanwhile, respondent No. 1 filed another application being I.A No. 7248 of 2012 on 1.11.2012 under Order 6 Rule 16 for striking off the pleadings in paragraph 3 and 4 of the Recrimination Petition. Appellant opposed this application by filing a reply. This application has been allowed by the impugned order which has led to the present Civil Appeal.

11. We may mention one more development. The appellant has filed an application under Order 6 Rule 17 to incorporate some material facts in her Recrimination Petition. That has been rejected by the High Court by its order dated 23.11.2012, and the appellant has filed a separate SLP against that order.

Submissions on behalf of the appellant:-

12. Mr. Ranjit Kumar and Ms. Pinki Anand, senior counsel appearing for the appellant took us through the application under Order 6 Rule 16 filed by the respondent No.1, and compared it with the earlier application filed by him under Order 7 Rule 11. It was submitted by them that the contents of the present application under Order 6 Rule 16 were identical to those in the earlier application filed under Order 7 Rule 11. Thus, it was pointed out that paragraphs 1 to 9 of the application under Order 6 Rule 16 were identical to paragraphs 8 (d), 8 (e), 8(f), 8 (h), 8(i), 8 (j), 8 (k), 8(l) and 8 (m) respectively of the earlier application. These paragraphs of the two applications specifically dealt with paragraphs 3 (A) to 3 (G) and paragraphs 4 (A) to 4 (D) of the Recrimination Petition. Thus, if this application under Order 6 Rule 16 is allowed, all the pleadings from paragraph 3 and 4 of the Recrimination

Petition will be struck off. These paras contained the main grounds of the Recrimination Petition, and if these were struck off nothing will remain in the Recrimination Petition. Mr. Ranjit Kumar, submitted that this new application is nothing but an attempt to reagitate under a new garb the earlier application under Order 7 Rule 11 which had been rejected. He pointed out that the High Court's order on the application under Order 7 Rule 11 dismissing the Recrimination Petition had been set-aside by this Court by consent, and the Recrimination Petition was set down for hearing. Paragraph 3 and 4 of the Order of this Court dated 2.2.2012 read as follows:-

"……

3. In course of the hearing in light of the discussion that took place, learned senior counsel for the parties agreed for the following order:

(i)The order dated July 14, 2011 passed by the High Court of Madhya Pradesh, Bench at Indore, is set aside.

(ii) The Recrimination Petition filed by the present appellant (returned candidate) under Section 97 of the Representation of the People Act, 1951 is restored to the file of the Election Petition No. 11 of 2009.

(iii) The High Court is requested to hear and conclude the trial with regard to the challenge to the election of the returned candidate in Election Petition No. 11 of 2009- Balmukund Singh Gautam Vs. Smt. Neena Vikram Verma and others – as early as may be possible and in no case later than May 31, 2012.

iv) In case the High Court declares the election of the returned candidate to be void, the High Court shall then proceed with the consideration of the Recrimination Petition and conclude the enquiry in respect therof expeditiously and positively by August 31, 2012.

4. The parties shall fully co-operate with the High Court in expeditious conclusion of the trial and shall not seek unnecessary adjournments.

……."

13. Mr. Ranjit Kumar, therefore submitted that since the Recrimination Petition has been restored to the file by an order of this Court, it was expected that the submissions therein had to be gone into and decided. This Hon'ble Court had passed its order on 2.2.2012 in terms of the agreement arrived at between the parties. The application under Order 6 Rule 16 was filed on 1.11.2012 which was 9 months after the said consent order. This was also in the teeth of the direction by this Court to dispose of the Recrimination Petition expeditiously, and in fact all parties had specifically agreed before this Court to fully cooperate with the High Court in expeditious disposal.

Submissions on behalf of the respondent No.1:-

14. Mr. P.P. Rao and Mr. A.V. Savant, learned senior counsel appeared for the respondent No. 1. Mr. Rao submitted that the nature of an application under Order 6 Rule 16 was different from the one under Order 7 Rule 11. Order 6 Rule 16 was to strike out those pleadings which were unnecessary, scandalous, frivolous or vexatious. As against that, Order 7 Rule 11 dealt with a situation where a plaint did not disclose any cause of action. Mr. Rao submitted that the Supreme Court Order dated 2.2.2012 did not bar filing of the application under Order 6 Rule 16 CPC for striking off unnecessary or scandalous pleadings. In support of his submission that the scope of the two provisions was different, he relied upon paragraph 18 of the judgment of this Court in *Sopan Sukhdeo Sable and Ors. Vs. Assistant Charity Commissioner and Ors.* reported in 2004 (3) SCC 137 which is to the following effect:-

"*18.* *As noted supra, Order 7 Rule 11 does not*

justify rejection of any particular portion of the plaint. Order 6 Rule 16 of the Code is relevant in this regard. It deals with "striking out pleadings". It has three clauses permitting the court at any stage of the proceeding to strike out or amend any matter in any pleading i.e. (a) which may be unnecessary, scandalous, frivolous or vexatious, or, (b) which may tend to prejudice, embarrass or delay the fair trial of the suit, or, (c) which is otherwise an abuse of the process of the court."

15. Paragraph 3 of the Recrimination Petition was concerning the alleged criminal activities on the part of the respondent No.1. Appellant has contended in this paragraph that the respondent No.1 had not disclosed that he was accused of various offences, and this non-disclosure was contrary to the requirement under Section 33A of the R.P. Act, 1951. The apellant has therefore, submitted that if the respondent No.1 was to be elected, the election would be void. Mr. Rao, however, pointed out that this section requires the candidate to furnish the information as to whether he is accused of any offence which is punishable with imprisonment for two years or more in a pending case, and in which a charge has been framed by a competent court. The particulars given by the appellant did not indicate that any charge had been framed against the respondent in any of those cases.

16. With respect to the allegations of criminality it was submitted that the election petition cannot be entertained, merely on the basis of general allegations of criminality unless a specific case as required by Section 33A was made out. The following observations of this Court from paragraph 8 in *Jyoti Basu and Ors. Vs. Debi Ghosal and Ors.* reported in 1982 (1) SCC 691 were pressed into service in that behalf:-

"8. *A right to elect, fundamental though it is to democracy, is, anomalously enough, neither a fundamental right nor a common law right. It is pure and*

simple, a statutory right. So is the right to be elected. So is the right to dispute an election. Outside of statute, there is no right to elect, no right to be elected and no right to dispute an election. Statutory creations they are, and therefore, subject to statutory limitation. An election petition is not an action at common law, nor in equity. It is a statutory proceeding to which neither the common law nor the principles of equity apply but only those rules which the statute makes and applies. It is a special jurisdiction, and a special jurisdiction has always to be exercised in accordance with the statute creating it. Concepts familiar to common law and equity must remain strangers to election law unless statutorily embodied. A court has no right to resort to them on considerations of alleged policy because policy in such matters as those, relating to the trial of election disputes, is what the statute lays down……."

17. With respect to paragraph 4 (and its sub-paragraphs) of the Recrimination Petition, Mr. Rao, submitted that this paragraph was concerning the alleged corrupt practices on the part of the respondent No.1. Corrupt practice is a ground available to set-aside the election under Section 100 (1) (d) (ii) of the R.P. Act, 1951. The Recrimination Petition is like an Election Petition, and Section 83 (1) (c) of the R.P. Act, 1951 requires that the Election Petition shall be signed by the petitioner and verified in the manner laid down in the CPC for the verification of pleadings. Over and above that, the proviso to Section 83 (1) (c) lays down that where the petitioner alleges any corrupt practice, the petition has to be accompanied by an affidavit in the prescribed form in support of the allegation of such corrupt practice and the particulars thereof. This affidavit has to be as per form 25, as laid down in Rule 94A of the Conduct of Election Rules, 1961. Mr. Rao, pointed out that in the present matter the affidavit was not made as per these requirements. He further pointed out that this submission had

been specifically raised in the affidavit of the respondent No. 1, and the same had not been controverted by the petitioner.

18. It was then submitted that for seeking a declaration that the election is void on the ground of corrupt practice under Section 100 (1) (d) (ii) of the Act, it was necessary to make out a prima facie case as required by Section 100 (1) (d) that the result of the election, in so far as it concerns a returned candidate, has been materially affected by the corrupt practice. That has not been shown in the present matter. Paragraph 11 of the judgment of this Court in ***Mangani Lal Mandal Vs. Bishnu Deo Bhandari*** reported in 2012 (3) SCC 314 which is on sub-clause (iv) of Section 100 (1) (d) was pressed into service in this behalf. It reads as follows:-

> ***"11.*** *A mere non-compliance or breach of the Constitution or the statutory provisions noticed above, by itself, does not result in invalidating the election of a returned candidate under Section 100(1)(d)(iv). The sine qua non for declaring the election of a returned candidate to be void on the ground under clause (iv) of Section 100(1)(d) is further proof of the fact that such breach or non-observance has resulted in materially affecting the result of the returned candidate. In other words, the violation or breach or non-observation or non-compliance with the provisions of the Constitution or the 1951 Act or the rules or the orders made thereunder, by itself, does not render the election of a returned candidate void Section 100(1)(d)(iv). For the election petitioner to succeed on such ground viz. Section 100(1)(d)(iv), he has not only to plead and prove the ground but also that the result of the election insofar as it concerned the returned candidate has been materially affected. The view that we have taken finds support from the three decisions of this Court in: (1) Jabar Singh v. Genda Lal [AIR 1964 SC 1200]; (2) L.R. Shivaramagowda v. T.M. Chandrashekar [1999 (1) SCC 666]; and (3) Uma Ballav Rath v. Maheshwar Mohanty [1999 (3) SCC 357]".*

19. The proposition that the verification of the petition or Recrimination Petition has to be in the prescribed form or else the matter cannot be gone into, was supported on the basis of the decision of a bench of two Judges of this Court in *P.A. Mohammed Riyas Vs. M.K. Raghavan & Ors.* reported in 2012 (5) SCC 511. Paragraph 47 of this judgment reads as follows:-

> ***"47.*** *In our view, the objections taken by Mr P.P. Rao must succeed, since in the absence of proper verification as contemplated in Section 83, it cannot be said that the cause of action was complete. The consequences of Section 86 of the 1951 Act come into play immediately in view of sub-section (1) which relates to trial of election petitions and provides that the High Court shall dismiss the election petition which does not comply with the provisions of Section 81 or Section 82 or Section 117 of the 1951 Act. Although Section 83 has not been mentioned in sub-section (1) of Section 86, in the absence of proper verification, it must be held that the provisions of Section 81 had also not been fulfilled and the cause of action for the election petition remained incomplete. The petitioner had the opportunity of curing the defect, but it chose not to do so."*

20. Last but not the least, with respect to the argument that the decision on these objections can wait till the end of the trial, the following observations in paragraph 12 in *Azhar Hussain Vs. Rajiv Gandhi* reported in AIR 1986 SC 1253 were relied upon which read as follows:-

> ***12.*** *Learned counsel for the petitioner has next argued that in any event the powers to reject an election petition summarily under the provisions of the Code of*

Civil Procedure should not be exercised at the threshold. In substance, the argument is that the court must proceed with the trial, record the evidence, and only after the trial of the election petition is concluded that the powers under the Code of Civil Procedure for dealing appropriately with the defective petition which does not disclose cause of action should be exercised. With respect to the learned counsel, it is an argument which it is difficult to comprehend. The whole purpose of conferment of such powers is to ensure that a litigation which is meaningless and bound to prove abortive should not be permitted to occupy the time of the court and exercise the mind of the respondent. The sword of Damocles need not be kept hanging over his head unnecessarily without point or purpose. ……."

Rejoinder on behalf of the petitioner:-

21. The learned senior counsel Mr. Ranjit Kumar, pointed out in the Rejoinder that Section 83(1) of the R.P. Act, 1951, required that the Election Petition (and for that matter the Recrimination Petition), shall contain a concise statement of the material facts which are relied upon. In the instant case the grounds raised in the Recrimination Petition were two-fold. Firstly, the criminality of the respondent, and secondly the corrupt practices in which the respondent had indulged. As far as the aspect of criminality is concerned, it was pointed that the Recrimination Petition is required to be filed within 14 days from the date of commencement of the trial as required under the proviso of Section 97 of the R.P. Act, 1951. Even so, within that period the petitioner has placed on record the material facts in paragraph 3 of the Recrimination Petition. In paragraph 3(B) thereof the particulars of the criminal cases registered against respondent were given in a table. The table contains the following details:-

SL. No	Police Station/ Case No.	Section	Name of Accused	Challan No.
1.	Sadalpur/ 76/ 22-5-85	147, 148, 149, 323, 451 IPC	Balmukund s/o Ramdeo--singh Gautam	48/2-6-1985
2.	Pithampur/ 359/ 26.9.89	341, 294, 323 IPC	Balmukund s/o Ramdeo--singh Gautam alongwith one other accused	318/27-9-89
3.	Pithampur/ 129/23-5-90	294, 323, 506 IPC	Balmukund s/o Ramdeo-singh Gautam	105/5-6-90
4.	Pithampur/ 109/24-3-96	34 Excise Act	Balmukund s/o Ramdeo--singh Gautam alongwith two other accused	104/29-4-96
5.	Pithampur/ 406/24-12-97	307, 147, 148, 149 of IPC	Balmukund s/o Ramdeo--singh Gautam alongwith five other accused	107/18-4-98
6.	Pithampur/ 70/12-3-01	365/34 IPC	Balmukund s/o Ramdeo--singh Gautam alongwith one other accused	1/18-3-2001
7.	Pithampur/ 27/29-1-2007	147/341 IPC	Balmukund s/o Ramdeo-	101/9-5-2007

			-singh Gautam alognwith one other accused	
8.	Pithampur/ 106/24-3-96	34 Excise Act	Balmukund s/o Ramdeosingh Gautam alongwith two other accused	104/29-4-96
9.	Sadalpur/ 32/2-3-96	34,36 Excise Act	Balmukund s/o Ramdeosingh Gautam	92/27-6-96
10.	Badnawar/ 258/21-8-96 Act	34, 49 Excise Gautam	Balmukund s/o Ramdeosingh	282/31-10-96
11.	Badnawar/ 259/21-8-96	34,49 Excise Act	Balmukund s/o Ramdeosingh Gautam	283/31-10-96
12.	Indore Police Criminal Case No. 1241/01	34 (1) (2) Excise Act	Balmukund s/o Ramdeosingh Gautam	2001
13.	Sadalpur/ 122/2-8-1985	379 IPC, 247(7) Land Revenue Court	Balmukund s/o Ramdeosingh Gautam	118/1-10-1986
14.	Sadalpur/ 199/13-10-86	147, 148, 452, 506 IPC	Balmukund s/o Ramdeosingh Gautam alongwith seven other accused	124/26-10-1986

22. In paragraph 3(E), it was placed on record that the respondent was declared as an absconded person in a criminal proceeding by C.J.M Dhar in a Criminal Case No. 968/96. In

paragraph 3(F) it was pointed out that the petitioner's name was registered as a listed Gunda in the year 2004, and the letter dated 12.1.2004 issued by S.P. Dhar to the Police Station Pithampur in that behalf was enclosed. It was further pointed out that on 22.11.2012, the petitioner had served a notice on the respondent under Order 12 Rule 4 of CPC to admit the facts. In the said notice, it was specifically stated that the following criminal cases are registered against him, in which charges have been framed, and the same are punishable with more than 2 years imprisonment. This table reads as follows:-

SL. No	Crime No.	Section	Name of Accused	Police Station
1.	76/22.5.85	147, 148, 149, 323, 451, IPC	Balmukund S/o Ramdeosingh Gautam	Sadalpur
2.	359/29.9.89	341, 394, 323 IPC	Balmukund s/o Ramdeosingh Gautam	Pithampur
3.	129/23.5.90	293, 323, 506 IPC	Balmukund S/o Ramdeosingh Gautam	Pithampur
4.	109/24.3.96	34 Excise Act	Balmukund S/o Ramdeosingh Gautam	Pithampur
5.	406/24.12.97	307, 147, 148, IPC	Balmukund S/o Ramdeosingh Gautam	Pithampur
6.	70/12.3.2001	365, 34 IPC	Balmukund S/o Ramdeosingh Gautam	Pithampur
7.	27/29.1.07	341, 147 IPC	Balmukund S/o Ramdeosingh Gautam	Pithampur

8.	106/24.3.96	34 Excise Act	Balmukund S/o Ramdeosingh Gautam	Pithampur
9.	32/2.3.96	34, 36 Excise Act	Balmukund S/o Ramdeosingh Gautam	Sadalpur
10.	258/21.8.96	34, 49 Excise Act	Balmukund S/o Ramdeosingh Gautam	Badnawar
11.	259/21.8.96	34, 49 Excise Act	Balmukund S/o Ramdeosingh Gautam	Badnawar
12.	Indore Police Criminal Case No. 1241/01	31 (1) (2) Excise Act	Balmukund S/o Ramdeosingh Gautam	Indore Police Station
13.	358/7.10.05	294, 323, 506 IPC	Balmukund S/o Ramdeosingh Gautam	Pithampur
14.	122/2.8.85	379 IPC and 247 (7) MPLR Code	Balmukund S/o Ramdeosingh Gautam	Sadalpur
15.	199/13.10.86	147, 148, 452, 506 IPC	Balmukund S/o Ramdeosingh Gautam	Sadalpur
16.	358/7.10.05	294, 323, 506 IPC	Balmukund S/o Ramdeosingh Gautam	Pithampur Distt. Dhar
17.	38/03/	Excise Act Gujarat	Balmukund S/o Ramdeosingh Gautam Declared Absconded	Dhanpur Distt. Dahopd Gujarat

18.	358/ 7.10.05	294, 323, 506, IPC	Balmukund S/o Ramdeosingh Gautam	Pithampur Distt. Dhar
19.	38/03/	Excise Act Gujarat	Balmukund S/o Ramdeosingh Gautam Declared Absconded	Dhanpur Distt. Dahod Gujarat
20.	239/03	19, 1/54, 19/54-65, 19/54(a) Excise Act Rajasthan	Balmukund S/o Ramdeosingh Gautam Declared Absconded	Bhilwara Rajasthan
21.	19/10	420, 181, 200 of IPC	Balmukund S/o Ramdeosingh Gautam	Plice Raoji Bazar, Indore

23. It was then pointed out that on 23.11.2013 the respondent sought time before the learned Single Judge to file reply to this notice to admit facts. On 4.12.2013, the learned Judge recorded that even though the respondent had stated on 23.11.2012 that he wished to file a reply, now he had decided to wait for the outcome of the application under Order 6 Rule 16 of CPC and, if required, to file a reply thereafter. Mr. Ranjit Kumar pointed out that this kind of reply will mean that the documents are deemed to be admitted, in view of the provision of Order 12 Rule 2-A of CPC. It was therefore, submitted that the High Court could not have held that the petitioner had not given the particulars in support of the allegations of criminality, as required by Section 33A of the R.P. Act, 1951.

24. The second limb of the argument of Mr. Rao was that for raising the ground of corrupt practice, full particulars of the

corrupt practice are required to be given under Section 83 (1) (b) of the R.P. Act, 1951. Mr. Ranjit Kumar, pointed out that Section 83 (1) (b) requires one to set forth full particulars of any corrupt practice, including as full a statement as possible of the names of the parties alleged to have committed such corrupt practice and the date and place of commission of each such practice. It was therefore pointed out that in paragraph 4(A) of the Recrimination Petition it was specifically pleaded that on 11.11.2008, at the instance of the respondent his younger brother Rakesh Singh had threatened the candidate of BSP namely Shri G.P. Saket, that if his nomination form was not withdrawn he shall have to face dire consequences. It was further pointed out that similar type of threat was given to the election agent of the said candidate namely Shri Munnalal Diwan. A letter dated 11.11.2008 sent to the Police Thana Pitampur was also enclosed with the Recrimination Petition. In paragraph 4(C) it was specifically pointed out that respondent was a liquor contractor, and during the election period several cases were registered against him and his associates/servants details of which were enclosed in an Annexure. A news report in Dainik Agniban dated 5.11.2008 was also enclosed, which stated that 700 boxes of illegal beer were seized by the Alirajpur Police, and in that case respondent was involved. It was alleged that he was distributing the beer bottles in the constituency, and it could amount to bribery and a corrupt practice under Section 123 of the R.P. Act, 1951. In para 4 (D) it was alleged that his agents /associates were found to indulge in digging bore-well without proper permission in the constituency, which would amount to a corrupt practice and bribery, and a copy of the information given by T.I. Police Station dated 14.1.2009 was enclosed. Mr. Ranjit Kumar pointed out that Section 83 (1) (b) requires one to give full particulars of the corrupt practices as possible, and that had been done. In the facts of the present case, the propositions from the judgments in the cases of *Jyoti Basu, Mangani Lal*

Mandal and Azhar Hussain (all supra) relied on behalf of the respondent have no application.

25. The other submission on behalf of the respondent No.1 was that the petitioner ought to prima-facie show that because of the corrupt practice his election was materially affected. In the instant case the appellant had won the election by just one vote, and obviously such corrupt practice would tilt the balance one way or the other and materially affect the result of the election.

26. The last submission of Mr. Rao was that when corrupt practices are alleged, an affidavit is to be sworn in the prescribed form, which is Form No. 25, and reliance was placed on paragraph 47 of the judgment of this Court in *P.A. Mohammed Riyas* (supra), which stated that in the absence of proper verification, the High Court has to dismiss the Election Petition. Mr. Ranjit Kumar, however, pointed out from paragraph 47 quoted above, that the petitioner in that matter had the opportunity of curing the defects, but he had chosen not to do so, and that made the difference. He pointed out that the absence of this affidavit is not laid down as a ground for dismissal of the Election Petition under Section 86 of the Act, and that has been the consistent view taken by this Court in various judgments.

27. Last but not the least, the principal submission of Mr. Ranjit Kumar was that at the time when the Recrimination Petition was restored by consent, nothing prevented the respondent from pointing out to this Court that the pleadings in the Recrimination Petition were in any way defective, unnecessary or scandalous. The respondent agreed to the Recrimination Petition being restored, and is now trying to reagitate the very cause under Order 6 Rule 16 of CPC which was undoubtedly impermissible as held by this Court in *K.K.*

Modi Vs. K.N. Modi & Ors. reported in 1998 (3) SCC 573. He submitted that this would amount to abuse of process of court.

Consideration of the submissions:-

28. We have noted the submissions of both the counsel. As can be seen, the application under Order 7 Rule 11 is required to be decided on the face of the plaint or the petition, whether any cause of action is made out or not. Once it is accepted by a party by consent that a particular petition (in the instant case the Recrimination Petition) is to be heard by the Court, by giving up the objection under Order 7 Rule 11, the very party cannot be subsequently permitted to seek the striking off the pleadings containing the cause of action under the garb that the pleadings containing the cause of action are unnecessary, vexatious or scandalous. One is expected to take all necessary pleas at the same time. The party concerned is expected to raise such a contention at the time of passing of the Court order (consent order in the present case) or seek the liberty to raise it at a later point of time that some of the pleadings are unnecessary or vexatious or scandalous. No Court is expected to permit any matter to be raised which might and ought to have been made ground of defence or attack, once the same is relinquished by the party concerned. The learned Single Judge ought to have noted this basic principle of any litigation. Reliance on the judgment in the case of *K.K. Modi* (supra) is quite apt in this behalf.

29. That apart, even when we look to the objections raised in the present matter under Order 6 Rule 16, the same is based on the requirement of Section 83 of the R.P. Act, 1951 that the applicant is required to place material facts before the Court. As far as the allegation of criminality is concerned, in our view sufficient material facts were placed on record alongwith the Recrimination Petition. Subsequently, a notice to admit facts was given, wherein, particulars of specific cases were given,

wherein, the charge-sheets were filed for the charges which would result into imprisonment of 2 years or more, as required by section 33A of the R.P. Act, 1951. The respondent chose not to reply to this notice. In fact the learned Judge ought to have drawn an adverse inference, but he failed in doing so. As far as the ground of corrupt practice is concerned, as can be seen from the pleadings quoted above, on that aspect also material facts were placed on record as rightly pointed out by Mr. Ranjit Kumar.

30. With reference to the observations in paragraph 47 of the judgment in the case of *P.A. Mohammed Riyas* (supra), we may note that way back in the case of *Murarka Radhey Shyam Ram Kumar Vs. Roop Singh Rathore and Anr.* reported in AIR 1964 SC 1545 a Constitution Bench of this Court has in terms held that a defect in the verification in the matter of Election Petition can be removed in accordance with the principles of CPC, and that it is not fatal to the Election Petition. This decision has been referred and followed by this Court time and again. Thus in *H.D. Revanna Vs. G. Puttaswamy Gowda and Ors.* reported in 1999 (2) SCC 217, this Court observed as follows in paragraph 15:-

> "*15. In Murarka Radhey Shyam Ram Kumar V. Roop Singh Rathore a Constitution Bench has held in unmistakable terms that a defect in the verification of an election petition as required by Section 83(1)(c) of the Act was not fatal to the maintainability of the petition and that a defect in the affidavit was not a sufficient ground for dismissal of the petition. Another Constitution Bench held in Ch Subbarao V. Member, Election Tribunal Hyderabad that even with regard to Section 81(3), substantial compliance with the requirement thereof was sufficient and only in cases of total or complete non-compliance with the provisions of Section 81(3), it could*

be said that the election petition was not one presented in accordance with the provisions of that part of the Act."

This Court has in *Ponnala Lakshmaiah Vs. Kommuri Pratap Reddy and Ors.* reported in 2012 (7) SCC 788, reiterated the law in *Murarka Radhey Shyam* (supra). Paragraph 26 of this judgment reads as follows:-

"*26. We may also refer to a Constitution Bench decision of this Court in Murarka Radhey Shyam Ram Kumar v. Roop Singh Rathore where this Court held that a defective affidavit is not a sufficient ground for summary dismissal of an election petition as the provisions of Section 83 of the Act are not mandatorily to be complied with nor did the same make a petition invalid as an affidavit can be allowed to be filed at a later stage or so. Relying upon the decision of a three-Judge Bench of this Court, in T. Phungzathang v. Hangkhanlian [2001 (8) SCC 358] this Court held that non-compliance with Section 83 is not a ground for dismissal of an election petition under Section 86 and the defect, if any, is curable as has been held by a three-Judge Bench of this Court in Manohar Joshi v. Nitin Bhaurao Patil [1996 (1) SCC 169] and H.D. Revanna v. G. Puttaswamy Gowda [1999 (2) SCC 217]."*

31. In view of what is stated above, the order passed by the learned Single Judge in allowing the application of the first respondent under Order 6 Rule 16 of CPC was clearly untenable and bad in law. The learned Single Judge of the High Court could not have entertained the application under Order 6 Rule 16 when this Court had restored the Recrimination Petition to the file of that Court by consent in order to decide it expeditiously. The learned Judge has erred in holding that the pleadings in paragraph 3 and 4 of the Recrimination Petition were vague, vexatious, non-specific and without any material

facts. The appeal is therefore allowed. The impugned order is set-aside. The learned Judge of the High Court will now proceed to decide the Recrimination Petition as filed by the petitioner expeditiously. The parties will bear their own cost of litigation.

B.B.B. Appeal allowed.