MAHALAXMI CO-OPERATIVE HOUSING SOCIETY LTD. & ETC.

v.

ASHABHAI ATMARAM PATEL (D) TH. LRS. AND ORS.

(Civil Appeal Nos. 2050-2053 of 2013)

MARCH 01, 2013

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

Code of Civil Procedure, 1908 – Order XXIII r.3 – Civil suits against original owner of the land in question and purchaser-housing society – By the plaintiffs claiming to be purchasers of the land in question – In, 'out of court settlement', one of the plaintiffs by virtue of Power of Attorney accepting certain amounts for himself and other 4 plaintiffs – Subsequently two of the plaintiffs (Plaintiff Nos.3 and 4) revoking the Power of Attorney – However, except one plaintiff (Plaintiff No.3) all other plaintiffs executing Dead of Confirmation acknowledging receipt of the amount from the Housing society – Plaintiff-Power of Attorney holder filing pursis on his behalf and on behalf of other plaintiffs except Plaintiff No.3 – Trial court disposing of the suits accepting the pursis – Order of trial court set aside by High Court – On appeal, held: There was not illegality is disposing of the suits under Or.XXIII r.3 accepting the pursis – Compromise between the parties was prior to the cancellation of Power of Attorney by plaintiff No.3, hence he was bound by the compromise – Legal heirs of plaintiff Nos.4 are also bound by the compromise as they cannot question the documents executed by plaintiff No.4 – Since the legal heirs of plaintiff No.4 did not get themselves impleaded as parties after the death of plaintiff No.4, the suit stood abated qua them.

Suits :

Consolidation of suits – Purpose of – Held: Purpose of

consolidation of suits is for meetings ends of justice as it saves the parties from multiplicity of proceedings, delay and expenses – Code of Civil Procedure, 1908 – s.151.

Transfer and Consolidation of suits – Effect of – Held: Transfer of suits will not take away the right of the parties to invoke Or.XXIII r.3 CPC – Suits always retain their independent identity – Even after consolidation court can independently dispose of a suit, if ingredients of Or.XXIII r.3 are satisfied – Code of Civil Procedure, 1908 – s.24, OR. XXIII r.3.

The property in question was sold by respondent No.6 to respondent Nos.1 to 5 (purchasers) in the year, 1964. The purchasers further executed agreement to sell the property in question to the appellant-society in the year 1975.

Respondent Nos.1, 2, 3 and 5 executed a Power of Attorney, in favour of respondent No.4 providing that the same would be binding on respondent Nos. 1, 2, 3 and 5 and their descendants, guardians and legal heirs.

In the year 1991, respondent No.6 entered into agreement to sell the property in question to the appellant-Society and permission was also granted u/s.20 of Urbans Land (Ceiling and Regulation) Repeal Act, 1999. Thereafter, she sold the property to the appellant-Society by two sale deeds.

Respondent No.s1 to 5 filed Special Civil Suit before High Court challenging the order passed u/s.20 of the Act. They also filed Civil Suit for a declaration that the sale-deeds executed by respondent No.6 in favour of the appellant-Society was illegal.

Respondent Nos.1 to 5, respondent No.6 and the appellant-Society settled their dis[illegible]

appellant-Society paid an amount of Rs.29,72,365/- to respondent Nos.1 to 5. Notarised Acknowledgement-cum-Settlement receipt was also issued. Registered Deed of Confirmation was executed by respondent No.4 (the Power of Attorney-holder) for himself and on behalf of respondent Nos.1, 2, 3 and 5 acknowledging receipt of the above-mentioned amount and also further payment of Rs.30,05,527/- by the appellant-Society. Declaration-cum-Indemnity of title was also made, wherein it was stated that the appellant-Society was the full, legal, proper and absolute owner and possessor of the land in question.

Thereafter, respondent No.3 and respondent No.1 (legal heir of Plaintiff No.4) by public Notice, cancelled the power of attorney executed in favour of respondent No.4. They also objected to the title of the appellant-Society. However, predecessor of respondent No.1 (Plaintiff No.4, who later expired) also executed Deed of Confirmation acknowledging he receipt of the amount above-mentioned from the appellant-Society.

Respondent No.4 filed *pursis* in the suit in his individual capacity as well as respondent Nos.1, 2 and 5. Trial court rejecting the objection to the *pursis* by respondent No.3, allowed he same and accorded permission to compound the suit by order dated 14.8.2008. The other suit was also disposed of accepting similar *pursis* filed by respondent No.4 by order dated 8.9.2009.

Respondent No.3 challenged the orders of the trial court by filing applications under Articles 226 and 227 of the Constitution of India. High Court quashed the orders passed by the trial court. Hence the present appeals.

In the present appeal a Group Co-operative Housing Society also intervened claiming to have interest in the

property having entered agreement to sell the property in question with respondent No.4.

Allowing the appeals, the Court

HELD: 1.1. There is no illegality in the orders passed by the trial court disposing of the suit under Order XXIII, Rule 3 CPC accepting the *pursis* dated 07.07.2008 and 18.09.2008. The High Court was not right in upsetting the orders dated 14.08.2008 and 08.09.2009. [Para 45] [31-D-E]

1.2. Pursuant to the execution of various documents by plaintiff No. 1, for himself and on behalf of the other plaintiffs, decided to record the compromise in both suits, since all the disputes between them were settled and they had acknowledged that the appellant-Society was the full, legal, proper and absolute owner and possessor of the lands in question. Consequently, plaintiff no. 1, on his behalf and on behalf of the other plaintiffs, except plaintiff Nos. 3/1 and 3/2, prepared a *pursis* dated 7.7.2008, referring to the sale deeds executed in favour of the appellant-Society in respect of all the properties in question stating that the plaintiffs had unconditionally given up all the claims raised in the suit and had settled the issues with the appellant-Society. The same was then presented before the trial court. Plaintiff Nos. 3/1 and 3/2 and defendant No. 3, however endorsed their objection to the *pursis*. Plaintiff No. 1 filed an affidavit on stating that the *pursis* was given in his individual capacity and as the power of attorney holder of plaintiff Nos. 2, 4 and 5. The trial Court, after hearing plaintiff nos. 3/1, 3/2 and defendant no. 3 (intervener), came to the conclusion that plaintiff Nos. 3/1 and 3/2 had cancelled the power of attorney only on 3.12.2004, whereas the Deeds of Confirmation were executed prior thereto, and that the claim of defendant No. 3 rested only on an agreement to sell, and could not enjoy any right under the Transfer of

Property Act and, thereby, allowed the pursis and disposed of the suits. [Para 32] [23-G-H; 24-A-E]

1.3. The documents executed by plaintiff No. 1 for himself and as a power of attorney holder for others and the acknowledgment deed; Declaration-cum-indemnity bonds, deeds of confirmation etc. executed by plaintiff No.2, heirs of 'B', plaintiff Nos. 5/1, 5/2, 5/3 and 5/4, plaintiff No. 4 etc. would clearly show that they had received large amounts from the appellant-Society and had acknowledged that the Society was the full, legal , proper and absolute owner in possession of the property in question. Plaintiff Nos. 3/1 and 3/2, though later, challenged the judgment and order dated 14.8.2008, after more than one year, while pending these appeals, they also settled the matter with the appellant-Society. [Para 33] [24-F-H; 25-A]

1.4. The heirs of deceased plaintiff No. 4 and plaintiff Nos. 5/1, 5/2 and 5/4 challenged the judgment and order dated 14.8.2008, more than one year and six months later. They had also received large amounts from the appellant-Society and the heirs of the deceased plaintiff no. 4 did not take any steps to get them recorded in the Civil Suit after the death of the plaintiff No. 4, and thus the suit abated. The heirs of plaintiff No. 4 and plaintiff Nos. 5/1, 5/2 and 5/4 also challenged the judgment and order dated 8.9.2009 in Civil Suit No. 681 of 1992 only on 1.3.2011. Plaintiff No. 4, was duly represented by plaintiff No. 1, while executing the various registered documents and issuing Acknowledgement-cum-Settlement Receipts by which large amounts were received by plaintiff No. 1, representing plaintiff no. 4. Over and above, plaintiff No. 4 himself had executed various registered deed of confirmation dated 5.1.2005 acknowledging the receipt of Rs.29,32,365/- and also Rs.30,05,527/-. The legal heirs of plaintiff No. 4 now cannot come forward and question the

various documents executed by plaintiff No. 4, especially when they had not taken any steps to get them impleaded in both the civil suits. Impugned orders passed on 14.8.2008 and 8.9.2009, therefore, would bind them. Plaintiff Nos. 5/1 to 5/4 had also not objected to the execution of various deeds and documents and ratified all the actions taken by plaintiff No.1, as power of attorney holder, since they had not objected to the *pursis* dated 07.07.2008, and hence acquiesced to the order dated 14.08.2008. [Para 35] [25-C-H; 26-A-B]

1.5. Defendant No. 3-Society i.e. the intervener had never independently challenged the order dated 14.8.2008 of the trial Court, consequently the order is binding on defendant No. 3. [Para 34] [25-B]

2. In the present case *pursis* falls under Order XXIII, Rule 3, since the defendant has satisfied the plaintiffs in respect of whole of the subject-matter of the suit. Since objections were raised by plaintiff No.3 and defendant No. 3, those objections had to be dealt with by the court, in accordance with Order XXIII, Rule 3. The proviso to Order XXIII, Rule 3 cast an obligation on the court to decide that question at the earliest, without giving undue adjournments. Objections raised by plaintiff No. 3 and defendant No.3 were examined by the court and rightly rejected. Cogent reasons have been stated by the court while rejecting their objections and accepting the *pursis*. [Para 41] [29-H; 30-A-C]

Pushpa Devi V. Rajinder Singh **(2006) 5 SCC 566: 2006 (3) Suppl. SCR 370 – relied on.**

3.1. It is not correct to say that the trial court has committed an error in not consolidating the various suits, to be tried together as ordered by the District Court in its order dated 29.08.2006. Section 24 CPC only provides for transfer of any suit from one c e

court did not pass an order of consolidating all the suits. There is no specific provision in the CPC for consolidation of suits. Such a power has to be exercised only under Section 151 CPC. The purpose of consolidation of suits is to save costs, time and effort and to make the conduct of several actions more convenient by treating them as one action. Consolidation of suits is ordered for meeting the ends of justice as it saves the parties from multiplicity of proceedings, delay and expenses and the parties are relieved of the need of adducing the same or similar documentary and oral evidence twice over in the two suits at two different trials. [Para 43] [30-F-H; 31-A-B]

Prem Lata Nahata and Anr. v. Chandi Prasad Sikaria **(2007) 2 SCC551: 2007 (2) SCR 261 – referred to**

3.2. The transfer of the suits from one court to another to be tried together will not take away the right of the parties to invoke Order XXIII Rule 3 CPC and there is also no prohibition under Order XXIII Rule 3 or Section 24 CPC to record a compromise in one suit. Suits always retain their independent identity and even after an order of consolidation, the court is not powerless to dispose of any suit independently once the ingredients of Order XXIII, Rule 3 CPC has been satisfied. [Para 44] [31-C-D]

Case Law Reference:

2006 (3) Suppl. SCR 370	**relied on**	**Para 37**
2007 (2) SCR 261	**referred to**	**Para 43**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 2050-2053 of 2013.

From the Judgment & Order dated 19.12.2011 of the High Court of Gujarat, Ahmedabad in Special Civil Application No.

10884 of 2009, 7087 of 2010, 11925 of 2009 and 7088 of 2010.

Mukul Rohatgi, Dr Rajeev Dhawan, Mihir Joshi, Sandeep Singh, Apurva S. Vakil, Mahesh Agarwal, Rishi Agrawala, E.C. Agrawala, Radhikha Gautam, Rohit Jolly, Shiv Mangal Sharma, Jyoti Taneja, Abhinandini Sharma, V.D. Khanna, V.K. Monga, Hari Shankar K., Vikas Singh, Aditya Verma, Jitendra M. Patel, Dharmendra Kumar Sinha, Jayraj Chauhan, Ritin Rai, Siddhartha Jha for the appearing parties.

The Judgment of the Court was delivered by

K.S. RADHAKRISHNAN, J.1. Leave granted.

2. These appeals arise out of a common judgment rendered by a learned single Judge of the High Court of Gujarat disposing of six special civil applications of which we are concerned with the appeals preferred against Special Civil Application Nos. 7088 of 2010, 10084 of 2009, 11925 of 2009 and 7087 of 2010. The learned single Judge, in exercise of his powers under Articles 226 and 227 of the Constitution of India quashed the orders dated 14.08.2008 and 08.09.2009 passed in Special Civil Suit No. 292/1993 and Special Civil Suit No. 681/1992 respectively by the Learned Civil Judge (SD) of Ahmadabad (Rural) and remanded the matter to the court, after reviving the interim order dated 28.05.1993 passed in Civil Suit No. 292/1993.

3. Civil Suit No. 292 of 1993 was preferred by respondent No.4 - Chandrakant Atmaram Patel and respondent nos. 1 to 5 herein (purchasers) against respondent no. 6 – Bai Saraswati and the appellant herein – Mahalaxmi Co-operative Housing Society Ltd. (for short 'Mahalaxmi Society') for a declaration that sale deeds dated 5.6.1992 and 8.6.1992 were illegal and also for an order of permanent injunction restraining the Mahalaxmi Society from dealing with the lands and also for other consequential reliefs. Chandra[illegible]l,

plaintiff no. 1, plaintiff no. 2 are the heirs of the deceased Baldevprasad (respondent nos. 5/1 and 5/2 herein), the plaintiff no. 3 are heirs of Manilal Bechardas (respondent nos. 3/1 and 3/2 herein), plaintiff no. 4 is Ashabai Patel (since deceased) and now through Legal Representatives – respondent nos. 1/1/A to 1/1/D) and plaintiff no. 5 are heirs of Amrutlal Patel (respondent nos. 2/1, 2/2, 2/3 and 7 herein), along with the plaint filed an application for temporary injunction, which was allowed vide order dated 28.5.1993. One Jankalyan Co-operative Housing Society sought intervention in Civil Suit No. 292/1993 on the basis of a registered Agreement to Sell dated 15.6.1992 and joined as defendant no. 3. Civil Suit No. 681/1992 was also a suit filed by respondent Nos. 1 to 5 against the Deputy Collector, the appellant herein and the 6th respondent for an order of permanent injunction on the ground that no permission under Section 63 of the Tenancy Act was obtained before executing various sale deeds.

4. We have to trace the facts leading to the filing of the above suits and the disputes cropped up thereafter between the original plaintiffs, Bai Saraswati and the Mahalaxmi Society, leading to the filing of pursis dated 7.7.2008 and 18.09.2008 and the steps they have taken for resolving those disputes in Civil Suit No. 292 of 1993 and Civil Suit No. 681/1992.

5. Bai Saraswati – respondent no. 6 herein – had executed two Sale Deeds dated 27.10.1964 in respect of separate non-contiguous parcels of lands in favour of five persons i.e. respondent nos. 1 to 5. Respondent nos. 1 to 5 (purchasers) formed a partnership firm in the name of M/s Arbuda Corporation on 4.3.1965 to deal with the above-mentioned properties and each partner had equal share. M/s Arbuda Corporation on 15.9.1975 executed an Agreement to Sell in favour of the Mahalaxmi Society in respect of the above-mentioned lands.

6. The Urban Land (Ceiling and Regulation) Act, 1976 (for short 'the ULC Act') came into force in 1976. M/s Arbuda

Corporation and the appellant Mahalaxmi Society jointly made an application under Section 20 of the ULC Act seeking permission to execute the sale deed before the Deputy Collector, Ahmadabad. Similar applications were also filed by Respondent No.6 – Bai Saraswati and respondent No. 4 – Chandrakant Atmaram Patel. On 7.1.1989, respondent nos. 5/1, 5/2 and 5/3, respondent nos. 3/1 and 3/2, respondent no. 1 (since deceased) and respondent no. 2 (since deceased) executed a Power of Attorney in favour of respondent No. 4 – Chandrakant Atmaram Patel in respect of the above-mentioned properties. The power of attorney provided that the same would be binding on respondent nos. 1, 2, 3 and 5 and their descendants, guardians and heirs. On 1.5.1991, Bai Saraswati executed an Agreement to Sell with possession of the above-mentioned properties in favour of the Mahalaxmi Society. Permission sought for under Section 20 of the ULC Act was also granted by the authority to Bai Saraswati for dealing with the properties.

7. Bai Saraswati then executed two sale deeds dated 5.6.1992 and 8.6.1992 in favour of the Mahalaxmi Society in respect of the above-mentioned properties, which led to various disputes between the Mahalaxmi Society, Bai Saraswati and the five purchasers mentioned earlier.

8. Respondent Nos. 1-5 then filed Special Civil Application No. 4413 of 1992 before the High Court against the Mahalaxmi Society and Bai Saraswati and the State of Gujarat challenging the order dated 3.6.1992 passed under Section 20 of the ULC Act and that order was stayed, so also the further proceedings thereto. Respondent Nos. 1-5, as plaintiffs, filed Special Civil Suit no. 681 of 1992 against the Deputy Collector, Ahmadabad, Mahalaxmi Society and Bai Saraswati on 31.07.1992 praying for an injunction restraining the grant of permission under Section 63 of the Tenancy Act, which was, however, granted on the same day. Consequently, Special Civil Suit No. 681 of 1992 was later amended challenging th[illegible]n.

9. As already stated, respondent Nos. 1 to 5 had also filed Civil Suit No. 292/1993 on 04.05.1993 against Bai Saraswati and the Mahalaxmi Society for a declaration that the sale deeds dated 05.06.1992 and 08.06.1992 were illegal and also for other consequent reliefs. Bai Saraswati, later, executed a sale deed dated 18.10.2000 in respect of the remaining survey no. 216 in favour of the Mahalaxmi Society.

10. Plaintiffs, Bai Saraswati and Mahalaxmi Society, in view of the various transactions entered into between various parties and the pending litigations were exploring the possibility of settling all their disputes. As a follow up, the Mahalaxmi Society, paid an amount of Rs.29,72,365/- to the plaintiffs by various cheques and a Notarised Acknowledgement-cum-Settlement receipt was also issued on 1.5.2004, which is reflected in the registered Deed of Confirmation dated 1.5.2004 executed by Chandrakant Atmaram Patel, the first plaintiff for and on behalf of other plaintiffs on the strength of the power of attorney dated 7.01.1989. The first plaintiff also executed a declaration-cum-indemnity of title on 09.11.2004 wherein it was stated that the Mahalaxmi Society was the full, legal, proper and absolute owner and possessor of the properties mentioned therein. Plaintiffs had also agreed to cooperate in obtaining appropriate orders in Special Civil Suit No. 681 of 1992 and Special Civil Suit No. 292 of 1993, in view of the compromise and settlement.

11. Plaintiff no. 1 – Chandrakant Atmaram Patel had also executed various documents individually. He executed a registered Deed of Confirmation dated 10.11.2004, referring to the payment of Rs.29,72,365/- by the Mahalaxmi Society. Reference was also made to the receipt dated 1.5.2004 and the registered Deed of Confirmation dated 1.5.2004 acknowledging the receipt of Rs.29,72,365/- from the Mahalaxmi Society by plaintiff No. 1 as power of attorney holder for himself and on behalf of the other plaintiffs as well. Registered articles of agreement dated 10.11.2004 also refer

to a further payment of Rs.66,05,527/- by the Mahalaxmi Society which was received by plaintiff No. 1 – Chandrakant Atmaram Patel. Declaration-cum-indemnity of title was also made on 10.11.2004, wherein it was stated that Mahalaxmi Society was the full, legal, proper and absolute owner and possessor of the above-mentioned lands.

12. Plaintiff No. 2 – heirs of Baldevprasad Jamnadas – had individually executed a registered Deed of Confirmation on 10.11.2004, referring to the payment of Rs.29,72,365/- and proportionate payment of Rs.5,94,473/-. The documents also refer to the Deed of Confirmation dated 01.05.2004. Registered Article of Agreement dated 11.11.2004 executed by the plaintiff No.2 also refers to a further payment of Rs.66,05,527/- made to the heirs of Baldev Prasad Jamnadas. Declaration-cum-Indemnity of Title dated 10.11.2004 executed by them acknowledged that the Mahalaxmi Society was the legal and absolute owner and was in possession of the properties.

13. Plaintiff Nos. 5/1 to 5/4, heirs of Amrutbhai Patel, had also individually executed various documents. Registered Deed of Confirmation dated 10.11.2004 executed by them also referred to the payment of Rs.29,72,365/- and the proportionate payment of Rs.5,94,473/-. Registered Articles of Agreement executed by them on the same day also referred to further payment of Rs.66,05,527/-. Declaration-cum-Indemnity of Title executed on 10.11.2004 also referred to the interest of appellant Mahalaxmi Society.

14. Plaintiff Nos. 3/1, 3/2 and plaintiff No. 4, however, issued a public notice on 5.12.2004 in the local newspapers (Gujarat Samachar and Dainik Bhaskar) cancelling the power of attorney dated 7.1.1989 executed in favour of plaintiff No. 1 – Chandrakant Patel. Mahalaxmi Society, through their Solicitor, on 11.12.2004, issued a public notice in the local newspaper (Sandesh) inviting claims/objections to the title of Mahalaxmi

Society. On 16.12.2004, plaintiff Nos. 3/1, 3/2 and plaintiff No. 4 gave their replies.

15. Plaintiff No. 4 (who later expired on 2.6.2006) had also executed a registered Deed of Confirmation on 5.1.2005, which acknowledged the payment of Rs.29,72,365/-. In the registered Articles of Agreement dated 5.1.2005, plaintiff No. 4 had acknowledged the receipt of payment of an additional amount of Rs.30,05,527/-. He had also referred to the interest of Mahalaxmi Society in the Declaration-cum-Indemnity of Title executed on the same day.

16. Plaintiff nos. 1, 2/1, 2/2, 4 and 5/1 to 5/4 (all plaintiffs, except plaintiff No. 3) through their advocates published a notice in the local newspapers (Sandesh, Gujarat Samachar, Divya Bhaskar) confirming the above said facts as also the execution of documents. They had indicated that it was after the execution of all the above said documents and receipt of payments, plaintiff No. 4 had expired on 2.6.2006. Respondent nos. 1/1/A to 1/1/D, the legal heirs of plaintiff no. 4, it is seen, did not take any steps to implead themselves as heirs in the two suits, namely, Special Civil Suit No. 681 of 1992 and Civil Suit No. 292 of 1993. Plaintiff No. 1 – Chandrakant Atmaram Patel – in the wake of the above-mentioned facts and circumstances, prepared a pursis on 7.7.2008, the operative portion of which reads as under:

> "By filing following pursis, I, plaintiff declare before the Hon'ble Court that outside court, amicable settlement has been arrived at between me and defendants. I, plaintiff, admit Registered Sale Deeds, bearing Sr. No. 13875, 13881, 13891, 13873, 13886 and 13896 dated 5/6/92 and All Registered Sale Deed No. 14034 dated 8/6/92 and Registered Sale Deeds, Sr. No. 4027 and 4028, dated 18/10/2000 executed by original landlord, Bai Saraswati d/o Ashabhai Revandas in favour of Mahalaxmi Co-0p. Housing Society Limited in respect of suit property

> mentioned by the plaintiff in the suit application of this case and in this regard, Registered Deeds of Agreement jointly and separately. The said Registered Deeds of Agreement have been produced, vide separate list, by us. The facts mentioned in the said Registered Deeds of Agreement are proper, true and legal. As stated in the said Deeds of Agreement, the ownership right and possession of the said suit property have been received by Mahalaxmi Co-op. Housing Society Limited. In the said suit property, I, plaintiff, have no right, authority or possession. As per said facts, I, plaintiff, unconditionally waive all contentions raised by us in this suit and by undergoing cost of the said suit, I compound the same.
>
> Ahmedabad
> Dated: 7/7/2008 Sd/-
>
> (Chandrakant Atmaram Patel)"

The same was filed before the Court. Defendant No. 3 and plaintiff Nos. 3/1 and 3/2 filed objections to the pursis on 31.7.2008. Plaintiff No. 1 – Chandrakant Atmaram Patel, on 13.9.2008, filed an affidavit before the Court stating that the pursis was given in his individual capacity and in his capacity of power of attorney holder of plaintiff Nos. 2, 4 and 5 and produced the power of attorney dated 7.1.1989 before the trial court. The trial court vide its order dated 14.8.2008 allowed the pursis (Ext.110) and accorded permission to compound the suit. Pursuant to the above mentioned settlement and compromise, a similar pursis dated 18.9.2008 (Ext 172) was also filed in Special Civil Suit No. 681 of 1992, which was also disposed of on 8.9.2009 accepting the same.

17. Plaintiff Nos. 3/1 and 3/2, as already stated, challenged the judgment and order dated 14.8.2008 by filing Special Civil Application no. 10884 of 2009, under Articles 226 and 227 of the Constitution of India. Plaintiff Nos. 3/1 and 3/2 also challenged the order dated 8.9.2009 il

Application No. 11929 of 2009. The heirs of plaintiff No. 4 also challenged the above-mentioned order by filing Special Civil Application no. 7097 of 2010 and the heirs of the deceased plaintiff no. 4 also filed Special Civil Application no. 7087 of 2010. Heirs of plaintiff No. 4 and plaintiff Nos. 5/1 and 5/2 also challenged the judgment and order dated 8.9.2009 by filing Special Civil Application no. 7088 of 2010. The High Court disposed of those applications by a common judgment on 19.12.2011, the legality of which is under challenge in these appeals.

18. Mr. Mukul Rohatgi, learned senior counsel appearing on behalf of the appellant, at the outset, raised the question of maintainability of the writ petitions filed before the High Court under Articles 226 and 227 of the Constitution by the respondents, on the ground that the orders assailed before the High Court dated 14.8.2008 and 08.09.2009 were the orders passed by the trial Court in exercise of its powers conferred under the proviso to Rule 3 of Order XXXIII of the Code of Civil Procedure (for short 'CPC'). Learned senior counsel submitted that, at best, the remedy available to the respondents was to file an appeal under Section 96 read with Order XLIII Rule 1A(2) and Order XLI CPC before the appellate Court. Learned senior counsel submitted that the pursis was preferred under Order XXIII Rule 3 CPC and not under Order XXI Rule 1 CPC. Learned senior counsel submitted that the order dated 14.8.2008 falls under the second part of Order XXIII Rule 3 CPC and hence it would be sufficient that plaintiffs or the plaintiffs' counsel appears before the Court and informs the Court that the subject matter suit had been settled or satisfied. Learned senior counsel also submitted that the heirs of the deceased plaintiff no. 4 and plaintiff nos. 5/1, 5/2 and 5/4 could not have preferred the writ petitions under Articles 226 and 227 of the Constitution of India, since the same could have resulted in setting aside of the abatement which was contrary to law in view of Order XXII CPC. Plaintiff No. 4 had died on 2.6.2006 and Civil Suit no. 292 of 1993 had, as such, abated qua the

deceased plaintiff no. 4. Since the heirs, who are respondent nos. 1/1/A to 1/1/D, did not take any steps to implead themselves as heirs either in Civil Suit No. 292 of 1993 or in Special Civil Suit No. 681 of 1992, on expiry of the period of limitation under Articles 120 and 121 of the Limitation Act, those suits stood abated qua plaintiff No. 4. The heirs of the deceased plaintiff no. 4 had not taken any steps for setting aside the abatement or to get them substituted on the death of deceased plaintiff No. 4 in the various suits. Further, it was also pointed out that plaintiff Nos. 5/1 to 5/4 had never objected to the pursis dated 7.7.2008 and hence acquiesced to the order dated 14.8.2008 and are estopped from challenging that order. Learned senior counsel submitted that all disputes with plaintiff Nos. 3/1 and 3/2 were also settled during the pendency of these appeals and their objections before the trial Court under Special Civil Application Nos. 10884 and 11925 of 2005 did not survive. Further, learned senior counsel also pointed out that the power of attorney dated 7.1.1989 executed by respondent Nos. 5/1, 5/2 and 5/3, respondent Nos. 3/1 and 3/2, respondent No. 1 (since deceased) and respondent No. 2 (since deceased) in favour of respondent No. 4 – Chandrakant Atmaram Patel, was binding on respondent Nos. 1, 2, 3, 5 and their descendants, guardians and heirs. Learned senior counsel also submitted that, pending the Special Civil Application before the High Court, building plans put up by Mahalaxmi Society for construction upon the lands in question, were sanctioned by the competent authority and Mahalaxmi Society had commenced the construction. Learned senior counsel submitted that large amounts were paid by Mahalaxmi Society to the owners of the properties and to the respondents and their representatives and they had acknowledged the receipt of those amounts. The judgment of the High Court has now unsettled the things which stood settled. Consequently, learned senior counsel prayed that the appeals be allowed and the judgment of the High Court be set aside.

19. Shri J.M. Patel, learned couns

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of the contesting respondents, submitted that the High Court has rightly set aside the order dated 14.8.2008 and directed the trial Court to take into consideration the objections raised by the respondent herein and to re-hear Exh. Nos. 110 and 172. Learned senior counsel submitted that the suit was withdrawn without consent of plaintiff Nos. 5/1 to 5/4 by Chandrakant Atmaram Patel. Further, it was pointed out that no documents were produced before the trial Court pointing out that the above mentioned plaintiffs had executed any document in favour of Mahalaxmi Society. Learned senior counsel also pointed out that Bai Saraswati had fraudulently, unauthorizedly and illegally made an application before the authority for seeking permission under Section 63 of the Tenancy Act to transfer the land in question in favour of Mahalaxmi Society. Following that, two registered sale deeds dated 5.6.1992 and 8.6.1992 were executed in favour of Mahalaxmi Society, which is in clear violation of Section 63 of the Tenancy Act read with Section 23 of the Contract Act. Learned senior counsel also pointed out that the plaint in Civil Suit No. 292 of 1993 was instituted in his individual capacity and not as a power of attorney holder for rest of the plaintiffs. Learned senior counsel also pointed out that Chandrakant Atmaram Patel on 15.5.2004 executed one registered document in favour of Mahalaxmi Society, signed and executed for and on behalf of Amrutbhai Ashabai Patel (heirs of Legal Representatives are plaintiff Nos. 5/1 to 5/4) and also signed on behalf of Bai Saraswati, who expired on 22.5.1992, before the institution of suit, on relying upon the power of attorney dated 7.1.1989. Learned senior counsel pointed out that the document executed in the name of and on behalf of dead persons and also for the persons who had not authorized them to sign, such a document, according to the learned senior counsel, could not have been produced before the Court.

20. Learned senior counsel appearing on behalf of the contesting respondents also submitted that the impugned order dated 14.8.2008 is not a decree within the meaning of Section

2(2) CPC and hence, no appeal could have been filed under Section 96 read with Order XLIII Rule 1(1) and Order XLI CPC before the trial Court. Learned senior counsel also submitted that the contents of the power of attorney dated 7.1.1989 do not empower Chandrakant Atmaram Patel to withdraw the suits, compound the suits for and on behalf of plaintiff Nos. 4 and 5 and the Court should not have allowed the application withdrawing the suit. Learned senior counsel submitted that the High Court has rightly set aside the order dated 14.8.2008 and remanded the matter to the trial Court for fresh consideration and no prejudice would be caused to the appellants, if the validity of Exts. 110 and 172 is re-examined. Learned senior counsel also submitted that this Court, sitting in Article 136 of the Constitution of India, shall not disturb the above finding of the High Court.

21. Dr. Rajeev Dhawan, learned senior counsel appearing for the intervener submitted that the purchasers, landowner and/or their legal heirs viz. Chandrakant Atmaram Patel had entered into an agreement dated 15.06.1992 with the intervener which was registered and hence it has right, title and interest over the property in question. Further, it was also pointed out that the intervener has already filed a suit RCS 783/2004 which is pending consideration before the civil court and hence it has interest in these proceedings. Learned senior counsel also submitted that the whole matter should go back to the trial court so as to safeguard the interest of the intervener.

22. We have already referred to the facts leading to the making of pursis dated 7.7.2008 and 18.09.2008 by plaintiff No. 1 – Chandrakant Atmaram Patel for himself and as power of attorney holder for others and the orders passed thereon on 14.08.2008 and 08.09.2009 allowing the pursis and compounding the suits Nos. 292/1993 and 681/1992.

23. Bai Saraswati, as already indicated, had executed two sale deeds dated 27.10.1964 in respect of separate/non-contiguous parcels of land in favour of r[illegible]5.

Schedule to that documents refer to the survey numbers and properties sold. Respondent No. 1 to 5 (purchasers) formed a partnership firm by name M/s Arbuda Corporation and they executed an agreement to sell dated 15.9.1975 in favour of Mahalaxmi Society in respect of the properties above-mentioned. Later, M/s Arbuda Corporation and Mahalaxmi Society jointly made an application in the year 1976 under Section 20 of the ULC Act. Similar applications were also filed by Mahalaxmi Society, Bai Saraswati and respondent No. 4 – Chandrakant Atmaram Patel. Respondent nos. 5/1, 5/2 and 5/3, respondent nos. 3/1 and 3/2, respondent No. 1 (since deceased) and respondent No. 2 (since deceased) had on 07.01.1989 executed a power of attorney before the Public Notarized Civil Court, Ahmedabad city, in favour of respondent No. 4 – Chandrakant Atmaram Patel in respect of properties mentioned earlier conferring authority on him to deal with their property for other plaintiffs and the same would be binding on respondent Nos. 1, 2, 3, 5 and their descendants, guardians and heirs. Bai Saraswati, after getting permission under the ULC Act executed two sale deeds dated 5.6.1992 and 8.6.1992 in favour of Mahalaxmi Society in respect of properties mentioned earlier.

24. We notice that disputes then cropped up between Mahalaxmi Society, Bai Saraswati and respondent Nos. 1 to 5 (purchasers), which ultimately led to the filing of Special Civil Suit No. 681 of 1992, the details of which have already been stated in the earlier part of this judgment, hence not reiterated. Respondent Nos. 1 to 5 as plaintiffs then filed Civil Suit No. 292 of 1993 against Bai Saraswati and Mahalaxmi Society on 4.5.1993 for a declaration that sale deeds dated 5.6.1992 and 8.6.1992 are illegal and for a permanent injunction restraining Mahalaxmi Society from dealing with the lands. Plaint was signed by respondent No. 4 - Chandrakant Atmaram Patel, plaintiff No. 2 who are heirs of deceased Baldevprasad (present respondent Nos. 5/1 and 5/2), plaintiff no. 3 who are heirs of Manilal Patel (present respondent Nos. 3/1 and 3/2), plaintiff

No. 4 Ashabhai Patel (since deceased) now through respondent Nos. 1/1/A to 1/1/D and plaintiff No. 5 who are heirs of Amrutlal Patel (present respondent Nos. 2/1, 2/2, 2/3 and 7). Contesting respondents, therefore, were duly represented in Civil Suit No. 292 of 1993.

25. Bai Saraswati on 18.10.2000 executed a sale deed in respect of one remaining survey No. 216 in favour of Mahalaxmi Society as well. While the above mentioned suits were pending, efforts were made for settling the entire disputes between parties, consequently, plaintiff No. 1 - Chandrakant Atmaram Patel, for himself and as power of attorney holders for other plaintiffs executed various documents and entered into various transactions. Plaintiff No. 1 for and on behalf of other plaintiffs received an amount of Rs.29,72,326/- made by Mahalaxmi Society by various cheques, evidenced by the Notarized Acknowledgement-cum-Settlement Receipt dated 1.5.2004. On the same day, a Deed of Confirmation was also registered, which also refers to the above mentioned payment made by Mahalaxmi Society to the plaintiffs. In the Declaration-cum-Indemnity of Title dated 9.11.2004, it has been clearly stated that Mahalaxmi Society is the full, legal, proper and absolute owner and possessor of the above mentioned properties. Further, it is also provided in the said declaration that the plaintiffs had agreed to co-operate in obtaining appropriate orders from the Court in pending cases, including Special Civil Suit No. 681 of 1992 and Civil Suit No. 292 of 1993, in view of the compromise and settlement. Though, at that stage, a cheque for proportionate amount was given to plaintiff No. 3, he did not encash the same. Above-mentioned are the documents executed by plaintiff No. 1 for himself and on behalf of other plaintiffs on the strength of the power of attorney dated 7.1.1989.

26. Plaintiff No. 1 individually also, apart from the above mentioned documents, executed various other documents as well, which re-enforce and re-confirm d

transactions entered into by Chandrakant Atmaram Patel – as power of attorney holder for four other plaintiffs. Plaintiff No. 1 executed a Registered Deed of Confirmation on 10.11.2004 which specifically refers to the payment of Rs.29,72,365/- by Mahalaxmi Society. Deed also indicates that plaintiff no. 1 personally, unconditionally and irrevocably without any reservation or restriction whatsoever accepted, confirmed, acknowledged and admitted the Deed of Confirmation dated 1.5.2004, which was executed by plaintiff no. 1 for himself on behalf of other plaintiffs on the strength of the power of attorney dated 7.1.1989. Registered Articles of Agreement executed on the same day also refers to further payment of Rs.66,05,527/- being made to plaintiff No. 1. The Declaration-cum-Indemnity of Title executed on the same day also recognises that Mahalaxmi Society is in full, legal, proper and absolute owner and possessor of the above mentioned lands.

27. Plaintiff No. 2, heirs of Baldevprasad Jamunadas, individually also executed various documents, apart from the documents dated 1.5.2004 and 9.11.2004 executed by plaintiff No. 1 on the strength of the power of attorney, representing plaintiff No. 2 as well. Plaintiff no. 2 executed, on 11.11.2004, a Registered Deed of Confirmation acknowledging the payment of Rs.29,72,365/- of the Mahalaxmi Society and proportionate payment of Rs.5,94,473/-. Plaintiff No. 2 in the said deed of confirmation, personally, unconditionally and irrevocably without any reservation or restriction whatsoever accepted, confirmed, acknowledged and admitted the deed of confirmation dated 1.5.2004 executed by plaintiff no. 1 on his behalf and on behalf of other plaintiffs. Registered Articles of Agreement dated 11.11.2004 also recognises the further payment of Rs.66,05,527/-. Declaration-cum-Indemnity of Title made on the same day also indicates that Mahalaxmi Society is the full, legal, proper and absolute owner and possessor of the above mentioned lands.

28. Plaintiff Nos. 5/1, 5/2, 5/3 and 5/4 – heirs of Amrutlal

Patel had also individually executed various documents. Registered Deed of Confirmation dated 10.11.2004 refers to the payment of Rs.29,72,365/- by the Mahalaxmi Society and the proportionate payment of Rs.5,94,473/-. Plaintiff Nos. 5/1, 5/2, 5/3 and 5/4, in the said deed of confirmation has personally, unconditionally and irrevocably without any reservation or restriction whatsoever accepted, confirmed, acknowledged and admitted the deed of confirmation dated 1.5.2004 executed by plaintiff No. 1 on the strength of the power of attorney dated 7.1.1989. Registered Articles of Agreement dated 10.11.2004 also refers to further payment of Rs,66,05,527/- being made to plaintiff Nos. 5/1, 5/2, 5/3 and 5/4. Declaration-cum-Indemnity of Title of the same date would also indicate that Mahalaxmi Society is the full, legal, proper and absolute owner and possessor of the above mentioned lands.

29. Plaintiff No. 4 had also individually, in addition to the documents dated 1.5.2004 and 19.11.2004 executed by plaintiff No. 1, executed a Registered Deed of Confirmation dated 5.1.2005 acknowledging the payment of Rs.29,72,365/-. In that deed also, plaintiff No. 4 has personally, unconditionally and irrevocably without any reservation or restriction whatsoever accepted, confirmed, acknowledged and admitted the deed of confirmation dated 1.5.2004 executed by plaintiff No. 1. Plaintiff no. 4 had also, vide Registered Articles of Agreement, acknowledged the receipt of the additional payment of Rs.30,05,527/- on the same day. Declaration-cum-Indemnity of Title dated 5.1.2005 also acknowledges that Mahalaxmi Society is the full, legal, proper and absolute owner and possessor of the above mentioned lands.

30. Above facts would clearly indicate that plaintiff No. 1 on 5.1.2005 had executed documents as the power of attorney holder and also in his individual capacity, plaintiff Nos. 2/1, 2/2, plaintiff No. 4 and plaintiff Nos. 5/1, 5/2 and 5/4 had also executed documents and settlement ack

of payments made by Mahalaxmi Society and also acknowledging that Mahalaxmi Society is the full, legal, proper and absolute owner and possessor of the above mentioned properties. Further, on 9.11.2005, plaintiff Nos. 1, 2/1, 2/2, 4 and 5/1 to 5/4, through their advocate, published a notice in the local newspaper confirming the above mentioned facts and also the execution of the documents, thereby acknowledging that Mahalaxmi Society is the true, full, legal, proper and absolute owner and possessor of the above mentioned properties.

31. Plaintiff Nos. 3/1, 3/2 and plaintiff no. 4, however, had issued a public notice dated 05.12.2004 in the local newspapers, cancelling the power of attorney dated 7.1.1989 executed in favour of plaintiff No. 1 - Chandrakant Atmaram Patel. Plaintiff no. 4, after having executed the aforesaid documents in his individual capacity and after receipt of all the payments as per the aforesaid documents from the Mahalaxmi Society expired on 2.6.2006. During his lifetime, he had not disputed any of the above mentioned documents or their contents. The legal heirs of plaintiff No. 4, i.e. plaintiff Nos. 1/1/A to 1/1/D had also not raised any dispute. On the death of plaintiff No. 4, they also did not take any steps to get them impleaded as the heirs of plaintiff No. 4 in Special Civil Suit no. 681 of 1992 or in Civil Suit No. 292 of 1993, consequently, on the expiry of the period of limitation, the suits stood abated, qua plaintiff No. 4.

32. We have found that pursuant to the execution of various documents, referred to hereinbefore, by plaintiff No. 1 - Chandrakant Atmaram Patel, for himself and on behalf of the other plaintiffs, as well as plaintiff no. 1 individually, plaintiff No. 2, plaintiff Nos. 5/1, 5/2, 5/3 and 5/4, plaintiff No. 4 individually, and after having received the amounts mentioned therein from the appellant – Mahalaxmi Society, decided to record the compromise in both suits, since all the disputes between them were settled and they had acknowledged that Mahalaxmi

Society is the full, legal, proper and absolute owner and possessor of the lands in question. Consequently, plaintiff no. 1, on his behalf and on behalf of the other plaintiffs, except plaintiff Nos. 3/1 and 3/2, prepared a pursis dated 7.7.2008, referring to the sale deeds dated 08.06.1992 and 18.10.2000 executed in favour of the Mahalaxmi Society in respect of all the properties in question stating that the plaintiffs have unconditionally given up all the claims raised in the suit and have settled the issues with the Mahalaxmi Society. The same was then presented before the trial Court. Plaintiff Nos. 3/1 and 3/2 and defendant No. 3 – Jankalyan Society, however endorsed their objection to the pursis on 31.07.2008. Plaintiff No. 1 filed an affidavit on 13.8.2008 stating that the pursis was given in his individual capacity and as the power of attorney holder of plaintiff Nos. 2, 4 and 5. The trial Court, after hearing plaintiff nos. 3/1, 3/2 and defendant no. 3 (intervener), came to the conclusion that plaintiff Nos. 3/1 and 3/2 had cancelled the power of attorney only on 3.12.2004, whereas the Deeds of Confirmation were executed prior thereto, and that defendant No. 3's claim rested only on an agreement to sell, and could not enjoy any right under the Transfer of Property Act and, thereby, allowed the pursis and disposed of the suit (Special Civil Suit no. 292 of 1993) on 14.8.2008. Following that, Civil Suit No. 681 of 1992 was also disposed of on 8.9.2009.

33. We may indicate that the documents referred to earlier, executed by the plaintiff No. 1 for himself and as a power of attorney holder for others and the acknowledgment deed; Declaration-cum-indemnity bonds, deeds of confirmation etc. executed by the plaintiff No.2, heirs of Baldev Prasad, plaintiff Nos. 5/1, 5/2, 5/3 and 5/4, plaintiff No. 4 etc. would clearly show that they had received large amounts from the Mahalaxmi Society and had acknowledged that the Mahalaxmi Society was the full, legal , proper and absolute owner and the possession of the property covered by the sale deeds dated 05.06.1992 and 08.06.1992. Plaintiff Nos. 3/1 and 3/2, though later, challenged the judgment and order

more than one year, while pending these appeals, they also settled the matter with Mahalaxmi Society and accepted all the arguments raised by Mahalaxmi Society in these appeals.

34. Defendant No. 3 – Jankalyan Co-operative Group Housing Society (present intervener) had never independently challenged the order dated 14.8.2008 of the trial Court, consequently the order is binding on defendant No. 3.

35. We are now left with the objections raised by the heirs of the deceased plaintiff No. 4 and plaintiff Nos. 5/1 to 5/4. The heirs of deceased plaintiff No. 4 and plaintiff Nos. 5/1, 5/2 and 5/4 challenged the judgment and order dated 14.8.2008 only on 1.3.2010, more than one year and six months later, by filing Special Civil Application no. 7087 of 2010. The documents referred to earlier clearly indicate that they had received large amounts from Mahalaxmi Society and the heirs of the deceased plaintiff no. 4 did not take any steps to get them recorded in the Civil Suit after the death of the plaintiff No. 4, so far as this case is concerned, the suit had abated. The heirs of plaintiff No. 4 and plaintiff Nos. 5/1, 5/2 and 5/4 also challenged the judgment and order dated 8.9.2009 in Civil Suit No. 681 of 1992 only on 1.3.2011 by filing Special Civil Application No. 7088 of 2010. Plaintiff No. 4, we have already indicated, was duly represented by plaintiff No. 1 – Chandrakant Atmaram Patel while executing the various registered documents and issuing Acknowledgement-cum-Settlement Receipts by which large amounts were received by plaintiff No. 1, representing plaintiff no. 4. Over and above, plaintiff No. 4 himself had executed various registered deed of confirmation dated 5.1.2005 acknowledging the receipt of Rs.29,32,365/- and also Rs.30,05,527/-. We are of the view that the legal heirs of plaintiff no. 4 now cannot come forward and question the various documents executed by plaintiff No. 4, especially when they had not taken any steps to get them impleaded in both the civil suits. Impugned orders passed on 14.8.2008 and 8.9.2009, therefore, would bind them. Plaintiff

Nos. 5/1 to 5/4 had also not objected to the execution of various deeds and documents and ratified all the actions taken by plaintiff No.1, as power of attorney holder, since they had not objected to the pursis dated 07.07.2008, and hence acquiesced to the order dated 14.08.2008.

36. We may now examine whether the impugned order would fall under Rule 3 of Order XXIII or Rule 1 of Order XXIII of the CPC, the said provisions are given below for easy reference:

ORDER XXIII. WITHDRAWAL AND ADJUSTMENT OF SUITS

1. Withdrawal of suit or abandonment of part of claim

(1) At any time after the institution of a suit, the plaintiff may as against all or any of the defendants abandon his suit or abandon a part of his claim:

Provided that where the plaintiff is a minor or other person to whom the provisions contained in rules 1 to 14 of Order XXXII extend, neither the suit nor any part of the claim shall be abandoned without the leave of the Court.

(2) An application for leave under the proviso to sub-rule (1) shall be accompanied by an affidavit of the next friend and also, if the minor or such other person is represented by a pleader, by a certificate of the pleader to the effect that the abandonment proposed is, in his opinion, for the benefit of the minor or such other person.

(3) Where the Court is satisfied,-

(a) that a suit must fail by reason of some formal defect, or

(b) that there are sufficient grounds for allowing the plaintiff to institute a fresh suit for the sub[illegible]or

part of a claim, it may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or such part of the claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of the claim. (4) Where the plaintiff-

(a) abandons any suit or part of claim under sub-rule (1), or

(b) withdraws from a suit or part of a claim without the permission referred to in sub-rule (3),

he shall be liable for such costs as the Court may award and shall be preclude from instituting any fresh suit in respect of such subject-matter or such part of the claim.

(5) Nothing in this rule shall be deemed to authorise the Court to permit one of several plaintiffs to abandon a suit or part of a claim under sub-rule (1), or to withdraw, under sub-rule (3), any suit or part of a claim, without the consent of the other plaintiffs.

"**ORDER XXIII – WITHDRAWAL AND ADJUSTMENT OF SUITS-**

(3) Compromise of suit.- Where it is proved to the satisfaction of the Court that a suit has been adjusted wholly or in part by any lawful agreement or compromise in writing and signed by the parties, or where the defendant satisfies the plaintiff in respect of the whole or any part of the subject-matter of the suit, the Court shall order such agreement, compromise or satisfaction to be recorded, and shall pass a decree in accordance therewith so far as it relates to the parties to the suit, whether or not the subject-matter of the suit.

Provided that where it is alleged by one party and denied by the other that an adjustment or satisfaction has been arrived at, the Court shall decide the question; but

no adjournment shall be granted for the purpose of deciding the question, unless the Court, for reasons to be recorded, thinks fit to grant such adjournment.

Explanation:- An agreement or compromise which is void or voidable under the Indian Contract Act, 1872 (9 of 1872), shall not be deemed to be lawful within the meaning of this rule."

Rule 1 of Order XXIII speaks of withdrawal of suit or abandonment of part of claim. Rule 1 of Order XXIII covers two types of cases (i) Where the plaintiff withdraws a suit or part of a claim with the permission of the Court to bring in fresh suit on the same subject matter and (ii) Where the plaintiff withdraws a suit without the permission of the Court.

Rule 3 of Order XXIII, on the other hand, speaks of compromise of suit. Rule 3 of Order XXIII refers to distinct classes of compromise in suits. The first part refers to lawful agreement or compromise arrived at by the parties out of court, which is under 1976 amendment of the CPC required to be in writing and signed by the parties. The second part of Rule deals with the cases where the defendant satisfies the plaintiff in respect of whole or a part of the suit claim which is different from first part of Rule 3. The expression 'agreement' or 'compromise' refer to first part and not the second part of Rule 3. The second part gives emphasis to the expression 'satisfaction'.

37. In *Pushpa Devi V. Rajinder Singh*, (2006) 5 SCC 566, this court has recognised that the distinction deals with the distinction between the first part and the second part.

"What is the difference between the first part and second part of Rule 3? The first part refers to situations where an agreement or compromise is entered into in writing and signed by the parties. The said agreement or compromise is placed before the court. When th at

the suit has been adjusted either wholly or in part by such agreement, or compromise in writing and signed by the parties and that it is lawful, a decree follows in terms of what is agreed between the parties. The agreement/ compromise spells out the agreed terms by which the claim is admitted or adjusted by mutual concessions or promises, so that the parties thereto can be held to their promise(s) in future and performance can be enforced by the execution of the decree to be passed in terms of it. On the other hand, the second part refers to cases where the defendant has satisfied the plaintiff about the claim. This may be by satisfying the plaintiff that his claim cannot be or need not be met or performed. It can also be by discharging or performing the required obligation. Where the defendant so 'satisfied' the plaintiff in respect of the subject-matter of the suit, nothing further remains to be done or enforced and there is no question of any 'enforcement' or 'execution' of the decree to be passed in terms of it."

38-39. Further, it is relevant to note the word 'satisfaction' has been used in contradistinction to the word 'adjustment' by agreement or compromise by the parties. The requirement of 'in writing and signed by the parties' does not apply to the second part where the defendant satisfies the plaintiff in respect of whole or part of the subject-matter of the suit.

40. The proviso to Rule 3 as inserted by the Amendment Act 1976 enjoins the court to decide the question where one party alleges that the matter is adjusted by an agreement or compromise but the other party denies the allegation. The court is, therefore, called upon to decide the *lis* one way or the other. The proviso expressly and specifically states that the court shall not grant such adjournment for deciding the question unless it thinks fit to grant such adjournment by recording reasons.

41. So far as the present case is concerned, pursis falls under Order XXIII, Rule 3 since the defendant has satisfied the

plaintiffs in respect of whole of the subject-matter of the suit. Since objections were raised by plaintiff No.3 and defendant No. 3, those objections had to be dealt with by the court in accordance with Order XXIII, Rule 3. The proviso to Order XXIII, Rule 3 cast an obligation on the court to decide that question at the earliest, without giving undue adjournments. Objections raised by plaintiff No. 3 and defendant No.3 were examined by the court and rejected, in our view, rightly. Cogent reasons have been stated by the court while rejecting their objections and accepting the pursis.

42. We have also found that the heirs of plaintiff No. 4 did not take steps to record themselves in Civil Suit No. 292/1993 till the same was disposed of and hence, as per the provisions of Articles 120 and 121 of the Limitation Act, suit stood abated qua plaintiff No. 4. No steps had been taken to set aside the abatement as well. We have also on facts found that the plaintiff No. 4 during his life time executed various documents acknowledging the amounts paid by the Mahalaxmi Society. Plaintiff No. 3, though objected to pursis, later plaintiff Nos. 3/ 1 and 3/2 have settled disputes and adopted the contention of the Mahalaxmi Society.

43. We are also not much impressed by the argument of the learned senior counsel appearing for the respondent that the trial court has committed an error in not consolidating the various suits including Civil Suits No. 292/1993 and 681/1992 to be tried together as ordered by the District Court in its order dated 29.08.2006 in Civil Misc. Application No. 16/2005. Section 24 of the CPC only provides for transfer of any suit from one court to another. The court has not passed an order of consolidating all the suits. There is no specific provision in the CPC for consolidation of suits. Such a power has to be exercised only under Section 151 of the CPC. The purpose of consolidation of suits is to save costs, time and effort and to make the conduct of several actions more convenient by treating them as one action. Consolida[illegible]d

for meeting the ends of justice as it saves the parties from multiplicity of proceedings, delay and expenses and the parties are relieved of the need of adducing the same or similar documentary and oral evidence twice over in the two suits at two different trials. Reference may be made to the judgment of this Court in *Prem Lala Nahata and Anr. v. Chandi Prasad Sikaria* (2007) 2 SCC 551.

44. The transfer of the suits from one court to another to be tried together will not take away the right of the parties to invoke Order XXIII Rule 3 and there is also no prohibition under Order XXIII Rule 3 or Section 24 of the CPC to record a compromise in one suit. Suits always retain their independent identity and even after an order of consolidation, the court is not powerless to dispose of any suit independently once the ingredients of Order XXIII, Rule 3 has been satisfied.

45. We are, therefore, of the view that so far as the instant case is concerned, there is no illegality in the orders passed by the trial court disposing of the suit under Order XXIII, Rule 3 of the CPC accepting the pursis dated 07.07.2008 and 18.09.2008. The High Court, in our view, was not right in upsetting the orders dated 14.08.2008 and 08.09.2009 in Special Civil Suit Nos. 292/1993 and 681/1992. Consequently, all these appeals are allowed and the common judgment of the High Court is, accordingly, set aside. However, there will be no order as to costs.

K.K.T. Appeals allowed.

M/S. P.G.F. LIMITED & ORS.
v.
UNION OF INDIA & ANOTHER
(Civil Appeal No.6572 of 2004)

MARCH 12, 2013

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

Securities and Exchange Board of India Act, 1992.

ss.11AA – Constitutional validity of – Held: The provision is constitutionally valid – It does not intrude into the specific activities of sale of agricultural land and development – The provision cannot be struck down on the ground of legislative competence, being in conflict with Entry 18 of List II of Seventh Schedule of the Constitution – Constitution of India, 1950 – Schedule VII, List II, Entry 18.

s.2(ba) and 11AA(2) – Collective Investment Scheme – Whether covers appellant-Company's business activity of sale and development of agricultural land – Held: The activity of the company is nothing but a scheme/arrangement in the guise of sale and development of agricultural land – The agreement between the investors and the company shows that it was one-sided and arbitrary and there was uncertainty in the transactions to the disadvantage of the investors – Therefore the business activity squarely fell within the definition of Collective Investment Scheme u/s. 2(ba) r/w. s.11AA(2) – In view of the fact that the whole attempt of the Company was vexatious, and it perpetuated the present litigation with evil intention, exemplary cost of Rs.50 lakhs imposed – Appropriate inquiry and investigation directed to be conducted by CBI and Income Tax Department apart from the inquiry by the second respondent.

Practice and Procedure – Writ petition – Challenging validity of provision of law – Held: In such cases, it is imperative to examine at the threshold, by applyng the principle of lifting of veil as to whether such challenge is bona fide or there is any hidden agenda in perpetrating such litigation – Writ court should also keep in mind certain criteria for the purpose of entertaining such challenge and also while granting interim relief in such cases.

Words and Phrases – 'Collective Investment Scheme' – Meaning of, in the context of s. 11AA of Securities and Exchange Board of India Act.

The appellant-Company was involved in business activity of sale of agricultural land, sale and development of agricultural land and joint ventures scheme. The second respondent by a public notice as well as by specific letter called upon the appellant-company to furnish certain details regarding its Collective Investment Schemes. It also asked the company to get itself credit rated from credit rating companies approved by the second respondent. Thereafter the second respondent passed an order dated 20.2.2002 in exercise of its powers u/s. 11B of SEBI Act, issuing stringent directions against the appellant-company. The order was challenged. The High Court directed the Company to furnish the details required by the second respondent and also directed the respondent to give personal hearing to the company. In compliance with the Court direction, second respondent passed its order dated 6.12.2002 holding that the business activity of the company i.e. sale and development of agricultural land and its joint venture schemes were Collective Investment Schemes and directed the Company neither to collect money from investors nor to launch any new Scheme as it had failed to comply with the statutory requirement as provided under SEBI (Collective Investment Schemes) Regulation,

1999. It also directed the Company to refund the money collected under the schemes, to the investors as per terms of the offers.

The company challenged the order dated 6.12.2002 contending that its business activities in sale of agricultural land and sale and development of agricultural land would not fall within the category of Collective Investment Scheme specified u/s. 2(ba) r.w. s.11AA of SEBI Act. The Company also challenged the vires of s.11AA of SEBI Act. The High Court dismissed the petition holding that the business activities of the Company were Collective Investment Schemes falling u/s. 11AA (2)(ii) and (iv) of SEBI Act and therefore the second respondent was authorized to proceed against the Company. The Court also held that s.11AA was valid as Union of India was competent to introduce the said provision. Hence the present appeal.

Dismissing the appeal, the Court

HELD: 1.1. On very many occasions a challenge to a provision of law, as to its constitutionality is raised with a view to thwart the applicability and rigour of those provisions and as an escape route from the applicability of those provisions of law and thereby create an impediment for the concerned authorities and the institutions who are to monitor those persons who seek such challenges by abusing the process of the Court. Such frivolous challenges always result in prolongation of the litigation, which enables such unscrupulous elements who always thrive on other peoples money to take advantage of the pendency of such litigation preferred by them and thereby gain, on the one side, unlawful advantage on the monitory aspect and to the disadvantage of innocent victims, and ultimately, gain unlawful enrichment of such ill-gotten money by

defrauding others. In effect, such attempts made by invoking the extraordinary jurisdiction of the writ Courts of many such challenges, mostly result in rejection of such challenges. However, at the same time, while taking advantage of the long time gap involved in the pending proceedings, such unscrupulous litigants even while suffering the rejection of their stand at the end as to the vires of the provisions, always try to wriggle out of their liabilities by stating that the time lag had created a situation wherein those persons who were lured to part with huge sums of money are either not available to get back their money or such unscrupulous petitioners themselves are not in a position to refund whatever money collected from those customers or investors. It is, therefore, imperative and worthwhile to examine at the threshold as to whether such challenges made are bonafide and do require a consideration at all by the writ courts by applying the principle of 'lifting the veil' and as to whether there is any hidden agenda in perpetrating such litigation. [Para 31] [65-A-G]

1.2. Therefore, certain criteria to be kept in mind whenever a challenge to a provision of law is made before the Court. The Court can, in the first instance, examine whether there is a prima facie strong ground made out in order to examine the vires of the provisions raised in the writ petition. The Court can also note whether such challenge is made at the earliest point of time when the statute came to be introduced or any provision was brought into the statute book or any long time gap exist as between the date of the enactment and the date when the challenge is made. It should also be noted as to whether the grounds of challenge based on the facts pleaded and the implication of provision really has any nexus apart from the grounds of challenge made. With reference to those relevant provisions, the Court should be conscious of the position as to the extent of public

interest involved when the provision operates the field as against the prevention of such operation. The Court should also examine the extent of financial implications by virtue of the operation of the provision vis-à-vis the State and alleged extent of sufferance by the person who seeks to challenge, based on the alleged invalidity of the provision with particular reference to the vires made. Even if the writ Court is of the view that the challenge raised requires to be considered, then again it will have to be examined, while entertaining the challenge raised for consideration, whether it calls for prevention of the operation of the provision in the larger interest of the public. The Writ Court should also examine such other grounds on the above lines for consideration while considering a challenge on the ground of vires to a Statute or provision of law made before it for the purpose of entertaining the same as well as for granting any interim relief during the pendency of such writ petitions. It is also imperative that when such writ petitions are entertained, the same should be disposed of as expeditiously as possible and on a time bound basis, so that the legal position is settled one way or the other. [Paras 31 and 32] [65-H; 66-A-G]

2.1. The paramount object of the Parliament in enacting the Securities and Exchange Board of India Act itself and in particular the addition of Section 11AA was with a view to protect the gullible investors most of whom are poor and uneducated or retired personnel or those who belong to middle income group and who seek to invest their hard earned retirement benefits or savings in such schemes with a view to earn some sustained benefits or with the fond hope that such investment will get appreciated in course of time. Certain other Section of the people who are worstly affected are those who belong to the middle income group who again make such investments in order to earn some ex s

and thereby improve their standard of living and on very many occasions to cater to the need of the educational career of their children. [Para 37] [71-E-G]

2.2. A reading of s.11AA of SEBI Act discloses that it talks of any scheme or arrangement, which would fall within the definition of a collective investment scheme. Section 2 (ba) under the definition clause states that a collective investment scheme would mean any scheme or arrangement, which satisfies the conditions specified in Section 11AA. Under sub-Section (2) of Section 11AA, it is stipulated that any scheme or arrangement made or offered by any company by which the contribution, or payment made by the investors, by whatever name called, are pooled and utilized for the purposes of scheme or arrangement; contributions or payments are made by the investors with a view to receive profits, income, produce or property, whether movable or immovable, based on the scheme or arrangement, any property, contribution or investment which forms part of the scheme or arrangement is identifiable or not, is managed by someone on behalf of the investors shall be collective investment scheme. Further the investors should not have day to day control over the management and operation of the scheme or arrangement. A detailed analysis of sub-section (2) of Section 11AA, which defines a collective investment scheme disclose that it is not restricted to any particular commercial activity such as in a shop or any other commercial establishment or even agricultural operation or transportation or shipping or entertainment industry etc. The definition only seeks to ascertain and identify any scheme or arrangement, irrespective of the nature of business, which attracts investors to invest their funds at the instance of someone else who comes forward to promote such scheme or arrangement in any field and such scheme or arrangement provides for the various consequences to

result there from. [Para 35] [69-H; 70-A]

Sahara India Real Estate Corporation Limited and Ors. vs. Securities and Exchange Board of India and Anr. **(2013) 1 SCC 1 – relied on.**

2.3. Sub-Section (3) of Section 11AA of SEBI Act provides that those institutions and schemes governed by sub-clause (i) to (viii) of sub-Section (3) of Section 11AA will not fall under the definition of collective investment scheme. Sub-clauses (i) to (viii) shows that those are all the schemes, which are operated upon either by a co-operative society or those institutions, which are controlled by the Reserve Bank of India Act, 1934 or the Insurance Act of 1938 or the Employees Provident Fund and Miscellaneous Provisions Act, 1952 or the Companies Act, 1956 or the Chit Fund Act of 1982 and contributions, which are made in the nature of subscription to a mutual fund, which again is governed by a SEBI (Mutual Fund) Regulations 1996. Therefore, by specifically stipulating the various ingredients for bringing any scheme or arrangement under the definition of collective investment scheme as stipulated under sub-Section (2) of Section 11AA, when the Parliament specifically carved out such of those schemes or arrangements governed by other statutes to be excluded from the operation of Section 11AA, one can easily visualize that the purport of the enactment was to ensure that no one who seeks to collect and deal with the monies of any other individual under the guise of providing a fantastic return or profit or any other benefit does not indulge in such transactions with any ulterior motive of defrauding such innocent investors and that having regard to the mode and manner of operation of such business activities announced, those who seek to promote such schemes are brought within the control of an effective State machinery in ord[illegible]er

working of such schemes. [Para 39] [72-D-H; 73-A-B]

2.4. The implication of Section 11AA was not intended to affect the development of agricultural land or any other operation connected therewith or put any spokes in such sale-cum-development of such agricultural land. By seeking to cover any scheme or arrangement by way of collective investment scheme either in the field of agricultural or any other commercial activity, the purport is only to ensure that the scheme providing for investment in the form of rupee, anna or paise gets registered with the authority concerned and the provision would further seek to regulate such schemes in order to ensure that any such investment based on any promise under the scheme or arrangement is truly operated upon in a lawful manner and that by operating such scheme or arrangement, the person who makes the investment is able to really reap the benefit and that he is not defrauded. Sub- clauses (i) to (viii) of sub-Section (3), which excludes those schemes and arrangements from the operation of Section 11AA in as much as those schemes are already governed under various statutes and are operated upon by a co-operative society or State machinery and there would be no scope for the concerned persons or the institutions who operate such schemes within the required parameters and thereby the common man or the contributory's rights or benefits will not be in any way jeopardized. It is, therefore, apparent that all other schemes/arrangements operated by all others, namely, other than those who are governed by sub-section 3 of Section 11AA are to be controlled in order to ensure proper working of the scheme primarily in the interest of the investors. [Para 40] [73-C-H; 74-A]

2.5. What sub-section (2) of Section 11AA intends to achieve is only to safeguard the interest of the investors whenever any scheme or arrangement is announced by

such promoters by making a thorough study of such schemes and arrangements before registering such schemes with the SEBI and also later on monitor such schemes and arrangements in order to ensure proper statutory control over such promoters and whatever investment made by any individual is provided necessary protection for their investments in the event of such schemes or arrangements either being successfully operated upon or by any mis-fortune happen to be abandoned, where again there would be sufficient safeguards made for an assured refund of investments made, if not in full, at least a part of it. [Para 42] [74-F-H; 75-A]

2.6. The factors, which weighed with the Parliament to introduce Section 11AA cannot be held to be done with a view to affect any particular category of business activity much less the activity of agriculture. Therefore, the stand of the appellant-Company that what it sought to carry out under its scheme was merely sale and development simplicitor of agricultural land and not a collective investment scheme cannot be accepted [Para 43] [75-B-C]

2.7. Section 11AA of the SEBI Act is constitutionally valid. The provision is not suffering from any infirmity, as it does not intrude into the specific activities of sale of agricultural land and its development. Thus, there is no scope to apply Entry 18 of List II of Seventh Schedule of the Constitution, in order to strike down the said provision on the ground of legislative competence. [Paras 43 and 53] [75-D; 81-F]

3.1. The activity of the appellant-Company, namely, the sale and development of agricultural land squarely falls within the definition of collective investment scheme under Section 2(ba) read along with Section 11AA (ii) of the SEBI Act and consequently the

respondent dated 06.12.2002 is perfectly justified and there is no scope to interfere with the same. [Para 53] [81-F-G]

3.2. In the present case, once the customer signs the application form and the agreement, virtually he would be left high and dry with no remedy, in the event of any breach being committed by the appellant-Company, while on the other hand he will have everything to loose if such breach happened to occur at the instance of the customer. The agreement, thus, demonstrates to be wholly one sided and arbitrary in all respects. [Para 49] [78-D-F]

3.3. A conspectus consideration of the scheme of development of the land purchased by the customers at the instance of the appellant-Company and the promised development under the agreement disclose that there was wholesale uncertainty in the transactions to the disadvantage of the investors' concerned. The above factors disclose that appellant-Company under the guise of sale and development of agricultural land in units of 150 sq. yrds. i.e. 1350 sq. ft. and its multiples offered to develop the land by planting plant, trees etc., and thereby the customers were assured of a high amount of appreciation in the value of the land after its development and attracted by such anticipated appreciation in land value, which is nothing but a return to be acquired by the customers after making the purchase of the land based on the development assured by the appellant-Company, part with their monies in the fond hope that such a promise would be fulfilled after successful development of the bits of land purchased by them. [Para 51] [79-G-H; 80-A-C]

3.4. The appellants, however, failed to supply any material to demonstrate as to how and in what manner any of the lands said to have been sold to its customers

were developed and thereby any of the customer was or would be benefited by such development. It is imperative that the transaction of the appellant-Company vis-à-vis its customers has necessarily to be examined as to its genuineness by subjecting itself to the statutory requirement of registration with the second respondent followed by its monitoring under the regulations framed by the second respondent. All the above factors disclose that the activity of sale and development of agricultural land propounded by the appellant-Company based on the terms contained in the application and the agreement signed by the customers is nothing but a scheme/ arrangement. Apart from the sale consideration, which is hardly 1/3rd of the amount collected from the customers, the remaining 2/3rd is pooled by the appellant-Company for the so called development/improvement of the land sold in multiples of units to different customers. Such pooled funds and the units of lands are part of such scheme/arrangement under the guise of development of land. It is quite apparent that the customers who were attracted by such schemes/arrangement invested their monies by way of contribution with the fond hope that the various promises of the appellant-Company that the development of the land pooled together would entail high amount of profits in the sense that the value of developed land would get appreciated to an enormous extent and thereby the customer would be greatly benefited monetarily at the time of its sale at a later point of time. As per the agreement between the customer and the appellant-Company, it was the responsibility of the appellant-Company to carry out the developmental activity in the land and thereby the appellant-Company undertook to manage the scheme/arrangement on behalf of the customers. Having regard to the location of the lands sold in units to the customers, which were located in different states while the customers were stated to be from different parts of the country it i e

for the customers to have day to day control over the management and operation of the scheme/arrangement. In these circumstances, the conclusion of the Division Bench in holding that the nature of activity of the appellant-Company under the guise of sale and development of agricultural land did fall under the definition of collective investment scheme under Section 2(ba) read along with Section 11AA of the SEBI Act was justified. [Para 52] [80-D-H; 81-A-E]

4.1. The appellant-Company is bound to comply with the direction of the second respondent dated 6.12.2002. While ensuring compliance of the order dated 06.12.2002, the second respondent shall also examine the claim of the appellant-Company that it had stopped its joint venture scheme as from 01.02.2000 is correct or not by holding necessary inspection, enquiry and investigation of the premises of the appellant-Company in its registered office or any of its other offices wherever located and also examine the account books other records and based on such inspection, enquiry and investigation issue any further directions in accordance with law. Whatever amount deposited by the appellant-Company, pursuant to the interim orders of this Court relating to joint venture scheme shall be kept in deposit by the second respondent in an Interest Bearing Escrow Account of a Nationalized Bank. The second respondent shall also verify the records of the appellant-Company relating to the refund of deposits of the customers who invested in the joint venture schemes and ascertain the correctness of such claim and based on such verification in the event of any default noted, appropriate further action shall be taken against the appellant-Company for settlement of the monies payable to such of those investors who participated in any such joint venture schemes operated by the appellant-Company. It will also be open to the second respondent while carrying out the above said

exercise to claim for any further payment to be made by the appellant-Company towards settlement of such claims of the participants of the joint venture schemes and charge interest for any delayed/defaulted payments. As far as the deposit made by the appellant-Company with the second respondent on the ground that the such amount could not be disbursed to any of the investors for any reason whatsoever the second respondent, based on the verification of the records of the appellant-Company, arrange for refund/disbursement of such amount back to the participants of the joint venture schemes with proportionate interest payable on that amount. The above directions are in addition to the directions made by the Division Bench of the High Court. [Para 53] [81-G-H; 82-A-G]

4.2. The whole attempt of the appellant-Company was thoroughly vexatious and calls for severe indictment. In view of the evil intention of the appellant-company in having perpetrated this litigation, apart from mulcting the appellant-Company with exemplary costs of Rs.50,00,000/- (fifty lakhs) it also calls for appropriate enquiry and investigation to be made not only by the second respondent but also by the prime criminal investigating agencies, namely, the Central Bureau of Investigation and also by the Department of Income Tax, in order to find out the extent of fraud indulged in by the appellant-Company under the garb of development of agricultural lands that too at the cost of gullible investors, who were offered fragmented pieces of so called agricultural lands in multiple units of 150 sq. yds. per unit. In the event of any malpractice indulged in by the appellant-Company, to launch appropriate proceedings, both Civil, Criminal and other actions against the appellant-Company, as well as, all those who were responsible for having indulged in such malpractice. [Paras 24 and 56] [59-G-H; 60-A-C;

4.3. The appellant-Company is directed to appoint a nodal officer, not below the rank of a Director, of its company who shall be responsible for furnishing whatever information, documents, account books or other materials that may be required by the second respondent, the Central Bureau of Investigation as well as the Income Tax Authorities. [Para 56] [85-C]

K.K. Baskaran vs. State represented by its Secretary, Tamil Nadu and Ors. **(2011) 3 SCC 793: 2011 (3) SCR 527;** *Sonal Hemant Joshi and Ors. vs. State of Maharashtra and Ors.* **(2012) 10 SCC 601;** *State of Maharashtra vs. Vijay C. Puljal and Ors.* **(2012) 10 SCC 599;** *New Horizon Sugar Mills Ltd. vs. Government of Pondicherry and Anr. (***2012) 10 SCC 575: 2012 (8) SCR 874;** *Naga People's Movement of Human Rights vs. Union of India* **(1998) 2 SCC 109: 1997 (5) Suppl. SCR 469;** *Union of India vs. Shri Harbhajan Singh Dhillon* **(1971) 2 SCC 779: 1972 (2) SCR 33;** *S.P. Mittal vs. Union of India and Ors.* **(1983) 1 SCC 51: 1983 (1) SCR 729;** *Kartar Singh vs. State of Punjab* **(1994) 3 SCC 569: 1994 (2) SCR 375;** *Mohinder Singh Gill and Anr. vs. The Chief Election Commissioner, New Delhi and Ors.* **(1978) 1 SCC 405: 1978 (2) SCR 272;** *Commissioner of Police vs. Gordhandas Bhanji-* **1952 SCR 135;** *Delhi Cloth and General Mills Co. Ltd. vs. Union of India and Ors.* **(1983) 4 SCC 166: 1983 (3) SCR 438;** *Reserve Bank of India vs. Peerless General Finance and Investment Co. Ltd. and Ors.* **(1987) 1 SCC 424: 1987 (2) SCR 1;** *Narendra Kumar Maheshwari vs. Union of India* **1990 (Suppl.) SCC 440: 1989 (3) SCR 43;** *E.V. Cinnaiah vs. State of A.P. and Ors.* **(2005) 1 SCC 394: 2004 (5) Suppl. SCR 972 – cited.**

Case Law Reference:

2011 (3) SCR 527	**cited**	**Para 15**
(2012) 10 SCC 601	**cited**	**Para 15**
(2012) 10 SCC 599	**cited**	**Para 15**

2012 (8) SCR 874	**cited**	**Para 15**
1997 (5) Suppl. SCR 469	**cited**	**Para 15**
1972 (2) SCR 33	**cited**	**Para 15**
1983 (1) SCR 729	**cited**	**Para 15**
1994 (2) SCR 375	**cited**	**Para 15**
1978 (2) SCR 272	**cited**	**Para 15**
1952 SCR 135	**cited**	**Para 15**
(2013) 1 SCC 1	**relied on**	**Para 36**
1983 (3) SCR 438	**cited**	**Para 16**
1989 (3) SCR 43	**cited**	**Para 16**
2004 (5) Suppl. SCR 972	**cited**	**Para 16**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6572 of 2004.

From the Judgment & Order dated 26.07.2004 of the High Court of Punjab & Haryana in C.W.P. No. 188 of 2003.

A.K. Ganguli, Parag P. Tripathi, Debesh Panda, Barnali Basak, Chhitanya Safaya, Rohit Tandon, Subramonium Prasad, P.N. Puri, Suruchii Aggarwal, Manish Kumar, Siddharth Jaiprakash, Monisha Handa, Sidharth Luthra, Sushma Suri, J.K. Mohopatra, Supriya Juneja, Aakansha Tandon, B.V. Balaram Das, Shovan Mishra, Milind Kumar for the Appearing Parties.

The Judgment of the Court was delivered by

FAKKIR MOHAMED IBRAHIM KALIFULLA, J. 1. This appeal is directed against the Division Bench Judgment of the High Court of Punjab & Haryana at Chandigarh in Civil Writ Petition (CWP) No.188/2003 dated 26.07.2004. Since the Division Bench has dealt with elaborately the background of the case for filing the writ petition at the ins t,

we do not wish to state the same in detail in our judgment. However, we only wish to refer such of those bare facts required to support our decision and conclusion. At the very outset, we wish to note that though this appeal has been preferred by PGF Limited, its Chairman-cum-Managing Director and two other individuals who are stated to be residents of village Khabra and Samaspur of Punjab but the same has been really contested by the appellant No.1 whom we will hereinafter refer to as 'PGF Limited'.

2. The appellant, known as Pearls Green Forests Limited and called PGF Limited from 1997, is having its registered office at S.C.O. No.1042-43, Sector 22-B, Chandigarh and its Head Office at 2nd Floor, Vaishali Building, Community Centre, Paschim Vihar, New Delhi. Though the Memorandum and Articles of Association of the Company provide for carrying on very many activities by way of business operations, we are only concerned with three of the activities of the PGF Limited, namely, sale of agricultural land, sale and development of agricultural land and joint venture schemes. Of the above three operations, when the writ petition was heard by the Division Bench of the High Court it was reported on 28.05.2004 by the learned counsel for the appellants that the PGF Limited took a decision to disband all its schemes, other than its operations relating to the business connected with sale of agricultural land and/or sale and development of agricultural land. Based on the said representation, an interim order came to be passed by the Division Bench on 28.05.2004 with which we are also not seriously concerned.

3. There was a public notice issued by the second respondent herein on 18.12.1997, apart from specific letter addressed by the second respondent to the PGF Limited dated 20.04.1998, by which the PGF Limited was called upon to furnish various details as regards to the Collective Investment Schemes, within 15 days of the issuance of its letter dated 20.04.1998. The second respondent also stated to have issued further communication based on the order of the Delhi High

Court in CWP No.3352/1998 dated 7th and 13th October 1998, wherein all plantation companies, agro companies and companies running collective investment schemes, to get themselves credit rated from credit rating companies approved by the second respondent. The PGF Limited was directed to comply with the said directions also.

4. In the above-stated background, the second respondent passed an order on 20.02.2002 in exercise of its powers under Section 11B of the SEBI Act, by issuing some stringent directions against the PGF Limited. The PGF Limited challenged the said order before the Punjab and Haryana High Court in CWP No.4620/2002 wherein the second respondent came forward to keep its order dated 20.02.2002 in abeyance, provided the PGF Limited agreed to furnish the information sought for within two weeks. Based on the said stand of the second respondent by order of the High Court dated 29.04.2002, the PGF Limited was directed to submit its reply to the show cause notice and furnish all requisite information to the second respondent. The second respondent was also directed to provide an opportunity of personal hearing to the PGF Limited. The order dated 20.02.2002 was also directed to be kept in abeyance, till the final order was passed. Subsequent to the said order of the High Court dated 29.04.2002, after following the directions contained in the said order, the second respondent passed its order on 06.12.2002, by which it was held that the business activity of the PGF Limited, namely, the sale and development of agricultural land, as well as its joint venture schemes, were all collective investment schemes and since the PGF Limited failed to comply with the statutory requirement as provided under the SEBI (Collective Investment Schemes) Regulation, 1999, directed the PGF Limited not to collect any money from investors nor to launch any new scheme with a further direction to refund the money collected under the schemes, which were due to the investors as per the terms of the offer within a period of one month from the date of its or h

threatened to initiate actions as available under the SEBI Act and SEBI (Collective Investment Schemes) Regulation, 1999.

5. Aggrieved by the said order of the second respondent dated 06.12.2002, the appellants preferred the writ petition before the High Court of Punjab and Haryana in CWP No.188 of 2003 wherein the order impugned dated 26.07.2004 came to be passed. Before the Division Bench of the High Court, on behalf of the appellants herein, two contentions were raised, namely, that apart from its joint venture business, its other business activities, namely, sale of agricultural land and sale and development of agricultural land, would not fall within the category of collective investment schemes as specified under Section 2(ba) read with Section 11AA of the SEBI Act and consequently the order impugned dated 06.12.2002 cannot be sustained.

6. Apart from challenging the order dated 06.12.2002, the appellants also challenged the *vires* of Section 11AA of the SEBI Act. At the instance of the second respondent the question about the territorial jurisdiction of the High Court was raised, which was turned down by the Division Bench in the order impugned and the same has become final and conclusive, as there was no challenge to the said part of the judgment of the Division Bench. As far as the stand of the PGF Limited that its business activity of sale and development of agricultural land would not fall within the category of collective investment schemes, the Division Bench, after a detailed consideration, held that having regard to the nature of offer made by the PGF Limited, the prescribed filled in application forms, collected from the investors before entering into the transaction of transfer of any land by way of sale and the various terms contained in the agreement for development, held that the nature of development of the land assured to the customer by the PGF Limited would bring the whole scheme of sale and development of agricultural land under the concept of collective investment schemes falling under Section 11AA(2)(ii) and (iv)

of the SEBI Act and, therefore, the second respondent had every authority to proceed against the PGF Limited.

7. The Division Bench, thereafter, proceeded to examine the correctness of the order of the second respondent dated 06.12.2002 and held that there was every justification for the second respondent to pass the said order and for passing the ultimate direction contained therein. As far as the challenge as to the *vires* of Section 11AA of the SEBI Act, the Division Bench examined the said submission threadbare and found no substance in the said submission inasmuch as the object of adding Section 11AA of the SEBI Act pointed at investors' protection, not agriculture and consequently the first respondent-Union of India had every competence to introduce the said provision in the SEBI Act.

8. We heard Mr. A.K. Ganguli, learned senior counsel for the appellants, Mr. Sidharth Luthra, learned Additional Solicitor General for respondent No.1 & Mr. Parag P. Tripathi, learned senior counsel for respondent No.2. Mr. Ganguli while assailing the order of the Division Bench after taking us through the material documents, in particular, the specimen application form submitted by the investors along with its annexures, copies of certain sale deeds between the vendor and the investors, submitted that once the joint venture operations carried on by the PGF Limited, were stopped by them on and from 01.02.2000, its other activity of sale of agricultural land nor the sale and development of agricultural land can be brought within the category of collective investment schemes. The learned senior counsel by referring to the definition of 'security' under the Securities Contracts (Regulation) Act, 1956, which definition was adopted for the purpose of application of SEBI Act as mentioned in Section 2(1)(i), contended that the application form or the development agreement cannot be construed as an 'instrument' in order to state that the sale and development activity of the PGF Limited can be brought within the category of collective investment sc

9. The learned senior counsel contended that none of the terms and conditions of the agreement contemplated any return while operating the activity of development of the agricultural land of the investors that since return is *sine qua non* for any collective investment scheme, the activity of sale and development of agricultural land cannot be construed as a collective investment scheme. According to learned senior counsel, the role of the PGF Limited was merely facilitating the investors for purchasing agricultural lands in multiple units and beyond that no other obligation was to be performed by the PGF Limited, which can be construed as providing for any return in the process of sale and development of agricultural land to the investors by the PGF Limited. The learned senior counsel, therefore, contended that the conclusion of the Division Bench in holding that the sale and development of agricultural land would fall within the definition of collective investment scheme under Section 2(ba) read along with 11AA of the SEBI Act, was erroneous and consequently the judgment of the Division Bench as well as the order of the second respondent dated 06.12.2002 are liable to be set aside.

10. As far as the *vires* of Section 11AA of the SEBI Act is concerned, learned senior counsel primarily contended that the business of the PGF Limited being sale of agricultural land and sale and development of agricultural land to its customers, the said activity would only fall under Entry 18 of List II of the Seventh Schedule and, therefore, the State Legislature alone was competent to bring about any legislation for the purpose of regulating its activities. The learned senior counsel contented that none of the transactions carried on by the PGF Limited with its customers whether directly or indirectly nor any of the documents available on record in relation to the transaction of sale of agricultural land and sale and development of agricultural land can be construed as an 'instrument' falling under the definition of 'securities' as defined under Section 2(h)(ib) of the Securities Contracts (Regulation) Act, 1956, which expression was 'mutatis mutandis' applied for the

definition of 'securities' under the provisions of the SEBI Act. According to learned senior counsel since those documents would not fall within the definition of 'securities' as defined under the SEBI Act read along with Securities Contracts (Regulation) Act, 1956 there is absolutely no scope to invoke the definition of Section 2(ba) read along with Section 11AA of the SEBI Act.

11. The learned senior counsel strenuously contended that the stand of the respondents as accepted by the Division Bench, namely, that the collective investment scheme would fall within the expression 'investor protection' and thereby governed by Entry 97 of List I of the Seventh Schedule read along with Article 248 of the Constitution was wholly misconceived and, therefore, on the ground of legislative competence, Section 11AA of the SEBI Act is liable to be struck down. In support of the said submission learned senior counsel also made detailed reference to various State enactments dealing with the protection of rights of depositors in financial establishments and contended that having regard to such initiatives taken by various State Governments, if at all, any protection were to be extended to the investors, namely, the customers of the PGF Limited whose rights *qua* the agricultural lands transferred in their favour, could have been validly enacted only in exercise of the powers vested with the respective State Governments under Entry 18 of List II of the Seventh Schedule and such exercise of power of legislation could have never been carried out by the first respondent.

12. Learned senior counsel further contended that the judgment of the Division Bench of the High Court in upholding the validity of Section 11AA of the SEBI Act resulted in various incongruities in that the impugned provision brought into the SEBI Act created under a law referable to Entries 43, 44 and 48 of List I of the Seventh Schedule directly encroaching upon the legislative power of the State under Entry 18 of List II of the Seventh Schedule. According to learned senior counsel, the subject matter of 'investors protection' p

respondents and accepted by the Division Bench of the High Court, which was referable only to Entries 43 and 44 of List I of the Seventh Schedule, can have no reference to the transactions dealing with sale and purchase of agricultural lands and their development and consequently the introduction of Section 11AA into the SEBI Act by way of a parliamentary legislation was wholly incompetent.

13. According to learned senior counsel, the SEBI Act and the Securities Contracts (Regulation) Act, 1956 deal only with instruments, which can be openly traded in the Stock Market as compared to the title deeds with respect to immovable properties, which cannot by any stretch of imagination brought within the meaning of the term 'instrument' in order to invoke Section 11AA of the SEBI Act to rope in the PGF Limited's activities as falling under the expression 'collective investment scheme' and proceed against them. It was, therefore, contended that even if Section 11AA can be held to be valid, it should be declared that the said provision will have no application to sale and development of agricultural land.

14. The learned senior counsel further contended that even the second respondent never contended that the transactions of the PGF Limited in the sale and development of the agricultural lands to its investors as sham transactions as could be seen from the impugned order of the second respondent dated 06.12.2002 and in the said circumstances the conclusions drawn by the Division Bench to the contrary cannot be accepted and the same cannot form the basis for upholding the order of the second respondent dated 06.12.2002.

15. In support of his submissions learned senior counsel relied upon the decisions in *K.K. Baskaran Vs. State represented by its Secretary, Tamil Nadu and others* - (2011) 3 SCC 793, *Sonal Hemant Joshi and others Vs. State of Maharashtra and others* - (2012) 10 SCC 601, *State of Maharashtra Vs. Vijay C. Puljal and others* - (2012) 10 SCC 599, *New Horizon Sugar Mills Ltd. Vs. Government of*

Pondicherry and another - (2012) 10 SCC 575, *Naga People's Movement of Human Rights Vs. Union of India* - (1998) 2 SCC 109, *Union of India Vs. Shri Harbhajan Singh Dhillon* - (1971) 2 SCC 779, *S.P. Mittal Vs. Union of India and others* - (1983) 1 SCC 51, *Kartar Singh Vs. State of Punjab* - (1994) 3 SCC 569, *Mohinder Singh Gill and another Vs. The Chief Election Commissioner, New Delhi and others* - (1978) 1 SCC 405 and *Commissioner of Police Vs. Gordhandas Bhanji* - 1952 SCR 135.

16. Mr. Luthra, learned Additional Solicitor General appearing for the Union of India after referring to the judgment of the Division Bench and the directions ultimately issued to the PGF Limited to refund all the monies collected from the investors, contented that the source of power to the Parliament to introduce Section 11AA of the SEBI Act was Entry 97 of List I read along with Article 248 of the Constitution and not Entry 48 of List I or Entry 18 of List II. By relying upon the recent decision of this Court in *Sahara India Real Estate Corporation Limited and others Vs. Securities and Exchange Board of India and another* - (2013) 1 SCC 1, learned Additional Solicitor General contended that the object of SEBI Act itself was mainly for the protection of investors and that the decision of this Court has also reinforced the said position. The learned Additional Solicitor General relied upon *Delhi Cloth & General Mills Co. Ltd. Vs. Union of India and others* - (1983) 4 SCC 166, *Reserve Bank of India Vs. Peerless General Finance and Investment Co. Ltd. and others* - (1987) 1 SCC 424 and *Narendra Kumar Maheshwari Vs. Union of India* - 1990 (Suppl.) SCC 440 to emphasis the need for investors protection in the present day context. The learned Additional Solicitor General contended that since the protection of investors is the main objective of the legislation, namely, SEBI Act and the said concept is not specifically enumerated in any of the Entries of Seventh Schedule, the same would be governed only by Entry 97 of List I and by virtue of the residual power is vested with the Parliament u e

Constitution, the introduction of Section 11AA of the SEBI Act was valid in law and the judgment of the Division Bench does not call for interference. By relying upon the decision of this Court in *E.V. Chinnaiah Vs. State of A.P. and Others* - (2005) 1 SCC 394, the learned Additional Solicitor General also contended that the pith and substance theory applied by the Division Bench of the High Court to conclude that the business activity of the PGF Limited, namely, sale and development of agricultural land is nothing but a collective investment scheme and consequently governed by the concept of investors protection as governed by Section 11AA of the SEBI Act, was perfectly justified and the same does not call for interference.

17. Mr. Tripathi, learned senior counsel for the second respondent in his submissions contended that the sale and development of agricultural land of the PGF Limited was in pith and substance a collective investment scheme and that the contention of the PGF Limited that its business related to transaction concerning agricultural land simplicitor cannot be accepted. The learned counsel, therefore, contended that the submission that there was no competence for the Parliament to enact Section 11AA of the SEBI Act and based on the said provision SEBI cannot control the business of the PGF Limited, cannot be countenanced. According to learned senior counsel the salient features of the business of the PGF Limited, namely, sale and development of agricultural land in reality was an investment simplicitor by the gullible public under the guise of sale and development of agricultural land and, therefore, Section 11AA of the SEBI Act was valid in law and the PGF Limited is bound to comply with the requirements of the SEBI Act in order to protect the interests of the investors.

18. While highlighting the salient features, the learned senior counsel referred to the application to be submitted by the investors and the various stipulations contained in the agreement of the PGF Limited, which disclose that while the sale of agricultural land in units of 150 sq. yrds. (1350 sq. ft.)

was not immediately made, the same was dependent on certain other time bound contingencies. The learned senior counsel then pointed out that various terms contained in the application and the agreement disclose that the PGF Limited continued to retain absolute control over the land in question, which is sold in fragmentation to different parties and created a bondage with the PGF Limited, which virtually deprived of those investors to have absolute control over the land purchased by them. According to him, the so called development of the land by various investors was collectively retained by the PGF Limited.

19. To highlight such a dominant control of the PGF Limited over the various units sold to the customers, the learned senior counsel pointed out that from the date of signing of the agreement for development, the PGF Limited retained absolute control in the matter of consultation with agro-consultants and experts for soil test, climate etc., apart from the development of the land by way of survey, demarcation, clearing cultivation, planting and raising of crops, trees, plants, saplings etc., use of fertilizers and pesticides, irrigation, harvesting and all other activities allied or incidental thereto, to be decided by the PGF Limited. Even as regards to the payment plans, the learned senior counsel pointed out that the sample agreement produced does not disclose as to how much from out of the composite amount collected from the customer would be the cost of the land for the purpose of development. By referring to the rejoinder filed before the High Court, the learned senior counsel pointed out that for the first time PGF Limited stated that 1/3rd of the consideration was towards the cost of land for which the sale deed is executed and the remaining amount spent towards development of land and there was no separate document to cover the amount spent for development. Based on the said stand of the PGF Limited, the learned senior counsel pointed out that out of Rs.5000/- by way of consideration only Rs.1750/- was relatable to cost of land and the rest was towards development, maintenance etc.

20. The learned senior counsel also submitted that the Notes of Accounts disclose that it was the policy of the company to acquire land and allot land units to its joint ventures by way of earmarking land units after three years in case of deferred schemes and after one year in case of a lump sum scheme. It was also pointed out that when a specific question was put by the High Court to the PGF Limited as to how many investors had in fact proceeded to cultivate the land and put it for agricultural use or developed it by themselves, nothing was placed before the High Court to substantiate the claim of the PGF Limited. It was pointed out that the investors mostly belonged to the rural areas and were uneducated, who were lured with a return of 12.3%, as against the comparative investment option of 8.9%, while in reality there was no development of the land and the alleged promise of distribution of return was from out of the investment, from new investors. In the light of the above features contained in the application and the agreement placed before the Court, it was contended that the activity of the PGF Limited was not a mere sale and purchase of land, but in actuality was an investment scheme wherein land was being used only as a resource, which was promised to be worked on and developed by the PGF Limited and the exploitation of the land would result in return to the investors. It was, therefore, submitted that in reality the business of the PGF Limited was purely an investment scheme and consequently governed by the definition of collective investment scheme as defined under Section 2(ba) read along with Section 11AA of the SEBI Act.

21. With regard to the legislative competence, the learned senior counsel submitted that having regard to the nature of business transaction of the PGF Limited, in pith and substance, it was a collective investment scheme of the PGF Limited along with the investors and, therefore, as rightly claimed by the respondent the introduction of Section 11AA of the SEBI Act by the Parliament was governed by the concept of 'investors protection' falling within residuary Entry 97 of List I read along

with Article 248 of the Constitution and not governed by Entry 18 of List II. The learned senior counsel, therefore, contended that the challenge to the said Section on the ground of legislative competence was rightly rejected by the Division Bench of the High Court.

22. As far as the contention that the PGF Limited's scheme did not fall under the category of security, the learned senior counsel contended that even applying Section 2(h) of the Securities Contracts (Regulation) Act, 1956 read along with the provisions of the SEBI Act, the sale-cum-development agreement of the PGF Limited would fall within the definition of 'instrument', which only means "a written legal document that defines rights, duties, entitlements or liabilities" and consequently governed by the provisions of the SEBI Act. In this context, learned senior counsel placed reliance upon a decision of the Bombay High Court in the case of *Ashok Organic Industries Ltd. Vs. Asset Reconstruction Company (India) Limited* – (2008) 3 Comp. L.J. 61, wherein it was held that instrument is a formal legal document which may even in appropriate case wide enough to cover the decrees. The learned senior counsel, therefore, contended that even a Certificate, Receipt, Registration Letter or a Unit Certificate or any such similar document would fulfill the criteria of "by whatever name called" in the definition of the term 'Unit' under Regulation 2(z)(dd) and it can be treated as an instrument and, therefore, subject to the rigours of SEBI (Collective Investment Schemes) Regulations, 1999.

23. Learned senior counsel also drew our attention to the fact that in the case on hand, the sale of land in multiple units could always be sold or disposed of after getting a No Objection Certificate from the PGF Limited and, therefore, from that angle as well the contention of the PGF Limited was liable to be rejected. The learned senior counsel also referred to the 'Blue Sky Laws' in the United States of America, which sought to regulate and control frauds in sec

initiative of the agrarian population and its small bankers against the fraudulent transactions of financiers in agricultural/ plantation lands and submitted that the SEBI (Collective Investment Schemes), Regulations are more or less parallel to such 'Blue Sky Laws', which was carried out in the interest of the investors, who were lured to part with their hard earned savings under the disguised promise of the PGF Limited to provide a higher value for the investment, by way of development and, therefore, the second respondent as a statutory authority had every duty to ensure that such schemes were controlled and regulated by the Regulation of 1999. The learned senior counsel, therefore, contended that the PGF Limited cannot be allowed to wriggle out of the control of SEBI Act by contending that it was dealing only with agricultural lands governed by Entry 18 of List II and hence its activities cannot be called as collective investment scheme falling under the provision of the SEBI Act.

24. Having heard Mr. A.K. Ganguli, learned senior counsel for the appellants, Mr. Sidharth Luthra, learned Additional Solicitor General for respondent No.1 & Mr. Parag P. Tripathi, learned senior counsel for respondent No.2, having perused the numerous paper books and compilations placed before us and having bestowed our serious consideration to the various submissions before us, at the very outset, we state that the present litigation by way of writ petition before the High Court in challenging the *vires* of Section 11AA of the SEBI Act and after having lost before the Division Bench of the High Court in its elaborate judgment, in its frantic attempt to pursue the litigation still further by filing this civil appeal before the Supreme Court, which in turn necessitated devotion of the precious time of this Court, force us to state that the whole attempt of the PGF Limited was thoroughly vexatious and calls for severe indictment. We also wish to note here and now that apart from rejecting the contentions of the PGF Limited for various reasons to be adduced in this judgment and having noted the evil intention of the PGF Limited in having perpetrated this litigation,

apart from mulcting the PGF Limited with exemplary costs, it also calls for appropriate enquiry and investigation to be made not only by the second respondent but also by the prime criminal investigating agencies, namely, the Central Bureau of Investigation and also by the Department of Income Tax, in order to find out the extent of fraud indulged in by the PGF Limited under the garb of development of agricultural lands that too at the cost of gullible investors, who were offered fragmented pieces of so called agricultural lands in multiple units of 150 sq. yds. per unit. At this juncture, it will be appropriate to note that in spite of our repeated asking of the learned senior counsel for the appellants, as to what materials were placed before the High Court or before this Court, as to the extent of developments made to the various so called agricultural lands procured and stated to have been transferred in favour of thousands of investors, to our utter dismay, the learned senior counsel appearing for the appellants fairly submitted that no material was either placed before the Division Bench of the High Court or before this Court till the conclusion of the hearing. The learned senior counsel, however, made a feeble contention that there was no occasion for the appellants to produce those materials though he was not able to satisfactorily explain to us as to why no such material could be placed before us when we repeatedly called upon the appellants to place such materials.

25. With the above prelude to the nature of litigation launched by the appellants in the High Court and pursuing the same in this Court, when we consider the submission of the appellants, we find that the submission was fivefold. According to the appellants while the appellants as a company provided in the Memorandum and Articles of Association, various objects and business ventures, it was actually involved in the business of joint venture schemes, sale of agricultural lands and sale and development of agricultural lands. While the sale of agricultural land and sale and development of agricultural land was continued to be operated upon, according to the PGF Limited, its business of joint venture sch

an end on and from 01.02.2000. In fact, the said stand was made at the time when the second respondent extended its opportunity prior to the passing of the impugned order dated 06.12.2002. Certain details were also furnished before the second respondent as to what were the extent of monitory transactions carried on in respect of the joint venture schemes and also the action taken by the PGF Limited after stopping its joint venture activities on and after 01.02.2000. Before this Court also certain details were furnished as to what extent monies were refunded to those who were part of the joint venture schemes and certain funds, which were deposited with the second respondent and were to be refunded to those whose availability and identity could not be traced after the stopping of the operation of joint venture schemes. We shall, however, examine the scope and extent of acceptability of such a stand made on behalf of the PGF Limited in order to examine whether the stand of the PGF Limited that its joint venture schemes were stopped from 01.02.2000 while the provisions of Section 11AA of the SEBI Act was brought into the statute book from 22.02.2000 by Act 31 of 1999. We, however, hasten to add that admittedly even after 01.02.2000, according to the PGF Limited it continued to receive funds from various participants of the joint venture schemes on the pretext that such receipt of funds related to the involvement of those investors in the schemes, which were in operation prior to 01.02.2000. The contention of the PGF Limited was that since the operation of joint venture schemes were brought to an end as from 01.02.2000 and Section 11AA of the SEBI Act was inserted into statute book and became operational only from 22.02.2000, there was no scope for the second respondent to have called upon the PGF Limited to subject itself to the jurisdiction of the second respondent in purported exercise of its power under Section 11AA of the SEBI Act as well as in pursuance of its public notice issued in the year 1997-98.

26. The second submission of the learned senior counsel for the appellants was that sale of agricultural land, which is one

of the business activities of the PGF Limited being an activity of mere sale and purchase of agricultural land and there being no connected scheme relating to such sale transaction, there was no scope for any collective investment scheme in order to invoke Section 11AA of the SEBI Act.

27. The third contention was that the other activities of sale and development of agricultural land of the PGF Limited was governed by Entry 18 of List II of the Seventh Schedule and, therefore, the connected developmental activity of the PGF Limited in regard to those agricultural land sold to its investors cannot form the subject matter of legislation by the Parliament and consequently even if the validity of Section 11AA of the SEBI Act can be upheld, the PGF Limited's activity of the development of agricultural land should stand excluded from its coverage. In other words, according to learned counsel, even if the activities of the PGF Limited based with land sold and its further development, if at all any legislation could be passed, the same could have been done only by the State Legislature and not under Section 11AA of the SEBI Act.

28. It was then contended that having regard to the fact that agricultural land, which was the subject matter of development of PGF Limited's business activity along with the incidence of sale, the same being governed by Entry 18 of List II of the Seventh Schedule, the very promulgation of Section 11AA of the SEBI Act by the Parliament was invalid and *ultra vires* of the Constitution on the ground of lack of competence and consequently the second respondent could not have proceeded against the PGF Limited for non-compliance of the provisions contained in the said Section.

29. It was lastly contented that the approach of the Division Bench of the High Court in having gone into the nature of transactions entered into by the PGF Limited with the investors, was incorrect as the sale deeds executed in favour of the investors were all not the subject matter of investigation even by the second respondent, while pa d

06.12.2002. Therefore, the order of the Division Bench in having extensively gone into the genuineness of those documents, was by way of extra pleadings of the Division Bench, which ought not to have been made and hence on that score the PGF Limited should not have been non suited.

30. Having noted the various submissions of the learned senior counsel for the appellants, we wish to deal with the constitutional validity of Section 11AA of the SEBI Act in the forefront before dealing with other contentions. In this context, in the foremost, we wish to deal with the contention of the PGF Limited by making reference to various State enactments dealing with the rights of depositors. The contention proceeds on the basis that if at all the activities of the PGF Limited in dealing with agricultural lands *vis-à-vis* its customers, in respect of the so called development agreements, were to be controlled, monitored or regulated, the State Legislature alone could be competent to bring about a legislation on par with various State enactments referred to by the PGF Limited. In fact, even after the elaborate submissions of learned senior counsel, we were at a loss to understand as to how far the operation of those State enactments relating to the depositors, can have any impact, while examining the constitutional validity of Section 11AA of the SEBI Act. For the purpose of analysis, when we examine the Madhya Pradesh Nikshepakon Ke Hiton Ka Sanrakshan Adhiniyam, 2000 (M.P. Act No.16 of 2001) the preamble of the Act states that the said Act was to protect the deposits made by the public in the financial establishments and matters connected therewith or incidental thereto. Admittedly, the PGF Limited is not a financial institution at all and even according to PGF Limited it has not collected any deposits from the public at large. The PGF Limited though a company incorporated under the Companies Act, was not receiving deposits under any scheme or arrangement or in any other manner and hence, it will not fall under the definition of 'financial establishment' of the said Act. The purported intent of almost all the other State enactments were identical. It is a common

ground that many of the statutes brought out by the respective States were upheld, except in some States where the Act was struck down, which is stated to be a subject matter of consideration pending before this Court. These State enactments in order to protect the depositors being duped under the garb of granting extraordinary returns, were sought to be protected by providing certain machineries, including certain prosecuting machinery and appropriate judicial forum for redressing their grievances. According to the PGF Limited it is not a financial institution and was not collecting any deposits and that its sole activity apart from sale of agricultural land was development of such lands sold to its customers. The extreme contention of the PGF Limited was that if Section 11AA of the SEBI Act was to be upheld, it would virtually set at naught those various State enactments, which in our considered opinion can only be stated as an argument of desperation and has absolutely no nexus whatsoever to the question raised with regard to the validity of Section 11AA of the SEBI Act and hence, does not in any way impinge upon the said Section. Moreover, the said submission was never raised or focused before the Division Bench and is now sought to be raised before this Court for the first time and we find no substance in the submission while examining the validity of Section 11AA of the SEBI Act. In the light of our above conclusion, we do not find any necessity to refer to any of the decisions relied upon in connection with the said submission, namely, the decisions in *K.K. Baskaran* (supra), *Sonal Hemant Joshi* (supra), *Vijay Puljal* (supra), *New Horizon Sugar Mills Ltd.* (supra), *Naga People's Movement of Human Rights* (supra), *Harbhajan Singh* (supra), *S.P. Mittal* (supra), *Kartar Singh* (supra), *Mohinder Singh Gill* (supra) and *Gordhandas Bhanji* (supra).

31. Before adverting to the various contentions raised in challenging the *vires* of Section 11AA of the SEBI Act, we feel that it is worthwhile to state and note certain precautions to be observed whenever a *vires* of any pro d

before the Court by way of a writ petition. It will be worthwhile to lay down certain guidelines in that respect, since we have noticed that on very many occasions a challenge to a provision of law, as to its constitutionality is raised with a view to thwart the applicability and rigour of those provisions and as an escape route from the applicability of those provisions of law and thereby create an impediment for the concerned authorities and the institutions who are to monitor those persons who seek such challenges by abusing the process of the Court. Such frivolous challenges always result in prolongation of the litigation, which enables such unscrupulous elements who always thrive on other peoples money to take advantage of the pendency of such litigation preferred by them and thereby gain, on the one side, unlawful advantage on the monitory aspect and to the disadvantage of innocent victims, and ultimately, gain unlawful enrichment of such ill-gotten money by defrauding others. In effect, such attempts made by invoking the extraordinary jurisdiction of the writ Courts of many such challenges, mostly result in rejection of such challenges. However, at the same time, while taking advantage of the long time gap involved in the pending proceedings, such unscrupulous litigants even while suffering the rejection of their stand at the end as to the *vires* of the provisions, always try to wriggle out of their liabilities by stating that the time lag had created a situation wherein those persons who were lured to part with huge sums of money are either not available to get back their money or such unscrupulous petitioners themselves are not in a position to refund whatever money collected from those customers or investors. It is, therefore, imperative and worthwhile to examine at the threshold as to whether such challenges made are bonafide and do require a consideration at all by the writ courts by applying the principle of 'lifting the veil' and as to whether there is any hidden agenda in perpetrating such litigation. With that view, we lay down some of the criteria to be kept in mind whenever a challenge to a provision of law is made before the Court.

32. The Court can, in the first instance, examine whether there is a *prima facie* strong ground made out in order to examine the *vires* of the provisions raised in the writ petition. The Court can also note whether such challenge is made at the earliest point of time when the statute came to be introduced or any provision was brought into the statute book or any long time gap exist as between the date of the enactment and the date when the challenge is made. It should also be noted as to whether the grounds of challenge based on the facts pleaded and the implication of provision really has any nexus apart from the grounds of challenge made. With reference to those relevant provisions, the Court should be conscious of the position as to the extent of public interest involved when the provision operates the field as against the prevention of such operation. The Court should also examine the extent of financial implications by virtue of the operation of the provision *vis-à-vis* the State and alleged extent of sufferance by the person who seeks to challenge based on the alleged invalidity of the provision with particular reference to the *vires* made. Even if the writ Court is of the view that the challenge raised requires to be considered, then again it will have to be examined, while entertaining the challenge raised for consideration, whether it calls for prevention of the operation of the provision in the larger interest of the public. We have only attempted to set out some of the basic considerations to be borne in mind by the writ Court and the same is not exhaustive. In other words, the Writ Court should examine such other grounds on the above lines for consideration while considering a challenge on the ground of *vires* to a Statute or provision of law made before it for the purpose of entertaining the same as well as for granting any interim relief during the pendency of such writ petitions. For the above stated reasons it is also imperative that when such writ petitions are entertained, the same should be disposed of as expeditiously as possible and on a time bound basis, so that the legal position is settled one way or the other.

33. Keeping the above factors relat al

challenge to a provision of law made in mind, we proceed to examine the challenge made by the PGF Limited to Section 11 AA of the SEBI Act. In fact, the challenge to the provision was two-fold. The main contention of the PGF Limited was that since indisputably the business of the PGF Limited was sale and development of agricultural land, the same would be governed by Entry 18 of List II, namely the State subject and, therefore, the Central Legislation brought about by the Parliament in introducing Section 11AA of the SEBI Act cannot be sustained. It was alternatively contended that even assuming that the Section can be held to be valid, inasmuch as the business is solely sale and development of agricultural land again falling under Entry 18 of List II section 11AA it can be read down to the effect that the said provision will have no application to the business activity of the PGF Limited.

34. As far as the main contention is concerned, when we test the said submission, we find that the said submission is wholly misconceived. In order to appreciate the first contention, it will be worthwhile to extract Section 11 AA which reads as under:

"11AA. Collective investment scheme- (1) Any scheme or arrangement which satisfies the conditions referred to in sub-section (2) shall be a collective investment scheme.

(2) Any scheme or arrangement made or offered by any company under which-

(i) the contributions, or payment made by the investors, by whatever name called, are pooled and utilized for the purposes of the scheme or arrangement;

(ii) the contributions or payments are made to such scheme or arrangement by the investors with a view to receive profits, income, produce or property, whether movable or immovable from such scheme or arrangement;

(iii) the property, contribution or investment forming part of scheme or arrangement, whether identifiable or not, is managed on behalf of the investors;

(iv) the investors do not have day-to-day control over the management and operation of the scheme or arrangement.

(3) Notwithstanding anything contained in sub-section (2), any scheme or arrangement-

(i) made or offered by a co-operative society registered under the Co-operative Societies Act, 1912 (2 of 1912) or a society being a society registered or deemed to be registered under any law relating to co-operative societies for the time being in force in any State;

(ii) under which deposits are accepted by non-banking financial companies as defined in clause (f) of section 45-I of the Reserve Bank of India Act, 1934 (2 of 1934);

(iii) being a contract of insurance to which the Insurance Act, 1938 (4 of 1938) applies;

(iv) providing for any scheme, pension scheme or the insurance scheme framed under the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (19 of 1952);

(v) under which deposits are accepted under Section 58A of the Companies Act, 1956 (1 of 1956);

(vi) under which deposits are accepted by a company declared as a *Nidhi* or a Mutual Benefit Society under Section 620A of the Companies Act, 1956 (1 of 1956)

(vii) falling within the meaning of chit business as defined in clause (e) of Section 2 of the Chit Funds Act, 1982 (40 of 1982);

(viii) under which contributions made are in the nature of subscription to a mutual fund, Shall not be collective investment scheme."

35. A reading of the said provision discloses that it talks of any scheme or arrangement, which would fall within the definition of a collective investment scheme. Section 2 (ba) under the definition clause states that a collective investment scheme would mean any scheme or arrangement, which satisfies the conditions specified in Section 11 AA. Under sub-Section (2) of Section 11AA, it is stipulated that any scheme or arrangement made or offered by any company by which the contribution, or payment made by the investors, by whatever name called, are pooled and utilized for the purposes of scheme or arrangement; contributions or payments are made by the investors with a view to receive profits, income, produce or property, whether movable or immovable, based on the scheme or arrangement, any property, contribution or investment which forms part of the scheme or arrangement is identifiable or not is managed by someone on behalf of the investors shall be collective investment scheme. Further the investors should not have day to day control over the management and operation of the scheme or arrangement. A detailed analysis of sub-section (2) of Section 11 AA, which defines a collective investment scheme disclose that it is not restricted to any particular commercial activity such as in a shop or any other commercial establishment or even agricultural operation or transportation or shipping or entertainment industry etc. The definition only seeks to ascertain and identify any scheme or arrangement, irrespective of the nature of business, which attracts investors to invest their funds at the instance of someone else who comes forward to promote such scheme or arrangement in any field and such scheme or arrangement provides for the various consequences to result

there from. As a matter of fact the provision does not make any reference to agricultural or any other specific activity and, therefore, at the very outset it will have to be held that the submission based on Entry 18 of List II, while challenging the *vires* of Section 11AA, is wholly misconceived. The fallacy in the submission of the PGF Limited is that it proceeds on the footing as though the said provision, namely, Section 11AA was also intended to cover an activity relating to agriculture and its development and, therefore, the provision conflicts with Entry 18 of List II of the State List to be struck down on that score. Inasmuch as the said Section 11AA seeks to cover, in general, any scheme or arrangement providing for certain consequences specified therein *vis-à-vis* the investors and the promoters, there is no question of testing the validity of Section 11AA in the anvil of Entry 18 of List II. The said submission made on behalf of the appellants is, therefore, liable to be rejected on that sole ground.

36. The correctness of the submission can also be examined in a different angle, namely, what is the paramount purpose for which the SEBI Act, 1992 came to be enacted? The object of the main Act itself came to be considered by this Court in a recent decision reported in *Sahara India Real Estate Corporation Ltd.* (supra) wherein this Court has stated as under:-

"65. Parliament has also enacted the SEBI Act to provide for the establishment of a Board to protect the interests of investors in securities and to promote the development of, and to regulate the securities market. The SEBI was established in the year 1988 to promote orderly and healthy growth of the securities market and for investors' protection. SEBI Act, Rules and Regulations also oblige the public companies to provide high degree of protection to the investor's rights and interests through adequate, accurate and authentic information and disclosure of information on a continuous basis."

The object for introducing Section 11AA which came to be inserted by Act 31 of 1999 w.e.f 22.02.2000 is to the following effect:

> "2. Recently many companies especially plantation companies have been raising capital from investors through schemes which are in the form of collective investment schemes. However, there is not an adequate regulatory framework to allow an orderly development of this market. In order that the interests of investors are protected, it has been decided that the Securities and Exchange Board of India would frame regulations with regard to collective investment schemes. It is, therefore, proposed to amend the definition of "securities" so as to include within its ambit the derivatives and the units or any other instrument issued by any collective investment scheme to the investors in such schemes."

37. Therefore, the paramount object of the Parliament in enacting the SEBI Act itself and in particular the addition of Section 11AA was with a view to protect the gullible investors most of whom are poor and uneducated or retired personnel or those who belong to middle income group and who seek to invest their hard earned retirement benefits or savings in such schemes with a view to earn some sustained benefits or with the fond hope that such investment will get appreciated in course of time. Certain other Section of the people who are worstly affected are those who belong to the middle income group who again make such investments in order to earn some extra financial benefits and thereby improve their standard of living and on very many occasions to cater to the need of the educational career of their children.

38. Since it was noticed in the early 90s that there was mushroom growth of attractive schemes or arrangements, which persuaded the above vulnerable group getting attracted towards such schemes and arrangements, which weakness

was encashed by the promoters of such schemes and arrangements who lure them to part with their savings by falling as a prey to the sweet coated words of such frauds, the Parliament thought it fit to introduce Section 11AA in the Act in order to ensure that any such scheme put to public notice is not intended to defraud such gullible investors and also to monitor the operation of such schemes and arrangements based on the regulations framed under Section 11AA of the Act. When such was the laudable object with which the main Act was enacted and Section 11AA was introduced as from 22.02.2000, the challenge made to the said Section will have to be examined by keeping in mind the above said background and test the grounds of challenge as to whether there is any good ground made out to defeat the purport of the enactment.

39. A reading of sub-Section (3) of Section 11AA also throws some light on this aspect, wherein it is provided that those institutions and schemes governed by sub-clause (i) to (viii) of sub-Section (3) of Section 11AA will not fall under the definition of collective investment scheme. A cursory glance of sub-clauses (i) to (viii) shows that those are all the schemes, which are operated upon either by a cooperative society or those institutions, which are controlled by the Reserve Bank of India Act, 1934 or the Insurance Act of 1938 or the Employees Provident Fund and Miscellaneous Provisions Act, 1952 or the Companies Act, 1956 or the Chit Fund Act of 1982 and contributions, which are made in the nature of subscription to a mutual fund, which again is governed by a SEBI (Mutual Fund) Regulations 1996. Therefore, by specifically stipulating the various ingredients for bringing any scheme or arrangement under the definition of collective investment scheme as stipulated under sub-Section (2) of Section 11AA, when the Parliament specifically carved out such of those schemes or arrangements governed by other statutes to be excluded from the operation of Section 11AA, one can easily visualize that the purport of the enactment was to ensure that no one who seeks

to collect and deal with the monies of any other individual under the guise of providing a fantastic return or profit or any other benefit does not indulge in such transactions with any ulterior motive of defrauding such innocent investors and that having regard to the mode and manner of operation of such business activities announced, those who seek to promote such schemes are brought within the control of an effective State machinery in order to ensure proper working of such schemes.

40. It will have to be stated with particular reference to the activity of the PGF Limited, namely, sale and development of agricultural land as a collective investment scheme, the implication of Section 11AA was not intended to affect the development of agricultural land or any other operation connected therewith or put any spokes in such sale-cum-development of such agricultural land. It has to be borne in mind that by seeking to cover any scheme or arrangement by way of collective investment scheme either in the field of agricultural or any other commercial activity, the purport is only to ensure that the scheme providing for investment in the form of rupee, *anna* or *paise* gets registered with the authority concerned and the provision would further seek to regulate such schemes in order to ensure that any such investment based on any promise under the scheme or arrangement is truly operated upon in a lawful manner and that by operating such scheme or arrangement the person who makes the investment is able to really reap the benefit and that he is not defrauded. Sub-clauses (i) to (viii) of sub-Section (3), which excludes those schemes and arrangements from the operation of Section 11 AA in as much as those schemes are already governed under various statutes and are operated upon by a cooperative society or State machinery and there would be no scope for the concerned persons or the institutions who operate such schemes within the required parameters and thereby the common man or the contributory's rights or benefits will not be in any way jeopardized. It is, therefore, apparent that all other schemes/arrangements operated by all others, namely, other

than those who are governed by sub-section 3 of Section 11AA are to be controlled in order to ensure proper working of the scheme primarily in the interest of the investors.

41. In this context, we can also take judicial notice of the fact that those schemes, which would fall under sub-Section (2) of Section 11AA would consist of a marketing strategy adopted by those promoters, by reason of which, the common man who is eager to make an investment falls an easy prey by the sweet coated words and attractive persuasions of such marketing experts who ensure that those who succumb to such persuasions never care to examine the hidden pitfalls under the scheme, which are totally against the interests of the investors, apart from various other stipulations, which would ultimately deprive the investors of their entire entitlement, including their investments. The investors virtually by signing on the dotted lines of those stereotyped blank documents would never be aware of the nature of constraints created in the documents, which would virtually wipe out whatever investment made by them in course of time and ultimately having regard to the legal entangles in which such investors would have to undergo by spending further monies on litigations, ultimately prefer to ignore their investments cursing themselves of their fate. More than 90 per cent of such investors would rather prefer to forget such investments than making any attempt to secure their money back. Thereby, the promoters put to unlawful gain who always thrive on other peoples money.

42. Therefore, in reality what sub-section (2) of Section 11AA intends to achieve is only to safeguard the interest of the investors whenever any scheme or arrangement is announced by such promoters by making a thorough study of such schemes and arrangements before registering such schemes with the SEBI and also later on monitor such schemes and arrangements in order to ensure proper statutory control over such promoters and whatever investment made by any individual is provided necessary protection for their investments in the event of such schemes or arra g

successfully operated upon or by any mis-fortune happen to be abandoned, where again there would be sufficient safeguards made for an assured refund of investments made, if not in full, at least a part of it.

43. By no stretch of imagination the above factors, which weighed with the Parliament to introduce Section 11AA can be held to be done with a view to affect any particular category of business activity much less the activity of agriculture. We are not, therefore, in a position to countenance the stand of the PGF Limited that what it sought to carry out under its scheme was merely sale and development simplicitor of agricultural land and not a collective investment scheme. In the light of our above conclusions on this ground it will have to be held that Section 11AA is a valid provision, not suffering from any infirmity, as it does not intrude into the specific activities of sale of agricultural land and its development. In other words, there is no scope to apply Entry 18 of List II of Seventh Schedule in order to strike down the said provision on the ground of legislative competence.

44. When we examine the nature of the activity of the PGF Limited by way of sale and development of agricultural land, it will be necessary to mention the salient features pointed out by Mr. Tripathi, learned senior counsel for the second respondent and find out as to how far Section 11AA of the SEBI Act, would apply and thereby, the validity of Section 11AA has to be upheld and the various grounds raised on behalf of the PGF Limited do not in any way impinge upon the said Section.

45. Some of the relevant documents, which are required to be noted for this purpose are the Application form, which is to be filled in and furnished by an investor with the PGF Limited based on which an agreement is to be first signed by the investor and thereafter, the sale deed is executed in units of 150 sq. yrds. per unit. A perusal of the Application form would show that when the investor applies for purchase of agricultural units/plots for getting the same developed and maintained by

PGF Limited under the PGF Limited's cash down payment plan/installment payment plan, based on the number of units/ plots a period plan number, the area of land, the period of plan, the consideration etc., are all noted. An agreement is also entered into based on the application on the same date depending upon the nature of payment either cash down or installment payment and the investor is referred as customer and the appellant No.1 is referred to as PGF, a public limited company who is stated to be engaged in the business of sale, purchase or development of agricultural land. After noting down the desire of the investor for purchase of the number of units/ plots based on the payment plan, the agreement in the forefront states that the PGF Limited would arrange for the allotment of the land within a reasonable period and not exceeding 270 days in respect of cash down payment plan and not exceeding 90 days after the receipt of 50 per cent of consideration in respect of installment payment plans. It is worthwhile to note that while money is received either by way of cash down or 50 per cent through installment facility only an allotment will be intimated by way of a letter without any assurance as to when the sale deed in favour of such applicant customer would be executed. After the allotment letter without prescribing any specific time stipulation, the agreement mentions that sale deed would be executed in favour of the customer and will be duly registered. Such execution was, however, to the condition that if transfer of such small plot of land as prescribed by law is not otherwise possible, practicable or feasible, even such transfer of title would be in favour of a customer by way of joint holding with other customers, by way of a joint sale deed and the original sale deed will be entrusted with a custodial service company, whose name and addresses would be communicated to the customer respectively. Thereafter, if the customer wants to verify the document he will have to approach the said custodial service company and that too after making a request 15 days before such intended verification.

46. When it comes to the questio s

stipulated that such development would be in consultation with agro consultants and experts after taking into account several factors such as soil condition, climate etc., apart from matters pertaining to development including survey, demarcation, clearing, cultivation, planting/raising of crops, trees, plants, saplings etc., as well as use of fertilizers and pesticides, irrigation and all other activities allied or incidental thereto would be decided by the PGF Limited. Insofar as the joint sale deed is concerned only certified copies of the sale deed would be furnished to the customer and if this is not possible/ feasible/ practical, PGF shall provide a copy of the sale deed duly attested by a Notary Public to the customer.

47. Under the heading 'Common Services & Facilities' it is stipulated in the agreement that in respect of certain common facilities such as irrigation and drainage systems, pipelines, electrical lines (which may be passing through, whether underground or overground, the customer's plot), motors, pump sets, temporary sheds and structures etc., the customer will have no ownership rights and cannot interfere in any manner with the same and that such common services and facilities would be the properties of the PGF. As far as consequences of any breach by the PGF Limited, under Clause 13 some skeleton provision is made that the customer will be entitled to terminate the agreement, in which event PGF Limited would refund the amounts along with simple interest @ 12.5% per annum from the date of the contract, (i.e.) if such breach related to the development of plot(s), then again the customer will be entitled to terminate the agreement, in which event the PGF Limited would refund the amounts paid by the customer after deducting the cost of land, registration expenses, development charges and other incidental expenses and the balance amount, if any, would be refunded together with simple interest @ 12.5% per annum from the date of contract and the PGF Limited shall not be liable to pay any cost/expense/damage whatsoever in any case other than what has been provided under Clause 13(a) & (b).

48. But when it comes to the question of breach by the customer under Clause 14(A) as many as sub-clauses (a) to (f) are stipulated and if it related to any default before allotment of land under Clauses 14(B) sub-clauses (a) to (e) providing for stringent conditions have been laid down. Under Clause 18 all possible situations are mentioned in order to ensure that under no circumstance PGF Limited will be liable for any consequence for non-performance of its part of the contract. Under Clause 20 it is stipulated that any dispute pertaining to the agreement would be referred for arbitration to a retired judicial officer appointed by the PGF Limited as sole arbitrator and settled in accordance with the Arbitration and Conciliation Act, 1996 and the jurisdiction for any further agitation of legal rights would be only in the Civil Courts at Delhi, to the exclusion of all other Courts.

49. Thus, as rightly pointed out by Shri Tripathi, learned senior counsel for the second respondent, once the customer signs the application form and the agreement, virtually he would be left high and dry with no remedy, in the event of any breach being committed by the PGF Limited, while on the other hand he will have everything to loose if such breach happened to occur at the instance of the customer. The agreement, thus, demonstrates to be wholly one sided and arbitrary in all respects.

50. When we refer to such incongruities existing in the predrafted/standard format agreement to be signed by the customers, it will also be worthwhile to the so called sale deeds, which were placed before the Division Bench as sample documents. A perusal of those sale deeds are much more revealing. One of the sample documents was executed by one Mr. Malkiat Singh s/o Sh. Sadhu Singh resident of Village Vhoje Majra, Punjab through his authorized attorney Mr. Rajesh Agarwal s/o Sh. Ram Agarwal in favour of one Mr. Pankaj Karnatak s/o Sh. V.D. Karnatak R/o Delhi. The said vendor Malkiat Singh stated to have purchased an extent of 9.37 acres of dry land in Survey No.113 in villag al

consideration of Rs.1,19,100/- from one Ganga Reddy s/o Raja Reddy. The said Malkiat Singh is stated to be a resident of Punjab. Out of the said extent of 9.37 acres an extent of 150 sq. yrds. was sold to the said Pankaj Karnatak of Delhi by sale deed dated 23.10.2001. The sale consideration was shown as Rs.1515/- while the value of the document is shown as Rs. 4000/-. The revealing fact was that the photocopy of the said document disclose the signature of Malkiat Singh at the bottom of each page of the document. But the signature of the Power of Attorney is not found in the said document though in the opening paragraph it is claimed that the sale deed was executed only by the Power Agent. The said Rajesh Agarwal has only signed on the back side of the first page of the document before the Registrar. Of the two witnesses to the document, one of the witnesses stated to be the resident of New Delhi, while the other witness was stated to be the resident of Nirmal. The addresses of the witnesses are not mentioned and the document was registered in the office of Sub-Registrar of Nirmal. In the schedule, the boundaries have been simply mentioned as surrounded on the East by 5 ft. wide road, West by 5 ft. wide road, North by Plot No.140 and South by Plot No.142. Along with the document a site plan is annexed and the authenticity of the said plan is not disclosed, while the name of the person who drew the sketch alone is mentioned. Thus, in very many respects the genuineness of the document appears to be doubtful. In fact, the Division Bench has dealt with this aspect of the nature of document *in extenso* in paragraph 56 of the judgment impugned with which observation we fully concern.

51. A conspectus consideration of the scheme of development of the land purchased by the customers at the instance of the PGF Limited and the promised development under the agreement disclose that there was wholesale uncertainty in the transactions to the disadvantage of the investors' concerned. The above factors and the factors, which weighed with the Division Bench in this respect definitely

disclose that PGF Limited under the guise of sale and development of agricultural land in units of 150 sq. yrds. i.e. 1350 sq. ft. and its multiples offered to develop the land by planting plant, trees etc., and thereby the customers were assured of a high amount of appreciation in the value of the land after its development and attracted by such anticipated appreciation in land value, which is nothing but a return to be acquired by the customers after making the purchase of the land based on the development assured by the PGF Limited, part with their monies in the fond hope that such a promise would be fulfilled after successful development of the bits of land purchased by them.

52. The above conclusion of ours can be culled out from the sample documents placed by the appellants before the Court. The appellants, however, failed to supply any material till date to demonstrate as to how and in what manner any of the lands said to have been sold to its customers were developed and thereby any of the customer was or would be benefited by such development. It is imperative that the transaction of the PGF Limited *vis-à-vis* its customers has necessarily to be examined as to its genuineness by subjecting itself to the statutory requirement of registration with the second respondent followed by its monitoring under the regulations framed by the second respondent. All the above factors disclose that the activity of sale and development of agricultural land propounded by the PGF Limited based on the terms contained in the application and the agreement signed by the customers is nothing but a scheme/arrangement. Apart from the sale consideration, which is hardly 1/3rd of the amount collected from the customers, the remaining 2/3rd is pooled by the PGF Limited for the so called development/improvement of the land sold in multiples of units to different customers. Such pooled funds and the units of lands are part of such scheme/arrangement under the guise of development of land. It is quite apparent that the customers who were attracted by such schemes/arrangement invested the

contribution with the fond hope that the various promises of the PGF Limited that the development of the land pooled together would entail high amount of profits in the sense that the value of developed land would get appreciated to an enormous extent and thereby the customer would be greatly benefited monetarily at the time of its sale at a later point of time. It is needless to state that as per the agreement between the customer and the PGF Limited, it is the responsibility of the PGF Limited to carry out the developmental activity in the land and thereby the PGF Limited undertook to manage the scheme/arrangement on behalf of the customers. Having regard to the location of the lands sold in units to the customers, which are located in different states while the customers are stated to be from different parts of the country it is well-neigh possible for the customers to have day to day control over the management and operation of the scheme/arrangement. In these circumstances, the conclusion of the Division Bench in holding that the nature of activity of the PGF Limited under the guise of sale and development of agricultural land did fall under the definition of collective investment scheme under Section 2(ba) read along with Section 11AA of the SEBI Act was perfectly justified and hence, we do not find any flaw in the said conclusion.

53. We, therefore, hold that Section 11AA of the SEBI Act is constitutionally valid. We also hold that the activity of the PGF Limited, namely, the sale and development of agricultural land squarely falls within the definition of collective investment scheme under Section 2(ba) read along with Section 11AA (ii) of the SEBI Act and consequently the order of the second respondent dated 06.12.2002 is perfectly justified and there is no scope to interfere with the same. In the light of our above conclusions, the PGF Limited has to comply with the directions contained in last paragraph of the order of the second respondent dated 06.12.2002. We also hold that while ensuring compliance of the order dated 06.12.2002, the second respondent shall also examine the claim of the PGF Limited

that it had stopped its joint venture scheme as from 01.02.2000 is correct or not by holding necessary inspection, enquiry and investigation of the premises of the PGF Limited in its registered office or any of its other offices wherever located and also examine the account books other records and based on such inspection, enquiry and investigation issue any further directions in accordance with law. Whatever amount deposited by the PGF Limited pursuant to the interim orders of this Court relating to joint venture scheme shall be kept in deposit by the second respondent in an Interest Bearing Escrow Account of a Nationalized Bank. The second respondent shall also verify the records of the PGF Limited relating to the refund of deposits of the customers who invested in the joint venture schemes and ascertain the correctness of such claim and based on such verification in the event of any default noted, appropriate further action shall be taken against the PGF Limited for settlement of the monies payable to such of those investors who participated in any such joint venture schemes operated by the PGF Limited. It will also be open to the second respondent while carrying out the above said exercise to claim for any further payment to be made by the PGF Limited towards settlement of such claims of the participants of the joint venture schemes and charge interest for any delayed/defaulted payments. As far as the deposit made by the PGF Limited with the second respondent on the ground that the such amount could not be disbursed to any of the investors for any reason whatsoever the second respondent, based on the verification of the records of the PGF Limited, arrange for refund/disbursement of such amount back to the participants of the joint venture schemes with proportionate interest payable on that amount. The above directions are in addition to the directions made by the Division Bench of the High Court.

54. Having noted the conduct of the PGF Limited in having perpetrated this litigation which we have found to be frivolous and vexatious in every respect, right from its initiation in the High Court by challenging the *vires* of Se

Act without any substantive grounds and in that process prolonged this litigation for more than a decade and thereby provided scope for defrauding its customers who invested their hard earned money in the scheme of sale of land and its development and since we have found that the appellants had not approached the Court with clean hands and there being very many incongruities in its documents placed before the Court as well as suppression of various factors in respect of the so called development of agricultural land, we are of the view that even while dismissing the Civil Appeal, the PGF Limited should be mulcted with the exemplary costs. We also feel it appropriate to quote what Mahatma Gandhi and the great poet Rabindranath Tagore mentioned about the greediness of human being which are as under:

> "Earth provides enough to satisfy every man's need, but not every man's greed.
>
> *-Mahatma Gandhi-*
>
> *The greed of gain has no time or limit to its capaciousness. Its one object is to produce and consume. It has pity neither for beautiful nature nor for living human beings. It is ruthlessly ready without a moment's hesitation to crush beauty and life out of them, molding them into money."*
>
> *-Rabindranath Tagore-*

55. In this respect, it will be worthwhile to note what the PGF Limited disclosed before the second respondent in its letter dated 15.01.1998 alongwith the covering letter dated 20.05.2002. The details mentioned therein disclose that the total amount received by the PGF Limited under different schemes from 01.01.1997 to 31.12.1997 was approximately Rs.186.84 crores. Its paid up capital was stated to be Rs.94,90,000/- and it mobilized Rs.815.23 crores under joint venture schemes from 01.04.1996 to 30.06.2002. The future liabilities towards joint

venture schemes was projected in a sum of Rs.655.41 crores. Total outstanding liabilities payable to investors under the old closed schemes as on 30.06.2002 was stated to be Rs.497 crores. As against the above, till 31.10.2002, the PGF Limited stated to have made a net payment of Rs.115.93 crores leaving the balance due in a sum of Rs.393.69 crores approximately. The above details have been noted by the second respondent while mentioning the submission of the PGF Limited in its order dated 06.12.2002. Thus, we are convinced that the PGF Limited deliberately did not furnish the amounts till this date what was collected from the customers who made their investments in the so-called venture of sale and development of agricultural lands. Therefore, it is explicit that the PGF Limited was playing a hide and seek not only before the second respondent, but was also taking the Courts for a ride. We have noted in more than one place in our order that inspite of our repeated asking the appellants did not come forward to disclose the details of any development it made in respect of the lands alleged to have been sold to its customers. There is also no valid reason for not disclosing the details before the court. As in one of its activities, namely, joint venture scheme alone, it had mobilized Rs.815.23 crores, it can be easily visualized that in its activities of sale and development of land such mobilization would have far exceeded several thousand crores. In such circumstances, the appeal is liable to be dismissed which may have costs.

56. Apart from imposing cost for having wasted the precious time of the High Court as well as of this Court, in order to ensure that none of the investors/customers of the PGF Limited, who have parted with their valuable savings and earnings by falling a prey to the promise extended to them are deprived of their investments, we feel it just and necessary to direct for proper investigation both by the Central Bureau of Investigation as well as the Department of Income Tax and in the event of any malpractice indulged in by the PGF Limited, to launch appropriate proceedings, both Civil, Criminal and other actions against the PGF Limited, a o

were responsible for having indulged in such malpractice. We also direct the second respondent to proceed with its investigation/enquiry and inspection of the PGF Limited as well as all its other officers and other premises and after due enquiry to be carried out in accordance with law, take necessary steps for ensuring the refund of the monies collected by the PGF Limited in connection with the sale and development of land to its various customers. In order to enable the second respondent to carry out the various directions contained in this judgment, we direct the PGF Limited to appoint a nodal officer, not below the rank of a Director, of its company who shall be responsible for furnishing whatever information, documents, account books or other materials that may be required by the second respondent, the Central Bureau of Investigation as well as the Income Tax Authorities. While intimating appointment of such nodal officer, the PGF Limited shall also furnish the contact number i.e., landline/mobile numbers, e-mail address and other details of its nodal officer, its registered office, administrative office and other offices. It is made clear that if the PGF Limited failed to comply with any of the directions contained in this judgment, the second respondent shall be at liberty to bring it to the notice of this Court by filing appropriate application for initiating necessary proceedings against the PGF Limited-appellant No.1, its Chairman-cum-Managing Director-appellant No.2 and other Directors and other responsible officers. With the above directions, the appeal stands dismissed with cost of Rs.50,00,000/-(Rupees fifty lacs only) to be deposited by the PGF Limited with the Registry of the Supreme Court within eight weeks from the date of receipt of copy of this judgment. On such deposit being made, the Registry shall arrange to deposit the said sum with the Supreme Court Legal Services Committee. In the event of PGF Limited failing to comply with the direction for payment of costs within the stipulated time limit, the Registry shall bring the same to the notice of the Court for initiating appropriate proceedings against the PGF Limited for non-compliance.

K.K.T. Appeal dismissed.

ABDUL NASAR ADAM ISMAIL THROUGH ABDUL BASHEER ADAM ISMAIL

v.

THE STATE OF MAHARASHTRA & ORS.

(Criminal Appeal No. 520 of 2013)

APRIL 2, 2013

[T.S. THAKUR AND RANJANA PRAKASH DESAI, JJ.]

Preventive Detention – Detention u/s. 3(1) of COFEPOSA – Detention order assailed on two grounds (1) there was no independent consideration of the representation of the detenu, and (2) delay in disposal of the representation and delay in transmitting the representation to the detaining authority by the jail authority – Held: The plea of lack of independent consideration is without any basis – Any unexplained delay would be breach of constitutional imperative provided under Art.22(5) – But it does not mean that everyday's delay has to be explained – Explanation must be reasonable indicating that there was no slackness or indifference – The detaining authority, and the sponsoring authority in the present case, have properly explained the time lag between receipt of the representation and the date of communication of rejection to the detenu – However, the delay in transmitting the representation to the detaining authority by the jail authority is not explained – Therefore, the continued detention of detenu is illegal – However, the delay has not vitiated the detention order – Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 – s.3(1) – Constitution of India, 1950 – Art. 22(5).

Practice and Procedure – New plea – Permissibility to raise before Supreme Court – Held: New plea in the case of preventive detention is permissible.

The appellant-accused was detained u/s. 3(1) of

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 with a view to prevent him in future for smuggling goods. The Writ Petition filed by the detenu, against the detention order was dismissed by High Court.

In appeal to this Court appellant-detenu contended that his detention was wrong because there was no independent consideration of the representation by the detaining authority and because there was inordinate delay in considering the representation of the detenu which has violated his right under Article 22(5) of the Constitution and there was also delay in transmitting the representation to the detaining authority from the jail authority.

Disposing of the appeal, the Court

HELD: 1.1. The plea that there was no independent consideration of the representation by the detaining authority was raised for the first time before this Court at the time of arguments. Ordinarily such plea would not have been allowed. But in view of the law laid down by Supreme Court that the *habeas corpus* cannot be dismissed on the ground of imperfect pleadings, this point is being permitted to be canvassed. [Para 5] [97-A-C]

Mohinuddin @ Moin Master vs. District Magistrate, Beed and Ors. **(1987) 4 SCC 58: 1987 (3) SCR 668 – relied on.**

1.2. Whether a representation is considered by the detaining authority independently or not, is for the detaining authority to say on affidavit. This fact is within the exclusive personal knowledge of the detaining authority. Had this point been raised in the writ petition, the detaining authority would have dealt with it in her affidavit. In the circumstances, if there is no categorical statement in the affidavit of the detaining authority that

she had independently considered the representation, she cannot be faulted for it. No inference can be drawn that the detaining authority did not consider the representation independently. In the affidavit, she has stated that the representation was processed through the concerned Assistant, the Under Secretary and the Deputy Secretary and then placed before her. No objection can be taken to this procedure unless there is any slackness shown in processing the representation. In the present case, the entire procedure was completed within four days. Therefore, the submission that the detaining authority has not considered the representation independently and she could have been swayed by the endorsements made by the subordinate officers, is without any basis. [Para 10] [99-E-H; 100-A-B]

K.M. Abdulla Kunhi and B.L. Abdul Khader vs. Union of India and Ors. **(1991) 1 SCC 476: 1991 (1) SCR 102;** *Kamleshkumar Ishwardas Patel etc. etc. vs. Union of India and Ors.* **(1995) 4 SCC 51: 1995 (3) SCR 279;** *Venmathi Selvam (Mrs.) vs. State of Tamil Nadu and Anr.* **1998 (5) SCC 510: 1998 (3) SCR 526;** *Harshala Santosh Patil vs. State of Maharashtra and Ors.* **(2006) 12 SCC 211;** *Union of India vs. Harish Kumar* **(2008) 1 SCC 195: 2007 (3) SCR 994;** *Union of India vs. Manish Bahal alias Nishu* . **(2001) 6 SCC 36: 2001 (3) SCR 810 – referred to.**

2.1. Article 22(5) of the Constitution casts a legal obligation on the Government to consider the detenu's representation as early as possible. Though no time limit is prescribed for disposal of the representation, the constitutional imperative is that it must be disposed of as soon as possible. There should be no supine indifference, slackness or callous attitude. Any unexplained delay would be a breach of constitutional imperative and it would render the continued detention of the detenu illegal. That does not, however, mean that every day's delay indealing with the

detenu has to be explained. The explanation offered must be reasonable indicating that there was no slackness or indifference. Though the delay itself is not fatal, the delay which remains unexplained becomes unreasonable. The court can certainly consider whether the delay was occasioned due to permissible reasons or unavoidable causes. It is not enough to say that the delay was very short. Even longer delay can as well be explained. So the test is not the duration or the range of delay, but how it is explained by the authority concerned. If the inter departmental consultative procedures are such that the delay becomes inevitable, such procedures will contravene the constitutional mandate. Any authority obliged to make order of detention should adopt procedure calculated towards expeditious consideration of the representation. The representation must be taken up for consideration as soon as such representation is received and dealt with continuously (unless it is absolutely necessary to wait for some assistance in connection with it) until a final decision is taken and communicated to the detenu. [Para 14] [104-B-F]

K.M. Abdulla Kunhi and B.L. Abdul Khader vs. Union of India andOrs. **(1991) 1 SCC 476: 1991 (1) SCR 102 – followed.**

2.2. The detaining authority and the sponsoring authority have properly explained the time lag between 6/7/2012 i.e. the date when the representation was received by the detaining authority and the date of communication of rejection to the detenu i.e. on 30/7/2012. The explanation offered by them is reasonable and acceptable. The representation was taken up for consideration as soon as it was received and dealt with continuously until a final decision was taken and communicated to the detenu. Undoubtedly, time was taken to obtain para-wise comments from the sponsoring

authority. But, seeking views of the sponsoring authority cannot be said to be a futile exercise. Thus, the time lag between receipt of the representation till its consideration and communication of rejection to the detenu is properly explained. [Para 15] [150-B-D]

Francis Coralie Mullin vs. W.C. Khambra **AIR 1980 SC 849 : 1980 (2) SCR 1095;** *Kamarunnissa vs. Union of India* **(1991) 1 SCC 128: 1990 (1) Suppl. SCR 457 – relied on.**

2.3. The affidavit of the detaining authority stated what steps were taken and how the proposal submitted by the sponsoring authority was processed till the detention order was passed. The sponsoring authority has also filed affidavit explaining steps taken by it till the proposal was submitted. The High Court has rightly held that the said explanation is satisfactory. Therefore, the order of detention cannot be quashed on the ground that there was delay in issuance of the detention order. [Paras 10 and 11] [100-G; 101-A; 102-C]

Rajendrakumar Natvarlal Shah vs. State of Gujarat **(1988) 3 SCC153:1988 (1) Suppl. SCR 287 – relied on.**

Saeed Zakir Hussain Malik v. State of Maharashtra **(2012) 8 SCC233: 2012 (7) SCR 235 – referred to**

2.4. So far as delay in execution of the detention order is concerned, it appears from the affidavit of the detaining authority that the detenu is a resident of Mangalore in the State of Karnataka. The affidavit of the Deputy Commissioner of Customs, COFEPOSA Cell, indicates that because the detenu was a resident of Mangalore in the State of Karnataka, the order of detention, grounds of detention and the accompanying documents were forwarded to the State of Karnataka and the order of detention, therefore, could be served on the detenu only on 10/5/2012. Thus

of the present case, the High Court has rightly rejected the submission that there was delay in execution of the detention order. [Para 11] [102-C-F]

2.5. However, the delay in transmitting the representation to the detaining authority by the jail authority is not explained. If the representation was received by the Superintendent of Jail on 23/6/2012, he should have immediately sent it to the detaining authority. The detaining authority has received it on 6/7/2012. The time lag between 23/6/2012 and 6/7/2012 is not explained at all. It was only stated by the detaining authority that 23/6/2012 and 1/7/2012 were public holidays. There is no explanation for the inaction on the part of the Superintendent of Jail. He has not cared to file any affidavit explaining why the representation which was received by him on 23/6/2012 was not sent to the detaining authority immediately. Since the Superintendent of Jail has not filed any affidavit explaining delay, this delay renders continued detention of the detenu, illegal. [Para 16] [102-D-F]

Aslam Ahmed Zahire Ahmed Shaik vs. Union of India and Ors. **(1989)3 SCC 277: 1989 (2) SCR 415;** *Pebam Ningol Mikoi Devi vs. State of Manipur and Ors.* **(2010) 9 SCC 618: 2010 (12) SCR 429;** *Vijay Kumar vs. State of J.and K.* **(1982) 2 SCC 43: 1982 (3) SCR 522 – relied on.**

2.6. It is clarified that the delay in disposal of the representation of the detenu has vitiated only the continued detention of the detenu and not the detention order. Thus the order of detention dated 16/4/2012 is valid. However, on account of delay in disposal of the representation of the detenu by the State Government, the continued detention of the detenu is rendered illegal. The detenu is directed to be released from detention. [Para 18] [107-E-F]

K.M. Abdulla Kunhi and B.L. Abdul Khader vs. Union of India andOrs. **(1991) 1 SCC 476: 1991 (1) SCR 102 – followed.**

Sayed Abdul Ala vs. Union of India **(2007) 15 SCC 208: 2007 (10) SCR 631;** *Meena Jayendra Thakur vs. Union of India* **(1999) 8 SCC 177: 1999 (3) Suppl. SCR 98;** *Union of India vs. Harish Kumar* **(2008) 1 SCC 195: 2007 (3) SCR 994 – relied on.**

Baby Devassy Chully @ Bobby vs. Union of India and Ors. **2012 (10) SCALE 176 – held inapplicable.**

Harish Pahwa vs. State of U.P. and Ors. **(1981) 2 SCC 710: 1981 (3) SCR 276 – referred to.**

Rattan Singh etc. vs. State of Punjab and Ors. **(1981) 4 SCC 481: 1982 (1) SCR 1010;** *B. Alamelu vs. State of Tamil Nadu and Ors.* **(1995) 1 SCC 306;** *Smt. Khatoon Begum etc. etc. vs. Union of India and Ors.* **(1981) 2 SCC 480: 1981 (3) SCR 137;** *Kundanbhai Dulabhai Shaikh etc. vs. Distt. Magistrate, Ahmedabad and Ors.* **(1996) 3 SCC 194: 1996 (2) SCR 479;** *Rajammal vs. State of Tamil Nadu and Anr.* **(1999) 1 SCC 417: 1998 (3) Suppl. SCR 551;** *Ummu Sabeena vs. State of Kerala and Ors.* **(2011) 10 SCC 781: 2011 (13) SCR 185;** *Smt. Icchu Devi Choraria v. Union of India and Ors.* **(1980) 4 SCC 531: 1981 (1) SCR 640;** *Rekha vs. State of Tamil Nadu* **(2011) 5 SCC 244: 2011 (4) SCR 740 – cited.**

Case Law Reference:

1982 (1) SCR 1010	**cited**	**Para 4**
(1995) 1 SCC 306	**cited**	**Para 4**
1981 (3) SCR 137	**cited**	**Para 4**
1996 (2) SCR 479	**cited**	**Para 4**

1998 (3) Suppl. SCR 551	**cited**	**Para 4**
2011 (13) SCR 185	**cited**	**Para 4**
1981 (1) SCR 640	**cited**	**Para 4**
2011 (4) SCR 740	**cited**	**Para 4**
1991 (1) SCR 102	**referred to**	**Para 5**
	followed	**Paras 13 and 17**
1998 (3) SCR 526	**referred to**	**Para 5**
(2006) 12 SCC 211	**referred to**	**Para 5**
1995 (3) SCR 279	**referred to**	**Para 5**
1987 (3) SCR 668	**relied on**	**Para 5**
2007 (10) SCR 631	**referred to**	**Para 5**
2007 (3) SCR 994	**referred to**	**Para 7**
2001 (3) SCR 810	**referred to**	**Para 7**
1981 (3) SCR 276	**referred to**	**Para 11**
2012 (10) SCALE 176	**held inapplicable**	**Para 11**
2012 (7) SCR 235	**referred to**	**Para 11**
1988 (1) Suppl. SCR 287	**relied on**	**Para 11**
1980 (2) SCR 1095	**relied on**	**Para 12**
1991 (1) SCR 102	**followed**	**Para 13**
1989 (2) SCR 415	**relied on**	**Para 16**
2010 (12) SCR 429	**relied on**	**Para 16**
1981 (3) SCR 276	**relied on**	**Para 17**
2012 (7) SCR 235	**relied on**	**Para 17**

1990 (1) Suppl. SCR 457	**relied on**	**Para 15**
1982 (3) SCR 522	**relied on**	**Para 16**
2007 (10) SCR 631	**relied on**	**Para17**
1999 (3) Suppl. SCR 98	**relied on**	**Para 17**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 520 of 2013.

From the Judgment & Order dated 23.01.2013 of the High Court of Judicature at Bombay in Writ Petition No. 2613 of 2012.

K.K. Mani, Abhishek Krishnan for the Appellant.

Arun R. Pednekar, Sanjay V. Kharde, Asha Gopalan Nair for the Respondents.

The Judgment of the Court was delivered by

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

2. In this appeal, by special leave, the appellant has challenged judgment and order dated 23/01/2013 passed by the Division Bench of the Bombay High Court dismissing the writ petition filed by him challenging order of detention dated 16/4/2012 issued by the detaining authority i.e. the Principal Secretary (Appeals and Security), Government of Maharashtra, Home Department under the provisions of Section 3(1) of the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (for short, "**the said Act**"). The order of detention directed his detention with a view to preventing him in future from smuggling goods.

3. From the grounds of detention, it appears to be the case of detaining authority that on 12/8/2011, the appellant Abdul Nasar Adam Ismail ("**detenu**" fo

from Dubai by Air India flight No.AI-984. He was carrying one trolley hand bag. After he was cleared through green channel, he was stopped by the Assistant Commissioner of Customs on duty. When his personal search was conducted, it was noticed that he had concealed two packets in his undergarments near his groin area and two packets under the knee caps worn on calves. On removal of his pants, four plastic packets wrapped with cello tape, which were kept inside his cycling shorts and knee caps worn by him on his calves were recovered. Detailed examination of these four packets resulted in recovery of 3086 gms. of 22 kt. and 1004 gms. of 18 kt. gold chains. The total seized gold was valued at Rs.95,35,932/-. The detenu's statements under Section 108 of the Customs Act, 1962 were recorded. On perusal of the proposal and accompanying documents sent by the sponsoring authority, the detaining authority passed the aforementioned detention order.

4. We have heard, at some length, Mr. K.K. Mani, learned counsel appearing for the detenu. He assailed the detention order on two counts. Firstly, he contended that the detenu through his lawyer submitted his representation dated 23/6/2012 to the jail authority for forwarding it to the State Government. The said representation was rejected by the State Government and the rejection was communicated to the detenu by the Under Secretary to the Government of Maharashtra vide letter dated 24/7/2012. Counsel submitted that thus there is an inordinate delay in considering the representation of the detenu which has violated his right under Article 22(5) of the Constitution of India. Counsel submitted that there is delay at every stage, which indicates the casual approach of the State Government. So far as unexplained delay in transmitting the representation to the State Government by the jail authority is concerned, he relied on the judgments of this Court in *Rattan Singh etc. v. State of Punjab and others*[1], *Aslam Ahmed Zahire Ahmed Shaik v. Union of India and others*[2] and *B. Alamelu v. State of Tamil Nadu and others*[3]. Counsel submitted that in a long line of judgments, remissness or casual approach shown by the authorities in considering the representation of the detenu is severely criticized by this Court because it breaches the mandate of Article 22(5) of the Constitution of India. In such a situation, the order of detention is liable to be set aside. In this connection, he relied on judgments of this Court in *Smt. Khatoon Begum etc. etc. v. Union of India and others*[4], *Harish Pahwa v. State of U.P. & Ors.,*[5] *K.M. Abdulla Kunhi and B.L. Abdul Khader v. Union of India and others*[6], *Kundanbhai Dulabhai Shaikh etc. v. Distt. Magistrate, Ahmedabad and others etc.*[7], *Venmathi Selvam (Mrs.) v. State of Tamil Nadu and another*[8], *Rajammal v. State of Tamil Nadu and another*[9], *Harshala Santosh Patil v. State of Maharashtra and others*[10], *Pebam Ningol Mikoi Devi v. State of Manipur & Ors.*[11] and *Ummu Sabeena v. State of Kerala & Ors.*[12]. Counsel submitted that the gravity of offence is irrelevant in preventive detention matters. Preventive detention is a serious inroad on the liberty of a person. The procedural safeguards are the only protection available to him and, therefore, their strict compliance is necessary. In this connection, counsel relied on the judgments of this Court in *Smt. Icchu Devi Choraria v. Union of India and others*[13], *Kamleshkumar Ishwardas Patel etc. etc. v. Union of India and*

1. (1981) 4 SCC 481.
2. (1989) 3 SCC 277.
3. (1995) 1 SCC 306.
4. (1981) 2 SCC 480.
5. (1981) 2 SCC 710.
6. (1991)1 SCC 476.
7. (1996) 3 SCC194.
8. 1998 (5) SCC 510.
9. (1999) 1 SCC 417.
10. (2006) 12 SCC 211.
11. (2010) 9 SCC 681.
12. (2011) 10 SCC 781.
13. (1980) 4 SCC 531.

others[14], *Kundanbhai Dulabhai Shaikh (supra)* and *Rekha v. State of Tamil Nadu*[15].

5. So far as the second point urged by the counsel viz. that there is no independent consideration of the representation by the detaining authority is concerned, we must mention that this point was not raised in the petition nor urged before the High Court. It is not even raised in the present appeal. Ordinarily, we would not have allowed the counsel to raise any point in this court, which was not urged before the High Court. However, we are mindful of the decision of this Court in *Mohinuddin @ Moin Master v. District Magistrate, Beed & Ors.,*[16] where this Court has held that the habeas corpus petition cannot be dismissed on the ground of imperfect pleadings. We have, therefore, allowed learned counsel to canvass this point. In support of his submission that the detention order is liable to be set aside if the detaining authority does not consider the detenu's representation independently, counsel relied on the judgments of this Court in *K.M. Abdulla Kunhi (supra), Kamleshkumar Ishwardas Patel*, *Venmathi Selvam (supra)* and *Harshala Santosh Patil (supra)*. Counsel submitted that in the circumstances, this Court should set aside the impugned judgment and quash the order of detention dated 16/04/2012.

6. We must make it clear that these were the only points urged by learned counsel for the detenu in this Court. While closing the hearing, we directed learned counsel to submit a list of authorities on the above points urged by him. Learned counsel for the State was to submit his reply to the above points. We are surprised to note that in the note submitted by learned counsel for the detenu, he has cited four decisions of this Court under the caption "New Points". These points are not formulated. Thus, an opportunity has been denied to learned counsel for the State to reply to those new points. We are also

14. (1995) 4 SCC 51.

15. (2011) 5 SCC 244.

16. (1987) 4 SCC 58.

at a loss to understand which are those 'New Points'. We are unhappy about this conduct. But, in any case, as already noted, since we are dealing with a preventive detention order, we would look into those four decisions.

7. Mr. Arun R. Pednekar, learned counsel for the State of Maharashtra, on the other hand, submitted that the representation has been considered with utmost promptitude and the explanation offered by the State is reasonable and satisfactory. Counsel submitted that if the delay is properly explained, there is no breach of the constitutional imperative. If there is no indifference or slackness shown by the State Government, the order of detention cannot be set aside on the ground of delay in considering the representation. In this connection, he relied on judgments of the Constitution Bench in *K.M. Abdulla Kunhi* (supra) and *Sayed Abdul Ala v. Union of India*[17]. Counsel submitted that in any event if this Court comes to the conclusion that there is unexplained delay in considering the representation of the detenu, the order or detention cannot be set aside on that ground. Only the continued detention becomes invalid. In this connection, he relied on judgments of this Court *Union of India v. Harish Kumar*[18] and *Union of India v. Manish Bahal alias Nishu*[19]. So far as the submission that the representation was not considered independently by the detaining authority is concerned, counsel submitted that no such ground was raised before the High Court nor was it taken in the petition and, therefore, the detenu should not be allowed to raise it at this stage. Counsel submitted that in any case, the affidavit of the detaining authority clearly establishes that there is independent consideration of the representation by the detaining authority. The appeal, therefore, deserves to be dismissed.

17. (2007) 15 SCC 208.

18. (2008) 1 SCC 195.

19. (2001) 6 SCC 36.

8. At the outset, we must note that on a query made by this Court as to whether the detenu wants to press this appeal in case the detenu is already released from detention, counsel for the detenu submitted that he has instructions to press the appeal because if the detention order is set aside by this Court, the proceedings initiated against the detenu under the provisions of the Smugglers and Foreign Exchange Manipulators Act, 1976 will automatically lapse. We, therefore, proceed to deal with his submissions.

9. Learned counsel urged that the gravity of the offence is irrelevant in a preventive detention matter. We entirely agree with this submission and, hence, it is not necessary to refer to the judgments cited by him on this point.

10. We shall first deal with the submission that the detaining authority has not considered the detenu's representation independently. As we have already noted, this point was not raised in the petition and admittedly, not urged before the High Court. Whether a representation is considered by the detaining authority independently or not is for the detaining authority to say on affidavit. This fact is within the exclusive personal knowledge of the detaining authority. Had this point been raised in the writ petition, the detaining authority would have dealt with it in her affidavit. In the circumstances, if there is no categorical statement in the affidavit of the detaining authority that she had independently considered the representation, she cannot be faulted for it. No inference can be drawn that the detaining authority did not consider the representation independently. In the affidavit, she has stated that the representation was processed through the concerned Assistant, the Under Secretary and the Deputy Secretary and then placed before her. She rejected it on 24/7/2012. No objection can be taken to this procedure unless there is any slackness shown in processing the representation. Here the entire procedure was completed within four days. We have seen the record. The concerned Assistant, the Under Secretary and the Deputy

Secretary have merely put their signatures on the file. They have expressed no opinion. Therefore, the submission that the detaining authority has not considered the representation independently and she could have been swayed by the endorsements made by the subordinate officers is without any basis. It is necessary to note here that this point is not raised even in the present appeal. Had it been raised, we would have called upon the detaining authority to file affidavit in this Court. In view of the above, we reject this submission.

11. We shall now deal with the judgments mentioned in the Note under the caption "New Points". So far as *Mohinuddin* is concerned, we have already discussed this judgment. It is, therefore, not necessary to refer to it again. So far as *Harish Pahwa* is concerned, we find that there is no new point discussed in this judgment. It also states that the representation of the detenu must be dealt with continuously until the final decision is taken and communicated to the detenu. The second judgment is *Baby Devassy Chully @ Bobby v. Union of India & Ors.*[20]. In this case, this Court has stated that if a person is in custody and, there is no imminent possibility of his being released, the rule is that power of preventive detention should not be exercised. In this case, the detenu was released on bail on 20/8/2011 and the detention order was passed on 16/4/2012. Thus, when the detention order was passed the detenu was not in custody. Therefore, this judgment has no application to the present case. The fourth judgment, which is stated to contain a new point, is *Saeed Zakir Hussain Malik v. State of Maharashtra*[21]. In that case, the detention order was set aside on the ground of delay in passing of the detention order and delay in execution of the detention order. We have carefully perused the affidavit of the detaining authority. The detaining authority has stated what steps were taken and how the proposal submitted by the sponsoring authority was processed

20. 2012 (10) SCC 176.

21. (20123) 8 SCC 233.

till the detention order was passed. The sponsoring authority has also filed affidavit explaining steps taken by it till the proposal was submitted. The High Court has rightly held that the said explanation is satisfactory. In this connection, reliance placed by the High Court on the judgment of this Court in *Rajendrakumar Natvarlal Shah v. State of Gujarat*[22] is apt. We deem it appropriate to quote the relevant paragraph.

> ***"10.*** *Viewed from this perspective, we wish to emphasise and make it clear for the guidance of the different High Courts that a distinction must be drawn between the delay in making of an order of detention under a law relating to preventive detention like the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 and the delay in complying with the procedural safeguards of Article 22(5) of the Constitution. It has been laid down by this Court in a series of decisions that the rule as to unexplained delay in taking action is not inflexible. Quite obviously, in cases of mere delay in making of an order of detention under a law like the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 enacted for the purpose of dealing effectively with persons engaged in smuggling and foreign exchange racketeering who, owing to their large resources and influence have been posing a serious threat to the economy and thereby to the security of the nation, the courts should not merely on account of delay in making of an order of detention assume that such delay, if not satisfactorily explained, must necessarily give rise to an inference that there was no sufficient material for the subjective satisfaction of the detaining authority or that such subjective satisfaction was not genuinely reached. Taking of such a view would not be warranted unless the court finds that the grounds are "stale" or illusory or that there is no real nexus between the grounds and the impugned order of detention. The decisions to the contrary by the Delhi High Court in Anil Kumar Bhasin v. Union of India & Ors., Crl. W.No.410/86 dated 2.2.1987, Bhupinder Singh v. Union of India & Ors., Crl. W. No.375/86 dated 11.12.1986, Surinder Pal Singh v. M.L. Wadhawan & Ors., Crl. W. No.444/86 dated 9.3.1987 and Ramesh Lal v. Delhi Administration, Crl. W. No.43/84 dated 16.4.1984 and other cases taking the same view do not lay down good law and are accordingly overruled."*

22. (1988) 3 SCC 153.

In light of the above observations of this Court in our opinion, the order of detention cannot be quashed on the ground that there is delay in issuance of the detention order. So far as delay in execution of the detention order is concerned, it appears from the affidavit of the detaining authority that the detenu is a resident of Mangalore in the State of Karnataka. The affidavit of Ravindra Kumar Das, Deputy Commissioner of Customs, COFEPOSA Cell, CSI Airport, Mumbai, indicates that because the detenu was a resident of Mangalore in the State of Karnataka, the order of detention, grounds of detention and the accompanying documents were forwarded to the State of Karnataka and the order of detention, therefore, could be served on the detenu only on 10/5/2012. In the peculiar facts of this case, in our opinion, the High Court has rightly rejected this submission. We endorse the High Court's view on this point.

12. We shall now turn to the submission that there is delay in disposal of the detenu's representation by the State Government. Several judgments have been cited by learned counsel for the appellant. It is not necessary to refer to all of them because they reiterate the same principles. We may begin with the observations of this Court in *Francis Coralie Mullin v. W.C. Khambra.*[23] The relevant portion of the said judgment reads thus:

23. AIR 1980 SC 849.

"The time imperative can never be absolute or obsessive".

In L.M.S. umma Saleem v. B.B. Gujra, (1981) 3 SCC 317, it was held:

"The occasional observations made by this Court that each day's delay in dealing with the representation must be adequately explained are meant to emphasise the expedition with which the representation must be considered and not that it is a magical formula, the slightest breach of which must result in the release of the detenu. Law deals with the facts of life. In law, as in life, there are no invariable absolutes. Neither life nor law can be reduced to mere but despotic formulae."

13.It is also necessary to refer to the observations of the Constitution Bench of this Court in *K.M. Abdulla Kunhi* which read thus:

"12. Clause (5) of Article 22 therefore, casts a legal obligation on the government to consider the representation as early as possible. It is a constitutional mandate commanding the concerned authority to whom the detenu submits his representation to consider the representation and dispose of the same as expeditiously as possible. The words "as soon as may be" occurring in clause (5) of Article 22 reflects the concern of the Framers that the representation should be expeditiously considered and disposed of with a sense of urgency without an avoidable delay. However, there can be no hard and fast rule in this regard. It depends upon the facts and circumstances of each case. There is no period prescribed either under the Constitution or under the concerned detention law, within which the representation should be dealt with. The requirement however, is that there should not be supine indifference, slackness or callous attitude in considering the representation. Any unexplained delay in the disposal of representation would be a breach of the constitutional imperative and it would

render the continued detention impermissible and illegal."

14. The principles which have been laid down by the Constitution Bench and the other judgments which we have referred to earlier can be summarized. Article 22(5) of the Constitution casts a legal obligation on the Government to consider the detenu's representation as early as possible. Though no time limit is prescribed for disposal of the representation, the constitutional imperative is that it must be disposed of as soon as possible. There should be no supine indifference, slackness or callous attitude. Any unexplained delay would be a breach of constitutional imperative and it would render the continued detention of the detenu illegal. That does not, however, mean that every day's delay in dealing with the representation of the detenu has to be explained. The explanation offered must be reasonable indicating that there was no slackness or indifference. Though the delay itself is not fatal, the delay which remains unexplained becomes unreasonable. The court can certainly consider whether the delay was occasioned due to permissible reasons or unavoidable causes. It is not enough to say that the delay was very short. Even longer delay can as well be explained. So the test is not the duration or the range of delay, but how it is explained by the authority concerned. If the inter departmental consultative procedures are such that the delay becomes inevitable, such procedures will contravene the constitutional mandate. Any authority obliged to make order of detention should adopt procedure calculated towards expeditious consideration of the representation. The representation must be taken up for consideration as soon as such representation is received and dealt with continuously (unless it is absolutely necessary to wait for some assistance in connection with it) until a final decision is taken and communicated to the detenu.

15. In light of above principles, it is now necessary to see how the State Government has disposed of the detenu's representation in this case. In this connection, relevant dates are available from the affidavit of Shiva[illegible]y

Secretary to the Government of Maharashtra, Home Department (Special), affidavit of Medha Gadgil, Principal Secretary (Appeals & Security), Government of Maharashtra, Home Department, Mantralaya, Mumbai and affidavit of Ravindra Kumar Das, Deputy Commissioner of Customs, COFEPOSA Cell, CSI Airport, Mumbai. The High Court has correctly located the important dates from the three affidavits. In our opinion, the detaining authority and the sponsoring authority have properly explained the time lag between 6/7/2012 i.e. the date when the representation was received by the detaining authority and the date of communication of rejection to the detenu i.e. on 30/7/2012. The explanation offered by them is reasonable and acceptable. We find that the representation was taken up for consideration as soon as it was received and dealt with continuously until a final decision was taken and communicated to the detenu. Undoubtedly, time was taken to obtain para-wise comments from the sponsoring authority. But, in *Kamarunnissa v. Union of India,*[24] this Court has held that seeking views of the sponsoring authority cannot be said to be a futile exercise. Thus, the time lag between receipt of the representation till its consideration and communication of rejection to the detenu is properly explained.

16. We, however, find that the delay in transmitting the representation to the detaining authority by the jail authority is not explained. If the representation was received by the Superintendent of Jail on 23/6/2012, he should have immediately sent it to the detaining authority. The detaining authority has received it on 6/7/2012. The time lag between 23/6/2012 and 6/7/2012 is not explained at all. It is only stated by the detaining authority that 23/6/2012 and 1/7/2012 were public holidays. There is no explanation for the inaction on the part of the Superintendent of Jail, Nashik Road Central Prison, Nashik. He has not cared to file any affidavit explaining why the representation which was received by him on 23/6/2012 was not sent to the detaining authority immediately. In *Pebam Ningol*

24. (1991) 1 SCC 128.

Mikoi Devi, seven days' unexplained delay in forwarding the representation to the Central Government was held to be fatal. In *Aslam Ahmed Zahire Ahmed Shaik,* the detenu had handed over his representation to the Superintendent of Jail on 16/6/1998 for onward transmission to the Central Government. It was kept unattended for a period of seven days and, as a result, it reached the Government 11 days' after it was handed over to the Superintendent of Jail. The Superintendent of Jail had not explained the delay. Relying on *Vijay Kumar v. State of J. & K.*[25], the continued detention of the detenu was set aside. At the cost of repetition, we must note that in this case, the Superintendent of Jail has not filed any affidavit explaining delay. Therefore, this delay, in our opinion renders continued detention of the detenu, illegal.

17. We would like to make it clear that the delay in disposal of the representation of the detenu has vitiated only the continued detention of the detenu and not the detention order. In *Meena Jayendra Thakur v. Union of India,*[26] this Court was considering a case where the detenu was detained under the provisions of the said Act. This Court held that if the detaining authority on the basis of the materials before him did arrive at his satisfaction with regard to the necessity for passing an order of detention and the order is passed thereafter, the same cannot be held to be void because of a subsequent infraction of the detenu's right or of non-compliance with the procedure prescribed under law because that does not get into the satisfaction of the detaining authority while making an order of detention under Section 3(1) of the said Act. It does not affect the validity of the order of detention issued under Section 3(1) of the said Act. Similar view has been taken by this Court in *Sayed Abdul Ala.* In that case, this Court was concerned with an order of detention issued under the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988. It was argued that there was delay in considering the

25. (1982) 2 SCC 43.

26. (1999) 8 SCC 177.

representation of the detenu. Relying on *Meena Jayendra Thakur*, this Court expressed that even if it is to be assumed that there was some delay in considering the representation, the same would not vitiate the original order of detention. By reason of the delay, only further detention of the detenu will become illegal. The delay in considering the representation does not vitiate the order of detention itself. In *Harish Kumar*, this Court was again considering an order of detention issued under the provisions of the said Act. This Court reiterated the same view and held that the detention order passed at the satisfaction of the detaining authority on the basis of the material available in no manner gets vitiated for the reason of non-consideration of the representation made by the detenu to the Central Government. It was held that initial order of detention was not rendered void *ab initio*. It may be noted that even the Constitution Bench of this Court in *K.M. Abdulla Kunhi,* held that any unexplained delay in disposal of representation of the detenu would be a breach of the constitutional imperative and it would render the continued detention impermissible and illegal and set aside the continued detention of the detenu.

18. In view of this clear legal position, we hold that the order of detention dated 16/4/2012 is valid. However, on account of delay in disposal of the representation of the detenu by the State Government, the continued detention of the detenu is rendered illegal. We, therefore, direct that the detenu – Abdul Nasar Adam Ismail be released from detention forthwith if he is not already released from detention and he is not required in any other case. The appeal is disposed of accordingly.

K.K.T. Appeal disposed of.

RAM DEO PRASAD
v.
STATE OF BIHAR
(Criminal Appeal No.1354 of 2012)

APRIL 11, 2013

[AFTAB ALAM AND RANJANA PRAKASH DESAI, JJ.]

Penal Code, 1860 – ss. 376 and 302 – Rape and murder of 4 years old child – Conviction and death sentence by courts below – On appeal, held: It is established that child was in possession of the accused soon after she was sexually abused – Therefore, presumption is invoked against the accused for causing the injuries on private parts of the victim leading to her death – Since the accused failed to rebut this presumption, his conviction is justified – However, in view of the deficiencies in the investigation, absence of forensic evidence, lapses in trial proceedings and that the accused had not sufficient resources to get himself defended upto his satisfaction, death sentence is converted to life imprisonment, which would be not less than 18 years – His case for remission would be considered only after 18 years of imprisonment – Evidence Act, 1872 – s.114 – Code of Criminal Procedure, 1973 – Remission of sentence.

Sentence/Sentencing – Death sentence – Imposition – Criteria – Held: Nature of offence alone may not in all cases be the determining factor for bringing the case in the 'rarest of rare' category to impose death penalty – Quality of evidence is also a relevant factor.

Appellant-accused was prosecuted for having raped and the killed a 4 years old child. The prosecution case was that the accused lifted the child from her house and thereafter, subjected her to sexual abuse. When he was seen by the villagers carrying the child, he threw the child

in the field and fled away. Charge was framed against him u/ss. 376 and 302 IPC. Trial Court convicted him for the offences charged and awarded death sentence. The trial court referred the case to High Court for confirmation of death sentence. The accused did not prefer any appeal. High Court confirmed the conviction and death sentence. Jail petition was sent to this Court.

Partly allowing the appeal, the Court

HELD: 1. The first part of the prosecution case i.e. when the victim/deceased was lifted from the verandah of her house and before she was subjected to the sexual abuse, did not form part of the charge. Further, this part of the prosecution case was based on the solitary evidence of PW1 and as he turned hostile, this part of the case falls to the ground. However, the second part of the case i.e. the case, after the victim child was subjected to sexual abuse and brutality, is fully established by the evidences of PW.1 and PW.3. What is thus established against the appellant is that he was seen carrying the child soon after she was sexually abused and brutalized in the most cruel manner and on seeing the group of villagers coming after him, he threw down the child in the wheat field and ran away. It was, therefore, for him to explain how the child came in his possession and in the absence of any explanation the court would be fully justified in invoking section 114 of the Evidence Act and to hold him guilty of causing the injuries to her private parts leading to her death. No exception can, therefore, be taken to the appellant's conviction under sections 376 and 302 IPC. [Para 35 and 36] [122-C-F]

2.1. The offence committed by the appellant is heinous and revolting but the nature of the offence alone may not in all cases be the determining factor for bringing the case in the "rarest of rare" category and to impose

the ultimate and irreversible punishment of death. [Para 39] [123-C]

Rajendra Pralhadrao Wasnik vs. State of Maharashtra **(2012) 4 SCC 37: 2012 (2) SCR 225 – distinguished.**

2.2. There are deficiencies in the investigation. No attempt was made to find out the spot where the child was sexually abused and brutalized and where it might have been possible to find some blood or some other article that could have thrown any light on the identity of the offender. Apart from the post-mortem report there is no medical evidence. There is not a scrap of forensic evidence of any kind. Even the torch in the light of which the appellant is said to have been identified in the cold wintry and foggy night was not produced before the court. There are also lapses in the trial proceedings in the framing of the charge and especially in the examination of the appellant under section 313 Cr.P.C. It was incumbent upon the trial court to clearly tell the appellant that according to the prosecution evidence, the child soon after being sexually abused in the most cruel manner was seen in his arms and to ask him to explain this very vital circumstance against him. But the Section 313 examination made in this case completely falls short of the requirements of the law. The fact that the appellant was represented before the trial court by a lawyer appointed by the court ; and that though facing death penalty, he did not file an appeal before the High Court and in this Court his appeal came through the Jail Superintendent, lead to presumption that the appellant did not have sufficient resources to engage a lawyer of his own choice and get himself defended up to his satisfaction. These facts and circumstances are also relevant factors to be taken into consideration while confirming the death penalty given to an accused. [Paras 7 and 40 to 43] [113-G-H; 114-A; 12

Sajjan Sharma vs. State of Bihar **(2011) 2 SCC 206: 2011 (1)SCR 629;** *Santosh Kumar Satishbhushan Bariyar vs. State of Maharashtra* **(2009) 6 SCC 498: 2009 (9) SCR 90;** *Ramesh vs. State of Rajasthan* **(2011) 3 SCC 685: 2011 (4) SCR 585 – relied on.**

2.3. In view of the overall facts of the case it would be unsafe to confirm the death sentence awarded to the appellant. Hence, while confirming his conviction under sections 376 and 302 IPC the death sentence given to the appellant is set aside and the same is substituted by imprisonment for life that should not be less than actual imprisonment for a period of 18 years. The case of the appellant for any remission under Cr.P.C. to be considered only after he has served out 18 years of actual imprisonment. [Para 47] [126-D-F]

Amit vs. State of Uttar Pradesh **(2012) 4 SCC 107: 2012 (1) SCR 1009 – relied on.**

Case Law Reference:

2012 (2) SCR 225	**distinguished**	**Para 38**
2011 (1) SCR 629	**relied on**	**Para 41**
2009 (9) SCR 90	**relied on**	**Para 44**
2011 (4) SCR 585	**relied on**	**Para 45**
2012 (1) SCR 1009	**relied on**	**Para 46**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1354 of 2012.

From the Judgment & Order dated 17.09.2009 of the High Court of Patna in Death Reference No. 15 of 2008.

P.S. Patwalia, Tushar Bakshi, Mridula Ray Bharadwaj, (Amicus Curiae), Samir Ali Khan, Chandan Kumar (for Gopal Singh) for the appearing parties.

The Judgment of the Court was delivered by

AFTAB ALAM,J. 1. The appellant Ram Deo Prasad has been awarded death penalty for raping and inflicting injuries to a four year old child causing her death.

2. The prosecution case is based on the statement of one Mohd. Kamruddin Mian made before Sub-Inspector, Birendra Kumar Pandey of Siwan Town P.S. on December 21, 2004 at 8:15 a.m. at the Sadar Hospital, Siwan. Mohd. Kamruddin stated that on the previous night after finishing their meal at about 8:30 p.m. his family had gone to sleep at his house in village Badka Gaon, P.S. Pachrukhi District Siwan. His four year old daughter Laila Khatoon was sleeping by the side of her grandmother on the outer verandah of the house and on the other side of the straw bed, the girl's mother was sleeping with her infant child. In the middle of the night, the Informant who was sleeping in an inside room came out to relieve himself and found Laila Khatoon missing from the side of her grandmother. A search started for the girl and then his neighbour, Suman Kumar Sah (PW.2) told them that just a little while ago he had seen the appellant swiftly running away towards east, carrying a girl child in his arms who was crying. As informed by Suman Sah, he (the Informant) and the villagers assembled there proceeded towards east in search (of the child). After going for about a kilometer, they heard the sound of heavy foot-steps and on going in the direction of the sound they saw that the appellant, who was fleeing away with the child, flung the child in the wheat field (by the side of the pathway) and ran away. On going to the child, he found that it was his missing daughter. She was moaning and bleeding from her private parts. The informant further stated that he fully believed that the appellant after committing rape on her child was taking her away with the intent to kill her and to hide the body somewhere.

3. The statement was reduced to writing, as the fard-e-beyan (Exhibit 4) by Sub-Inspector, Bi[illegible]y

(PW.6) and was duly signed by the Informant and a witness, apart from the Sub-Inspector recording it. It was dispatched to Pachrukhi police station, within the jurisdiction of which the offence was committed, and there the recorded statement was incorporated in the formal FIR (Exhibit 1), registered as Pachrukhi P.S. case No.131/2004 dated December 21, 2004 under section 376 of the Penal Code.

4. The child Laila Khatoon died at the Sadar Hospital Siwan on the same day and consequently section 302 of the Penal Code was also added to the case.

5. On the following day (December 22, 2004) at 11:00 a.m. the Investigating Officer of the case (PW.4) went to the collector's office (in Siwan town) for a meeting in connection with the preparations for the elections that were to be held shortly. There he was told by the officer in-charge of the Siwan Town P.S. that at 9.00 that morning the appellant was caught at the Siwan bus-stand and he was detained at the Town P.S. The Investigating Officer went to the Town P.S., prepared the arrest memo of the appellant and sent him for production before the Magistrate with the request to take him in judicial custody. The appellant was, thus, produced before the Magistrate on December 22, 2004 and as per the request of the Investigating Officer, was remanded to judicial custody.

6. It did not occur to the Investigating Officer to take the appellant on remand for interrogations or getting him examined by a doctor or seizing his clothes etc.

7. In course of investigation, the Investigating Officer inspected two sites as "the place of occurrence"; one, the verandah of the Informant's house from where the child was lifted and the other, the wheat field where the child was said to have been thrown by the appellant; nothing was found of any significance at either of two places. No attempt was made to find out the spot where the child was sexually abused and brutalized and where it might have been possible to find some

blood or some other article that could have thrown any light on the identity of the offender. The "investigation" mainly consisted of recording the statements of witnesses under section 161 of the Code of Criminal Procedure and as it was completed charge-sheet was submitted on March 30, 2005, naming the appellant as the accused.

8. On the basis of the charge-sheet the appellant was put on trial before the 1st Additional Sessions Judge, Siwan.

9. It needs to be stated here that in support of its case, the prosecution examined six (6) witnesses before the trial court. PW.6 is the Sub-Inspector who had recorded the statement of the victim's father Kamruddin Mian. He was simply called to formally prove the *fard-e-beyan*, giving rise to the FIR. PW.4 is the Investigating Officer. He formally proved the FIR. He also stated that he had recorded the statements of Rukhsana Khatoon (the mother of the victim: PW.3), Suman Sah (PW.1), Hasmuddin (not examined), Nasir (PW.2), Ram Chhabila Prasad (not examined), Gumani Pandit (not examined) and some others. PW.5 is the doctor who was a member of the team of doctors which had conducted post-mortem over the body of the child. She formally proved the post-mortem report.

10. Apart from the two policemen and the doctor the prosecution examined three other witnesses. PW.1 is Suman Sah, the neighbour of the Informant who was the first to say that he had seen the appellant running away, carrying a girl child who was crying. PW.2 is Nasir, the paternal cousin of the Informant who was one of the group which had gone in pursuit of the appellant and who had seen the appellant flinging the child in the wheat field and making good her escape. PW.3 is Rukhsana Khatoon, the unfortunate mother of the child. We shall presently see their evidences in greater detail. But at this stage it is important to note that the Informant, the father of the child did not appear as one of the witnesses. By the time the trial

took place he had gone somewhere abroad to earn the livelihood.

11. Further, the prosecution took steps to examine two other witnesses mentioned in the charge-sheet, namely Hasmuddin and Gumani Pandit and obtained warrants of arrest for their production. They were produced before the trial court on October 5, 2007 but from the order dated October 30, 2007 passed by the court, it appears that though the prosecution produced the aforesaid two witnesses, besides one Ram Chhabila Prasad (also named in the charge-sheet as one of the witnesses), the In-charge Public Prosecutor filed a petition that the three witnesses were not inclined to support the prosecution case and, as such, he was giving them up and was not in favour of examining them. That petition was disposed of by order dated November 13, 2007 and the three persons were discharged from giving evidence in the case.

12. At the commencement of the trial, the court framed the charge against the appellant. It is relevant to see what was said in the charge which is reproduced below:

> "First - That you, on or about the 21st day of December 4 at Badaka Gaon you committed rape on Laila Khatoon hardly aged about 4 years and thereby committed an offence punishable under section 376 of the Indian Penal Code and within my cognizance.
>
> Secondly – That you on or about the same date/ day of same month and same place you committed murder intentionally and knowingly that the act of rape was likely to cause death of Laila Khatoon and that thereby committed an offence punishable section 302 of the Indian penal Code and within my cognizance.
>
> And I hereby direct that you be tried by the said court on the said charge.

> The charge was read over and explained to the accused in Hindi to which he pleaded not guilty and claimed to be tried.
>
> Dated this 19 day of 04, 2007."

13. It is, thus, to be seen that the charge is completely silent in regard to the first part of the prosecution case that immediately after the child was missing, the appellant was seen running away carrying in his arms a girl child who was crying. There was no charge under section 366A or section 367 of the Penal Code.

14. At the conclusion of the prosecution evidence, the court examined the appellant under section 313 of the Code of Criminal Procedure. It is also important to see how the examination under section 313 took place; hence, the full examination under section 313 is quoted below.

> "Question: Have you heard the statements of the witnesses?
>
> Answer: Yes.
>
> Question: Against you the charge and evidence are that on 20/12/2004 in the night at 12.00 you went to the house of Kamruddin Miyan s/o Babujaan Miyan, village Barka Gaon P.S. Pachrukkhi district Siwan and abducted his daughter Laila Khatoon (6 years).
>
> Answer: No.
>
> Question: There is also evidence against you that you committed rape on her and flung her in the field and as a result she died.
>
> Answer: No.
>
> Question: Do you have anything to say in your defense?

Answer: I have been falsely implicated. The villagers have wrongly declared me as mad."

15. This is all! The first question was an empty formality and the second question was evidently asked even without looking to the charge as there was no charge of abducting the child from her father's house against that appellant. The whole of section 313 was, thus, squeezed into the third and the last question. We shall advert back to this aspect of the matter later but there is something else in the appellant's statement under section 313 which we cannot fail to notice. There is an allusion to the villagers' calling him, "mad". Unfortunately, this aspect of the matter received absolutely no attention either in investigation or during trial. We may here clarify that on the basis of that isolated fragment of a sentence we are not suggesting that the appellant was of unsound mind. But what we wish to emphasize is that in a case involving death sentence, the court cannot afford to leave any detail, howsoever small and apparently insignificant, fully explored.

16. At the conclusion of the trial, the court found the appellant guilty of committing rape and causing injuries to the child leading to her death and accordingly, by judgment and order dated September 6, 2008/September 9, 2008 passed in Sessions Trial No. 417 of 2006, convicted him under sections 376 and 302 of the Penal Code and awarded him the death penalty.

17. Since the punishment given to the appellant was death, the trial court made a reference under section 366 of the Code of Criminal Procedure which was registered in the High Court as Death Reference No.15/2008.

18. It needs to be stated here that before the trial court, the appellant was unrepresented and, therefore, the court had appointed an advocate to defend him from the panel of lawyers for undefended accused. Further, even after being punished with death, the appellant did not file any appeal before the High

Court and, thus, what the High Court had before it was only the death reference made by the trial court. The High Court in its judgment has brushed aside the fact that no appeal was filed by the appellant, observing as under.

> "The respondent has not preferred an appeal, understandably because he could challenge the findings upon which the orders of conviction and sentence are based as if he had preferred an appeal."

19. In our view, the High Court, attributed to the appellant, knowledge of law and the court procedure for which there does not appear to be any basis. To our mind, the appellant filed no appeal before the High Court either because of the lack of resources or because he did not fully realize the gravity of his position and we are unable to accept the view taken by the High Court for the appellant filing no appeal against the judgment of the trial court giving him the death penalty.

20. Anyway, since there was no one to represent the appellant in the death reference, the High Court requested a senior advocate of that court to assist it in hearing and disposing of the reference and finally by a detailed judgment dated September 17, 2009 accepted the reference and confirmed the death penalty awarded to the appellant.

21. After the High Court judgment, the Registry of the Supreme Court received the jail petition (special leave petition) (death case) on behalf of the appellant through the Superintendent, Central jail, Buxar, Bihar. Though the petition was barred by limitation by 42 days, it was not accompanied by any application for condonation of delay. The jail petition along with copies of the judgments passed by the trial court and the High Court were handed over to the *Amicus Curiae*, appointed as per the instructions contained in Circular, dated December 6, 2008. The *amicus* then drew up and filed a proper special leave petition on which notice was issued and the execution of the appellant was staye h

19, 2010. Leave to appeal was finally granted by order dated September 3, 2012.

22. The *amicus* appointed by the office assisted us to the best of his ability but we also requested Mr. P.S. Patwalia, learned senior counsel, to assist the Court in the hearing of the appeal and Mr. Patwalia rendered admirable assistance to us.

23. Since the appeal involves death penalty, we propose to re-examine all the issues arising in the case ourselves, independently of any findings arrived at by the courts below.

24. It is noted above that the prosecution examined six witnesses in support of its case. Dr. Seema Choudhary (PW.5) is the doctor who was a member of the Medical Board constituted to examine the dead body of Laila Khatoon. She stated before the court the findings of the post-mortem and proved the post-mortem report which was marked as Ex.3. The evidence of the doctor coupled with the post-mortem report leaves no room for doubt that the child was sexually abused and brutalized with utmost cruelty and perversity and the injuries inflicted upon her in course of the sexual abuse caused her death.

25. Birendra Kumar Pandey (PW.6) is the Sub-Inspector of Police of Siwan (Town) P.S. who had taken down the statement made by Mohd. Kamruddin Mian and recorded it as the *fard-e-beyan*. He identified the *fard-e-beyan* which was marked as Ex.4.

26. Mehboob Alam Khan (PW.4) is the Investigating Officer of the case. There is hardly anything significant in his deposition before the court.

27. This leaves us with the statements of PW.1 to PW.3.

28. Suman Kumar Sah (PW.2) is the Informant's neighbour. In his deposition before the court he stated that about two and a half years before the date of the deposition he woke up one

night at about 11- 11.30 for relieving himself, he saw that **a person** carrying a child in his arms was going towards the field of Ram Bachan Mishra. He then went back to sleep. After 10-20 minutes, he saw Mohd. Kamruddin (the Informant), Nasir Mian (PW.1), Gumani Pandit (not examined), Ram Chhabila Prasad (not examined) and others, coming on the road in front of his house. He went out to meet them and then he came to know that someone had taken away a child from Kamruddin's house. **He further said that he did not tell them that a little while ago he had seen someone carrying a child**. However, he also joined them and proceeded with them. He further said that they found a girl lying in the field of Sachidanand Mishra. The girl was bleeding from her private parts. The girl was brought to Siwan where she died. **He added that he did not know who had abducted the girl**. He concluded by saying that he knew the appellant who was present in court. **At that stage he was declared hostile by the prosecution and was subjected to cross-examination.** He denied that he had made any statement before the police that he had seen the appellant taking away the child from the verandah of Kamruddin and further that in course of search he had seen the appellant with the child. The Investigating Officer (PW.4), however, stated before the court that Suman Sah had said before him that he had seen the appellant coming out from the verandah of Kamruddin and in course of the search too had seen the appellant with the victim child.

29. The second witness Nasir Mian (PW.1) stated before the court that about two and a half years earlier, at about 12:00 in the night, Kamruddin got up and found that his daughter was missing from the side of his mother with whom she was sleeping. Kamruddin came to him and then there was an outcry that the child was missing. He, along with Kamruddin and other villagers started searching for the child. In course of the search they went to Suman Sah who told them that the appellant had gone towards east, in the direction of Ram Bachan Mishra's orchard, carrying a child. They then

Mishra's orchard and, lighting the torch there, they saw the appellant running away with a child. The appellant, on seeing them coming after him, flung the child in Ram Bachan Mishra's wheat field. They ran after him but he succeeded in fleeing away. In the wheat field they found Kamruddin's daughter who was about 4 years old. She was injured and was bleeding from her private parts. They brought the child to the Sadar Hospital, Siwan, where she passed away the following morning. The mouth of the child was filled with earth and she was also bleeding from her nose.

30. In cross-examination he stated that the occurrence took place on a winter night which was very cold and there was a dense fog on that night. He also stated that he had produced the torch in the light of which he had identified the appellant before the *darogaji*. The torch, however, was not presented before the court.

31. On an overall scrutiny of the deposition of Nasir Mian we find that he remained quite firm and unshaken on his part of the story.

32. The third witness, Rukhsana Khatoon (PW.3), is the mother of the child. She stated that as the child was found missing and a search started, Suman Kumar Sah one of the neighbours informed that (he had seen) the appellant going away carrying a child. She then stated about the group of villagers going in search of and finding the girl whom the appellant had flung in the field. In the course of cross-examination, however, she said that she was also a part of the group which had gone in search of the child on the fateful night and her mother-in-law was also a part of that group.

33. This is all the oral evidence adduced by the prosecution.

34. We may here broadly divide the prosecution case in two parts. In the first part, soon after the child was found missing,

the appellant was seen close to the house of the Informant, swiftly going eastwards in the direction of Ram Bachan Mishra's fields/orchard carrying in his arms a girl child who was crying. This was at a point when the child was lifted from the verandah of her house and before she was subjected to the sexual abuse. In the second part of the prosecution case the appellant was seen carrying the child and on seeing the group of villagers coming in pursuit of him he threw down the child in the wheat field and fled away. This was at a point after the child was subjected to the sexual abuse and brutality.

35. The first part of the prosecution case, as seen above, did not form part of the charge. Further, this part of the prosecution case was based on the solitary evidence of Suman Sah and as he turned hostile, this part of the case falls to the ground.

36. However, the second part of the case is fully established by the evidences of Nasir Mian (PW.1) and Rukhsana Khatoon (PW.3). What is thus established against the appellant is that he was seen carrying the child soon after she was sexually abused and brutalized in the most cruel manner and on seeing the group of villagers coming after him he threw down the child in the wheat field and ran away. It was, therefore, for him to explain how the child came in his possession and in the absence of any explanation the court would be fully justified in invoking section 114 of the Evidence Act and to hold him guilty of causing the injuries to her private parts leading to her death. No exception can, therefore, be taken to the appellant's conviction under sections 376 and 302 of the Penal Code.

37. But the vital question is that of the sentence to which he should be liable.

38. Mr. Samir Ali Khan, learned counsel appearing for the State of Bihar, strongly submitted that the offence committed by the appellant showed not only extrem at

depravity and urged that this Court while confirming his conviction should also confirm the death penalty awarded to him by the courts below. In support of his submission he relied upon a decision of this Court in *Rajendra Pralhadrao Wasnik* v. *State of Maharashtra*[1]. Like the present appellant, Wasnik was also held guilty of raping and killing a three year old girl and in his case this Court confirmed the death penalty awarded to him. It is true that the case of *Wasnik* relied upon by Mr. Khan is similar to the case in hand insofar as in both cases girls of very tender age were subjected to extreme sexual brutality resulting in their death.

39. There can be no doubt that the offence committed by the appellant is heinous and revolting but the nature of the offence alone may not in all cases be the determining factor for bringing the case in the "rarest of rare" category and to impose the ultimate and irreversible punishment of death. There are certain features of this case which are not to be found in *Wasnik's* case and make the present case distinguishable from the decision relied upon by Mr. Khan.

40. In the earlier part of the judgment we have indicated the deficiencies of investigation. Apart from the post-mortem report there is no medical evidence. There is not a scrap of forensic evidence of any kind. Even the torch in the light of which the appellant is said to have been identified in the cold wintry and foggy night was not produced before the court.

41. We have also recounted the lapses in the trial proceedings in the framing of the charge and especially in the examination of the appellant under section 313 of the Code of Criminal Procedure. On an earlier occasion, in the decision in *Sajjan Sharma v. State of Bihar*[2] (to which, one of us, Aftab Alam J. was a party) this Court had commented upon the careless and the unmindful way in which examination of the

1. (2012) 4 SCC 37.
2. (2011) 2 SCC 206.

accused under section 313 of the Code of Criminal Procedure was generally conducted in the State of Bihar. The present case is another glaring example. It was incumbent upon the trial court to clearly tell the appellant that according to the prosecution evidence, the child soon after being sexually abused in the most cruel manner was seen in his arms and to ask him to explain this very vital circumstance against him. But the section 313 examination made in this case completely falls short of the requirements of the law.

42. We have also seen that the appellant was represented before the trial court by a lawyer appointed by the court from the panel of advocates for undefended accused. Though facing death penalty, he did not file an appeal before the High Court and in this Court his appeal came through the Jail Superintendent. We presume that the appellant did not have sufficient resources to engage a lawyer of his own choice and get himself defended up to his satisfaction.

43. We are very clear that the aforesaid facts and circumstances are also relevant factors to be taken into consideration while confirming the death penalty given to an accused.

44. Mr. Patwalia, senior counsel, invited our attention to the decision of this Court in *Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra*[3]. In Santosh Kumar, after surveying a large number of decisions on death penalty, this Court in Paragraph 56 of this judgment observed as under:

> "56. At this stage, *Bachan Singh* informs the content of the sentencing hearing. The court must play a proactive role to record all relevant information at this stage. Some of the information relating to crime can be culled out from the phase prior to sentencing hearing. This information would include aspects relating to the nature, motive and

3. (2009) 6 SCC 498.

impact of crime, culpability of convict, etc. **Quality of evidence adduced is also a relevant factor.** For instance, extent of reliance on circumstantial evidence or child witness plays an important role in the sentencing analysis. But what is sorely lacking, in most capital sentencing cases, is information relating to characteristics and socio-economic background of the offender. This issue was also raised in the 48th Report of the Law Commission."

(emphasis added)

45. Mr. Patwalia submitted that the above passage from the decision in Santosh Kumar was cited and followed by the Court in *Ramesh v. State of Rajasthan*[4]. In Paragraph 68 of the judgment in Ramesh this Court observed as under:

"68. Practically, the whole law on death sentence was referred to in *Santosh Kumar case*. In SCC para 56, the Court observed: (SCC p. 527)

"*56*. … The court must play a proactive role to record all relevant information at this stage. Some of the information relating to crime can be culled out from the phase prior to sentencing hearing. This information would include aspects relating to the nature, motive and impact of crime, culpability of convict, etc. *Quality of evidence is also a relevant factor. For instance, extent of reliance on circumstantial evidence or child witness plays an important role in the sentencing analysis*. But what is sorely lacking, in most capital sentencing cases, is information relating to characteristics and socio-economic background of the offender. This issue was also raised in the 48th Report of the Law Commission."

(emphasis supplied)

4. (2011) 3 SCC 685.

The Court, thus, has in a guided manner referred to the quality of evidence and has sounded a note of caution that in a case where the reliance is on circumstantial evidence, that factor has to be taken into consideration while awarding the death sentence. This is also a case purely on the circumstantial evidence. We should not be understood to say that in all cases of circumstantial evidence, the death sentence cannot be given."

46. Mr. Patwalia also cited before us the decision of this Court in *Amit v. State of Uttar Pradesh*[5]. In the case of Amit, though this Court upheld his conviction under sections 376 and 302 of the Penal Code finding him guilty of raping and killing a three year old girl, commuted the death penalty awarded to him by the courts below.

47. In the overall of facts of the case and for the reasons discussed above we feel it quite unsafe to confirm the death sentence awarded to the appellant. Hence, while confirming his conviction under sections 376 and 302 of the Penal Code, we set aside the death sentence given to the appellant and substitute it by imprisonment for life that should not be less than actual imprisonment for a period of 18 years. The case of the appellant for any remission under the Code of Criminal Procedure may be considered only after he has served out 18 years of actual imprisonment.

48. In the result, the appeal is dismissed subject to the modification in sentence.

K.K.T. Appeal partly allowed.

5. (2012) 4 SCC 107.

RAM PRAKASH AGARWAL & ANR.
v.
GOPI KRISHAN (DEAD THROUGH L.RS.) & ORS.
(Civil Appeal No. 2798 of 2013)

APRIL 11, 2013

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

Code of Civil Procedure, 1908:

Or. IX r. 13 r/.w. s.151 – Land acquisition proceedings – Land in joint ownership of two persons, acquired – Reference u/s. 18 of Land Acquisition Act for enhancement of compensation by one of the owners – Without impleading the other owner as party – Grant of enhanced compensation by the Reference Court – Application by the other owner u/Or. IX r.13 r/w.s.151 – Maintainability of – Held: Application u/Or. IX r.13 not maintainable by a non-party to the proceedings – However, such relief can be given in exercise of inherent powers u/s. 151. if the order has been obtained by playing fraud upon the Court – But, the same is not maintainable if the fraud is committed upon the party – In such eventuality, the aggrieved party can seek remedy by filing independent suit – In the instant case, the Reference Court could not have permitted the application u/Or. IX, r.13 – It could not have permitted the application even in exercise of powers u/s. 151, because in the instant case, the fraud was played upon the party and not the Court – Land Acquisition Act, 1894.

s.151 – Inherent powers of the Court – Nature and scope of – Discussed.

Land Acquisition Act, 1894 – Reference Court – Jurisdiction of – A person aggrieved can maintain an application for reference u/ss. 18 or 30, but cannot make an

application for impleadment or apportionment before the Reference Court.

Respondent No.1 and predecessor-in-interest of the appellants were the joint owners of the land in question. The land was acquired under Land Acquisition Act. Respondent No.1 approached the authorities concerned to claim the compensation amount. In that case, predecessor-in-interest of the appellants was a party and after her death her legal heirs were brought on record. In the meantime, appellants filed a Reference u/s. 18 of the Acquisition Act, for enhancement of the compensation in respect of her half share. In that case, respondent No.1 was not made a party. The Tribunal held that the appellants were entitled to receive the compensation amount, including the enhanced amount. Respondent No.1, thereafter, filed an application under Order IX r. 13 r/w. s.151 CPC for the purpose of setting aside the ex-parte award. The Tribunal rejected the application. Respondent No.1 preferred writ petition, challenging the order of the Tribunal and the same was allowed by the High Court. Hence the present appeals.

The questions for consideration before the Court were whether an application under Or. IX r.13 CPC is maintainable by a person, who was not party to the suit and if such application is not maintainable, whether such relief can be granted in exercise of the inherent powers u/s. 151 CPC; and whether the provisions of CPC are applicable to the Land acquisition proceedings.

Allowing the appeal, the Court

HELD: 1. An application under Order IX Rule 13 CPC cannot be filed by a person who was not initially a party to the proceedings. In exceptional circumstances, the Court may exercise its inherent powers, apart from Order IX CPC to set aside an *ex parte* [illegible]e

decree passed due to the non-appearance of the counsel of a party, owing to the fact that the party was not at fault, can be set aside in an appeal preferred against it. So is the case, where the absence of a defendant is caused on account of a mistake of the Court. An application under Section 151 CPC will be maintainable, in the event that an *ex parte* order has been obtained by fraud upon the court or by collusion. The provisions of Order IX CPC may not be attracted, and in such a case, the Court may either restore the case, or set aside the *ex parte* order in the exercise of its inherent powers. [Paras 9 and 20(i)] [147-A; 140-C-E]

Smt. Santosh Chopra vs. Teja Singh and Anr. **AIR 1977 Del 110;** *Smt. Suraj Kumari vs. District Judge, Mirzapur and Ors.* **AIR 1991 All 75 – relied on.**

2. Section 151 CPC is not a substantive provision that confers the right to get any relief of any kind. It is a mere procedural provision which enables a party to have the proceedings of a pending suit conducted in a manner that is consistent with justice and equity. The court can do justice between the parties before it. Similarly, inherent powers cannot be used to re-open settled matters. The inherent powers of the Court must, to that extent, be regarded as abrogated by the Legislature. A provision barring the exercise of inherent power need not be express, it may even be implied. Inherent power cannot be used to restrain the execution of a decree at the instance of one who was not a party to suit. Such power is absolutely essential for securing the ends of justice, and to overcome the failure of justice. The Court under Section 151 CPC may adopt any procedure to do justice, unless the same is expressly prohibited. [Para 8] [139-B-D]

3. The consolidation of suits has not been provided for under any of the provisions of CPC, unless there is a

State amendment in this regard. Thus, the same can be done in exercise of the powers under Section 151 CPC, where a common question of fact and law arise therein, and the same must also not be a case of misjoinder of parties. The non-consolidation of two or more suits is likely to lead to a multiplicity of suits being filed, leaving the door open for conflicting decisions on the same issue, which may be common to the two or more suits that are sought to be consolidated. Non-consolidation may, therefore, prejudice a party, or result in the failure of justice. Inherent powers may be exercised *ex debito justitiae* in those cases, where there is no express provision in CPC. The said powers cannot be exercised in contravention of, or in conflict with, or upon ignoring express and specific provisions of the law. [Para 8] [139-E-H]

B.V. Patankar and Ors. vs. C.G. Sastry **AIR 1961 SC 272: 1961 SCR 91;** *Ram Chandra Singh vs. Savitri Devi and Ors.* **AIR 2004 SC 4096;** *Jet Plywood Pvt. Ltd. vs. Madhukar Nowlakha* **AIR 2006 SC 1260: 2006 (2) SCR 761;** *State Bank of India vs. Ranjan Chemicals Ltd. and Anr.* **(2007) 1 SCC 97: 2006 (7) Suppl. SCR 145;** *State of Haryana and Ors. vs. Babu Singh* **(2008) 2 SCC 85;** *Durgesh Sharma vs. Jayshree* **AIR 2009 SC 285: 2008 (13) SCR 1056;** *Nahar Industrial Enterprises Ltd. vs. H.S.B.C. etc. etc.* **(2009) 8 SCC 646: 2009 (12) SCR 54;** *Rajendra Prasad Gupta vs. Prakash Chandra Mishra and Ors.* **AIR 2011 SC 1137: 2011 (1) SCR 321 – relied on.**

4.1. Where a Court employs a procedure to do something that it never intended to do, and there is miscarriage of justice, or an abuse of the process of Court, the injustice so done must be remedied, in accordance with the principle of *actus curia neminem gravabit* - an act of the Court shall prejudice no person. [Para 9] [140-F-G]

4.2. The inherent powers enshrined under Section 151 CPC can be exercised only where no remedy has been provided for in any other provision of the CPC. In the event that a party has obtained a decree or order by playing a fraud upon the court, or where an order has been passed by a mistake of the court, the court may be justified in rectifying such mistake, either by recalling the said order, or by passing any other appropriate order. However, inherent powers cannot be used in conflict of any other existing provision, or in case a remedy has been provided for by any other provision of the CPC. Moreover, in the event that a fraud has been played upon a party, the same may not be a case where inherent powers can be exercised. [Para 13] [143-C-E]

5. In the event that an order has been obtained from the Court by playing fraud upon it, it is always open to the Court to recall the said order on the application of the person aggrieved, and such power can also be exercised by the appellate court. But where the fraud has been committed upon a party, the court cannot investigate such a factual issue, and in such an eventuality, a party has the right to get the said judgment or order set aside, by filing an independent suit. [Paras 20(iii) and (iv)] [147-C-D]

6. In the instant case, the proceedings stood concluded so far as the court of first instance is concerned, and that the respondent was not the party before the said court. Permitting an application under Order IX Rule 13 CPC by a non-party, would amount to adding a party to the case, which is provided for under Order I Rule 10 CPC, or setting aside the *ex-parte* judgment and decree, i.e. seeking a declaration that the decree is null and void for any reason, which can be sought independently by such a party. In the instant case, as the fraud, if any, as alleged, has been committed upon a party, and not upon the court, the same is not a case

where Section 151 CPC could be resorted to by the court, to rectify a mistake, if any was made. [Para 16] [144-F-H; 145-A]

May George vs. Special Tahsildar and Ors. **(2010) 13 SCC 98: 2010 (7) SCR 204 – relied on.**

7. A person who has not made an application before the Land Acquisition Collector, for making a reference under Section 18 or 30 of the Land Acquisition Act cannot get himself impleaded directly before the Reference Court. A person aggrieved may maintain an application before the Land Acquisition Collector for reference under Section 18 or 30 of the Land Acquisition Act but cannot make an application for impleadment or apportionment before the Reference Court. [Paras 19 and 20(v)] [146-G; 147-E]

Ajjam Linganna and Ors. vs. Land Acquisition Officer, RDO, Nizamabad and Ors. **(2002) 9 SCC 426;** *Prayag Upnivesh Awas Evam Nirman Sahkari Samiti Ltd. vs. Allahabad Vikas Pradhikaran and Anr.* **(2003) 5 SCC 561: 2003 (3) SCR 567;** *Parmatha Nath Malik Bahadur vs. Secretary of State* **AIR 1930 PC 64:** *Mohammed Hasnuddin vs. The State of Maharashtra* **AIR 1979 SC 404: 1979 (2) SCR 265;** *Kothamasu Kanakarathamma and Ors. vs. State of Andhra Pradesh and Ors.* **AIR 1965 SC304: 1964 SCR 294 – relied on.**

Dulhim Suga Kuer and Anr. vs. Deorani Kuer and Ors. **AIR 1952 Pat 72;** *Surajdeo vs. Board of Revenue U.P. Allahabad and Ors.***AIR 1982 All 23;** *Manohar Lal Chopra vs. Rai Bahadur Rao Raja Seth Hiralal* **AIR 1962 SC 527: 1962 Suppl. SCR 450;** *Indian Bank vs. M/s. Satyam Fibres (India) Pvt. Ltd.* **AIR 1996 SC 2592: 1996 (4) Suppl. SCR 464;** *Dadu Dayal Mahasabha vs. Sukhdev Arya and Anr.* **(1990) 1 SCC 189: 1989 (2) Suppl. SCR 233;** *Dr. G.H. Grant vs. State of Bihar* **AIR 1966 SC**

Shyamali Das vs. Illa Chowdhry and C

2006 (8) Suppl. SCR 310 – referred to.

Case Law Reference:

AIR 1977 Del 110	**relied on**	**Para 4**
AIR 1991 All 75	**relied on**	**Para 5**
AIR 1952 Pat 72	**referred to**	**Para 6**
AIR 1982 All 23	**referred to**	**Para 7**
1961 SCR 591	**relied on**	**Para 8**
2004 SC 4096	**relied on**	**Para 8**
2006 (2) SCR 761	**relied on**	**Para 8**
2006 (7) Suppl. SCR 145	**relied on**	**Para 8**
(2008) 2 SCC 85	**relied on**	**Para 8**
2008 (13) SCR 1056	**relied on**	**Para 8**
2009 (12) SCR 54	**relied on**	**Para 8**
2011 (1) SCR 321	**relied on**	**Para 8**
1962 Suppl. SCR 450	**referred to**	**Para 10**
1996 (4) Suppl. SCR 464	**referred to**	**Para 11**
1989 (2) Suppl. SCR 233	**referred to**	**Para 12**
2010 (7) SCR 204	**relied on**	**Para 17**
1965 SCR 576	**referred to**	**Para 17**
2006 (8) Suppl. SCR 310	**referred to**	**Para 18**
(2002) 9 SCC 426	**relied on**	**Para 19**
2003 (3) SCR 567	**relied on**	**Para 19**
AIR 1930 PC 64	**relied on**	**Para 19**
1979 (2) SCR 265	**relied on**	**Para 19**

1964 SCR 294 relied on Para 19

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2798 of 2013.

From the Judgment and Order dated 20.10.2011 of the High Court of Judicature at Allahabad, Lucknow Bench, Lucknow in Writ Petition No. 764 of 2002 (MS).

WITH

C.A. No. 2799 of 2013.

Pradeep Kant, Rakesh Dwivedi, Deepak Goel, Vipin Kumar, E.C. Agrawala, Divyansu Sahay, Radhika Gautam, Tara Chandra Sharma, Neelam Sharma, Rupesh Kumar, Arvind Kumar, Laxmi Arvind, Poonam Prasad, Pradeep Kumar Mathur, T. Anamika for the appearing parties.

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 20.10.2011, passed by the High Court of Allahabad, (Lucknow Bench) in Writ Petition No.764 of 2002 (MS), by way of which, the High Court has set aside the order of the trial court dated 20.2.2002 by which it had rejected the application under Order IX Rule 13 read with Section 151 of the Code of Civil Procedure, 1908 (hereinafter referred to as the 'CPC'), for setting aside the judgment and decree dated 22.5.2000 in Misc. Case No. 66 of 1999.

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

A. The dispute pertains to the ownership of shop no.53/11 (old number) corresponding to its new number, i.e. 53/8, Nayayaganj, Kanpur Nagar. Janki Bibi (Ist) daughter of Har Dayal, was married to one Durga Prasad, son of Dina Nath. Radhey Shyam was the adopted son of Durga Prasad, whose son Shyam Sunder was married to Ja[illegible]n

Sunder died in the year 1914. Thus, Radhey Shyam created a life interest in the property in favour of Janki Bibi (2nd), by way of an oral Will, which further provided that she would have the right to adopt a son only with the consent of Mohan Lal, the grand son of Har Dayal. Gopi Krishan, the great grand son of Mohan Lal, claims to have been adopted by Janki Bibi (2nd), with the consent of Mohan Lal, and as regards the same, a registered document was also prepared.

B. Gopi Krishan filed Regular Suit No.45 of 1956 against Smt. Janki Bibi (2nd), in the Court of the Civil Judge Mohanlal Ganj, Lucknow, seeking the relief of declaration, stating that Janki Bibi was only a life estate holder in respect of the properties shown in Schedule 'A', and that further, she was not entitled to receive the compensation or rehabilitation grant bonds with respect to the village Nawai Perg., Jhalotar Ajgain, Tehsil Hasangunj, District Unnao. He stated all this, claiming himself to be her adopted son.

C. Janki Bibi (2nd) contested the suit, denying the aforesaid adoption. However, the suit was decreed vide judgment and decree dated 23.4.1958, holding that while Smt. Janki Bibi (2nd) was in fact the life estate holder of Radhey Shyam's property, she was also entitled to receive the said compensation in respect of the property in question herein.

D. That the property bearing no.264/1-53 admeasuring 17 bighas, 2 biswas, 2 biswansi and 19 kachwansi to the extent of half share situated in village Suppa Rao, Pargana Tehsil, District Lucknow, was owned by Radhey Shyam. The aforesaid suit land was acquired by the State Government for Uttar Pradesh Avas Evam Vikas Parishad (hereinafter referred to as, the 'Parishad'), for the development of the Talkatora Road Scheme, Lucknow, vide notification under Section 4 of the Land Acquisition Act, 1894 (hereinafter referred to as `the Act, 1894') dated 20.10.1962. The possession of the said land was taken on 30.12.1971, after completion of certain formalities.

E. Gopi Krishan approached the Nagar Mahapalika Tribunal, constituted under the Municipal Corporation Act, 1959, under Sections 18/30 of the Act, 1894, by filing Misc. Case No.269 of 1983, claiming compensation in respect of the properties acquired by the State of U.P., on the ground that he possessed the legal right to do so, as a vested remainder, under the judgment and decree dated 23.4.1958. In the said case, Smt. Janki Bibi (2nd) was a party and after her death, Madhuri Saran and his legal heirs were also brought on record, pursuant to the Will of Janki Bibi as a legatee.

F. In the meanwhile, Madhuri Saran, predecessor in interest of the present appellants, filed a Reference under Section 18 of the Act, 1894 which was registered as Miscellaneous Case No.66 of 1999, for enhancement of compensation in respect of half share in the aforesaid suit land. During the pendency of the aforesaid proceedings, Madhuri Saran died and his legal heirs were substituted. Gopi Krishan, respondent no.1 was not impleaded as a party. The Tribunal vide judgment and order dated 22.5.2000 held that the opposite parties were entitled to receive compensation (including enhancement) relating to the aforesaid property. In pursuance of the said Reference award, the appellants applied for withdrawal of the enhanced compensation. When respondent no.1 learnt about the order dated 22.5.2000, he filed an application under Order IX Rule 13 read with Section 151 CPC, for the purpose of setting aside the said award dated 22.5.2000. The Tribunal, vide order dated 20.2.2002, rejected the said application, on the ground that an application under Order IX Rule 13 can only be filed by a person who was a party to the proceedings in which such an order was passed, and that such an application was not maintainable at the behest of a stranger.

G. Aggrieved, the respondents preferred a writ petition before the High Court, which has been allowed by the Court holding, that while an application under [illegible]s

not maintainable, the said award should have been set aside in exercise of its powers under Section 151 CPC, as the same was required to be done, in order to do substantial justice between the parties. Hence, these appeals.

3. We have heard Shri S. Naphade and Shri Pradip Kant, learned counsel appearing for the appellants and Shri Rakesh Dwivedi, learned senior counsel appearing for the respondents, as regards the issues, particularly with respect to the extent that the provisions of the CPC are applicable to these proceedings, and further, in relation to whether an application under Order IX Rule 13 CPC can be maintained by a person who was never a party to the suit, and lastly, in the event that such an application is not maintainable, whether such relief can be granted in exercise of the inherent powers under Section 151 CPC.

4. In *Smt. Santosh Chopra v. Teja Singh & Anr.,* AIR 1977 Del 110, the Delhi High Court dealt with the issue with respect to whether a non-party/stranger has any *locus standi* to move an application under Order IX Rule 13 CPC, to get an *ex-parte* decree set aside, he would be adversely affected by such decree. In the said case, the Rent Controller had held, that it would be patently unjust to bar any remedy for such a landlord, since the applicant was the assignee of the rights of the previous landlord, therefore, he could apply for setting aside of the decree as such. The Delhi High Court came to the conclusion that the statutory provisions of Order IX Rule 13 CPC itself, refer to the defendant in an action, who alone can move an application under Order IX Rule 13 CPC. Therefore, a person who is not a party, despite the fact that he might be interested in the suit, is not entitled to move an application under the rule. In fact he had no *locus standi* to have the order set aside. Such an order could not be passed even under Section 151 CPC. In view thereof, the order passed by the Rent Controller was reversed.

5. In *Smt. Suraj Kumari v. District Judge, Mirzapur & Ors.,* AIR 1991 All 75, the Allahabad High Court dealt with a similar issue, and rejected the contention that at the instance of a stranger, a decree could be reopened in an application under Order IX Rule 13 read with Section 151 CPC, even if such decree is based on a compromise, or has been obtained by practising fraud upon the court, to the prejudice of the said stranger.

6. However, in *Dulhim Suga Kuer & Anr. v. Deorani Kuer & Ors.,* AIR 1952 Pat 72, the Patna High Court dealt with the provisions of Section 146 CPC, which contemplate a change of title after the decree has been awarded and held that, the true test is whether the transferee is affected by the order or decree in question. Where, the transfer is subsequent to the ex parte decree, the transferee would certainly be interested in setting aside the ex parte decree.

7. In *Surajdeo v. Board of Revenue U.P. Allahabad & Ors.,* AIR 1982 All 23, the Allahabad High Court dealt with an issue where an application was filed by a non-party, under Order IX Rule 13 CPC to set aside the ex parte decree. The Court held:

> *"the petitioner was vitally interested in the decree passed in favour of the contesting opposite parties which he wants to be vacated. If the decrees in favour of the contesting opposite parties remain intact, the petitioner's right of irrigating his fields from the disputed land shall be vitally affected. In such a circumstance even if the petitioner is assumed to have no locus standi to move the application for setting aside the ex parte decrees in favour of the contesting opposite parties, it cannot be said that the trial court had no jurisdiction to set aside the* ***ex parte decrees which were against the provisions of law and were the result of collusion and fraud practiced by the plaintiff and the defendants in the suits*** *in which decrees recogni[illegible]e*

contesting opposite parties in the disputed land as Sirdar were passed."

(Emphasis added)

8. Section 151 CPC is not a substantive provision that confers the right to get any relief of any kind. It is a mere procedural provision which enables a party to have the proceedings of a **pending suit** conducted in a manner that is consistent with justice and equity. The court can do justice between the **parties before it**. Similarly, inherent powers cannot be used to re-open settled matters. The inherent powers of the Court must, to that extent, be regarded as abrogated by the Legislature. A provision barring the exercise of inherent power need not be express, it may even be implied. Inherent power cannot be used to restrain the execution of a decree at the instance of one who was not a party to suit. Such power is absolutely essential for securing the ends of justice, and to overcome the failure of justice. The Court under Section 151 CPC may adopt any procedure to do justice, unless the same is expressly prohibited.

The consolidation of suits has not been provided for under any of the provisions of the Code, unless there is a State amendment in this regard. Thus, the same can be done in exercise of the powers under Section 151 CPC, where a common question of fact and law arise therein, and the same must also not be a case of misjoinder of parties. The non-consolidation of two or more suits is likely to lead to a multiplicity of suits being filed, leaving the door open for conflicting decisions on the same issue, which may be common to the two or more suits that are sought to be consolidated. Non-consolidation may, therefore, prejudice a party, or result in the failure of justice. Inherent powers may be exercised *ex debito justitiae* in those cases, where there is no express provision in CPC. The said powers cannot be exercised in contravention of, or in conflict with, or upon ignoring express and specific provisions of the law. (See: *B.V. Patankar & Ors. v. C.G. Sastry,*

AIR 1961 SC 272; *Ram Chandra Singh v. Savitri Devi & Ors.,* AIR 2004 SC 4096; *Jet Plywood Pvt. Ltd. v. Madhukar Nowlakha,* AIR 2006 SC 1260; *State Bank of India v. Ranjan Chemicals Ltd. & Anr.,* (2007) 1 SCC 97; *State of Haryana & Ors. v. Babu Singh,* (2008) 2 SCC 85; *Durgesh Sharma v. Jayshree,* AIR 2009 SC 285; *Nahar Industrial Enterprises Ltd. v. H.S.B.C. etc. etc.,* (2009) 8 SCC 646; and *Rajendra Prasad Gupta v. Prakash Chandra Mishra & Ors.,* AIR 2011 SC 1137).

9. In exceptional circumstances, the Court may exercise its inherent powers, apart from Order IX CPC to set aside an *ex parte* decree.

An *ex-parte* decree passed due to the non appearance of the counsel of a party, owing to the fact that the party was not at fault, can be set aside in an appeal preferred against it. So is the case, where the absence of a defendant is caused on account of a mistake of the Court. An application under Section 151 CPC will be maintainable, in the event that an *ex parte* order has been obtained by fraud upon the court or by collusion. The provisions of Order IX CPC may not be attracted, and in such a case the Court may either restore the case, or set aside the *ex parte* order in the exercise of its inherent powers.

There may be an order of dismissal of a suit for default of appearance of the plaintiff, who was in fact dead at the time that the order was passed. Thus, where a Court employs a procedure to do something that it never intended to do, and there is miscarriage of justice, or an abuse of the process of Court, the injustice so done must be remedied, in accordance with the principle of *actus curia neminem gravabit* - an act of the Court shall prejudice no person.

10. In *Manohar Lal Chopra v. Rai Bahadur Rao Raja Seth Hiralal,* AIR 1962 SC 527, this Court examined the issue with respect to whether, the court is competent to grant interim

relief under Section 151 CPC, when the same cannot be granted under Order XXXIX Rules 1 & 2 CPC, and held :

> *"There is difference of opinion between the High Courts on this point. One view is that a Court cannot issue an order of temporary injunction if the circumstances do not fall within the provisions of Order 39 of the Code…… the other view is that a Court can issue an interim injunction under circumstances which are not covered by Order 39 of the Code, if the Court is of opinion that the interests of justice require the issue of such interim injunction;……**We are of opinion that the latter view is correct and that the Court have inherent jurisdiction to issue temporary injunction in circumstances which are not covered by the provisions of Order 39, C.P.C.**, there is no expression in Section 94 which expressly prohibits the issue of temporary injunction in circumstances not covered by Order 39 or by any rule made under the Code. It is well-settled that the provisions of the Code are not exhaustive, for the simple reason that the Legislature is incapable of contemplating all the possible circumstances which may arise in future litigation and consequently for providing the procedure for them. The effect of the expression ' if it is so prescribed' is only this that **when the rule prescribes the circumstances** in which the temporary injunction can be issued, ordinarily the **Court is not to use its inherent powers to make the necessary orders in the interests of justice**, but is merely to see whether the circumstances of the case bring it within the prescribed rule. If the provisions of Section 94 were not there in the Code, the Court could still issue temporary injunction, but it could do that in the exercise of its inherent jurisdiction. No party has a right to inherent jurisdiction **only when it considers it absolutely necessary for the ends of justice to do so.** It is in the incidence of the exercise of the power of the Court to issue temporary injunction that*

> *the provisions of Section 94 of the Code have their effect and not in taking away the right of the Court to exercise the inherent power."*

(Emphasis added)

11. In *Indian Bank v. M/s. Satyam Fibres (India) Pvt. Ltd.,* AIR 1996 SC 2592, this Court dealt with a similar case and observed, that fraud not only affects the solemnity, regularity and orderliness of the proceedings of the court, but that it also amounts to abuse of the process of court. The Court further held, that "the judiciary in India also possesses inherent powers, specially under Section 151 CPC, to recall its judgment or order if the same has been obtained by **fraud upon the court**. In the case of fraud upon a party to the suit or proceedings, the court may direct the affected party to file a separate suit for setting aside the decree obtained by fraud."

12. Similarly, in *Dadu Dayal Mahasabha v. Sukhdev Arya & Anr.,* (1990) 1 SCC 189, this Court examined a issue as to whether the trial court has the jurisdiction to cancel an order permitting the withdrawal of the suit under its inherent powers, if it is ultimately satisfied that the suit has been withdrawn by a person who is not entitled to withdraw the same. The court held that "the position is well established **that a court has the inherent power to correct its own proceedings** when it is satisfied that in passing a particular order it was misled by one of the parties". However, the Court pointed out that there is a distinction between cases where fraud has been practised upon the court and where fraud has been practised upon a party, while observing as under:

> *"If a party makes an application before the court for setting aside the decree on the ground that he did not give his consent, the court has the power and duty to **investigate the matter** and to set aside the decree if it is satisfied that the consent as a fact was lacking and **the court was induced to pass the d**[illegible]**nt***

representation *made to it that the party had actually consented to it. However, if the case of the party challenging the decree is that he was in fact a party to the compromise petition filed in the case but his consent has been procured by fraud,* ***the court cannot investigate*** *the matter in the exercise of its inherent power, and the only remedy to the party is to institute a suit".* (Emphasis added)

13. In view of the above, the law on this issue stands crystalised to the effect that the inherent powers enshrined under Section 151 CPC can be exercised only where no remedy has been provided for in any other provision of the CPC. In the event that a party has obtained a decree or order by playing a fraud upon the court, or where an order has been passed by a mistake of the court, the court may be justified in rectifying such mistake, either by recalling the said order, or by passing any other appropriate order. However, inherent powers cannot be used in conflict of any other existing provision, or in case a remedy has been provided for by any other provision of the CPC. Moreoveer, in the event that a fraud has been played upon a party, the same may not be a case where inherent powers can be exercised.

14. Be that as it may, the Tribunal decided the case of compensation filed by the appellants on 22.5.2000, and the application filed by the respondents under Order IX Rule 13 CPC was dismissed vide order dated 20.2.2002. The respondents challenged the said order dated 20.2.2002, by filing Writ Petition No. 764 of 2002 in the High Court, and the same stood dismissed in default. The same was restored, heard and disposed of vide order dated 12.12.2005, by way of which the said Writ Petition was dismissed, in view of the alternative remedy of appeal. Such an order was passed in view of the fact that the order passed by the Tribunal was appealable under Section 381 of the U.P. Nagar MahaPalika Adhiniyam, 1959, to the High Court. The respondents filed an

appeal to recall the said order, the court heard such appeal on merits. However, the said application for recall was dismissed in default vide order dated 12.1.2009. A second application for recall was then filed, which was also dismissed in default vide order dated 15.3.2010. A third application was finally filed, and has been allowed vide impugned order.

15. In fact, while passing its final order, the High Court was convinced that the appellants had committed a fraud upon the court by not disclosing before the Tribunal, that at a prior stage, the matter had been adjudicated upon, with respect to the entitlement of the respondents, and also in respect of some other properties therein, the High Court had made certain observations against the respondents, and that the matter had ultimately come before this Court in Civil Appeal No. 3871 of 1990, wherein this Court had passed the following order:

> "Having considered the entire matter, we are of the view that special leave petition is fit to be dismissed. However, there may be some mis-apprehension with respect to certain observations made in the impugned judgment as having finally decided the adjudicated issues between the parties and we, therefore make it clear that those observations shall not be treated to have finally adjudicated upon any of the disputed points. The appeal is disposed of accordingly."

16. In the instant case, we have to bear in mind that the proceedings stood concluded so far as the court of first instance is concerned, and that the respondent was not the party before the said court. Permitting an application under Order IX Rule 13 CPC by a non-party, would amount to adding a party to the case, which is provided for under Order I Rule 10 CPC, or setting aside the *ex-parte* judgment and decree, i.e. seeking a declaration that the decree is null and void for any reason, which can be sought independently by such a party. In the instant case, as the fraud, if any, as alleged, has been committed **upon a party,** and not upon [illegible]s

not a case where Section 151 CPC could be resorted to by the court, to rectify a mistake, if any was made.

17. The matter basically relates to the apportionment of the amount of compensation received for the land acquired. This Court, in *May George v. Special Tahsildar & Ors.,* (2010) 13 SCC 98, has held, that a notice under Section 9 of the Act, 1894, is not mandatory, and that it would not by any means vitiate the land acquisition proceedings, for the reason that ultimately, the person interested can claim compensation for the acquired land. In the event that any other person has withdrawn the amount of compensation, the "person interested", if so aggrieved, has a right either to resort to the proceedings under the provision of Act 1894, or he may file a suit for the recovery of his share. While deciding the said case, reliance has been placed upon a large number of judgments of this Court, including *Dr. G.H. Grant v. State of Bihar,* AIR 1966 SC 237.

18. The said case is required to be examined from another angle. Undoubtedly, the respondents did not make any application either under Section 18 or Section 30 of the Act, 1894 to the Land Acquisition Collector. The jurisdiction of the Reference Court, vis-à-vis "persons interested" has been explained by this Court in *Shyamali Das v. Illa Chowdhry & Ors.,* AIR 2007 SC 215, holding that the Reference Court does not have the jurisdiction to entertain any application of *pro interesse suo,* or in the nature thereof. The Court held as under:

> *"The Act is a complete code by itself. It provides for remedies not only to those whose lands have been acquired but also to those who claim the awarded amount or any apportionment thereof. A Land Acquisition Judge derives its jurisdiction from the order of reference. It is bound thereby. His jurisdiction is to determine adequacy and otherwise of the amount of compensation paid under the award made by the Collector". Thus holding that, "It is not within his domain to entertain any application of pro interesse suo or in the nature thereof."*

The plea of the appellant therein, stating that the title dispute be directed to be decided by the Reference Court itself, since the appellant was not a person interested in the award, was rejected by this Court, observing that the Reference Court does not have the power to enter into an application under Order I Rule 10 CPC.

19. In *Ajjam Linganna & Ors. v. Land Acquisition Officer, RDO, Nizamabad & Ors.,* (2002) 9 SCC 426, this court made observations to the effect that it is not open to the parties to apply directly to the Reference Court for impleadment, and to seek enhancement under Section 18 for compensation.

In *Prayag Upnivesh Awas Evam Nirman Sahkari Samiti Ltd. v. Allahabad Vikas Pradhikaran & Anr.,* (2003) 5 SCC 561, this Court held as under:

> *"It is well established that the Reference Court gets jurisdiction only if the matter is referred to it under Section 18 or Section 30 of the Act by the Land Acquisition Officer and if the Civil Court has got the jurisdiction and authority only to decide the objections referred to it. The Reference Court cannot widen the scope of its jurisdiction or decide matters which are not referred to it."*

While deciding the said case, the Court placed reliance on the judgments in *Parmatha Nath Malik Bahadur v. Secretary of State,* AIR 1930 PC 64; and *Mohammed Hasnuddin v. The State of Maharashtra,* AIR 1979 SC 404.

(See also: *Kothamasu Kanakarathamma & Ors. v. State of Andhra Pradesh & Ors.,* AIR 1965 SC304)

It is evident from the above, that a person who has not made an application before the Land Acquisition Collector, for making a reference under Section 18 or 30 of the Act, 1894, cannot get himself impleaded directly before the Reference Court.

20. In view of the above, the legal issues involved herein, can be summarised as under:-

(i) An application under Order IX Rule 13 CPC cannot be filed by a person who was not initially a party to the proceedings;

(ii) Inherent powers under Section 151 CPC can be exercised by the Court to redress only such a grievance, for which no remedy is provided for under the CPC;

(iii) In the event that an order has been obtained from the Court by playing fraud upon it, it is always open to the Court to recall the said order on the application of the person aggrieved, and such power can also be exercised by the appellate court;

(iv) Where the fraud has been committed upon a party, the court cannot investigate such a factual issue, and in such an eventuality, a party has the right to get the said judgment or order set aside, by filing an independent suit.

(v) A person aggrieved may maintain an application before the Land Acquisition Collector for reference under Section 18 or 30 of the Act, 1894, but cannot make an application for impleadment or apportionment before the Reference Court.

21. The instant case has been examined in light of the aforesaid legal propositions. We are of the considered opinion that the impugned judgment and order of the High Court cannot be sustained in the eyes of law, and is hence liable to be set aside.

In view of the above, the appeals succeed and are allowed. The judgment and order impugned herein are set aside. The respondents are at liberty to seek appropriate remedy, by resorting to appropriate proceedings, as permissible in law.

K.K.T. Appeals allowed.

ASHRAFI AND ORS.

v.

STATE OF HARYANA AND ORS.

(Civil Appeal Nos. 3279-3287 of 2013)

APRIL 11, 2013

[ALTAMAS KABIR, CJI. AND J. CHELAMESWAR, J.]

Land Acquisition Act, 1894 – s.23 – Compensation – Determination of, on basis of market value of comparable lands – Passage of time between different acquisitions – Held: On facts, compensation accordingly enhanced from Rs.280/- per sq. yard to Rs.325/- per sq. yard.

Land Acquisition Act, 1894 – s.23 – Compensation – Land in question falling within municipal limits – Deduction towards development costs – Held: On facts, deduction of 40% unjustified – Cut of 331/3 per cent more realistic.

Land Acquisition Act, 1894 – s.23 – Compensation – Land under acquisition already developed to some extent – Held: On facts, cut of 50% on the value is excessive – At best a standard cut of 1/3rd would have been sufficient.

Land Acquisition Act, 1894 – s.23 – Compensation – Land under acquisition already within developed municipal limits – Held: On facts, cut of 60%, as imposed by the High Court, inappropriate – Cut of one-third the value would be appropriate.

Land Acquisition Act, 1894 – s.23 – Compensation – Land under acquisition divided into belts – Held: On facts, having regard to the potentiality of the acquired lands, the belting system should not have been resorted to.

Land Acquisition Act, 1894 – s.23 – Compensation – Land under acquisition having substantial potential – Sharp

in value of lands in recent times – Held: On facts, although, High Court had allowed a yearly increase of 12%, taking 1983 as a base-year, such increase was not commensurate with the yearly escalation of prices and that was required to be calculated on a cumulative basis – Compensation directed to be reassessed by applying the cumulative rate of increase at the rate of 12% per annum with the base year being the date of the Notification u/s.4 of the Act, together with the statutory benefits.

Common question relating to claims for enhancement of compensation in respect of lands acquired under the Land Acquisition Act, 1894, in several States, such as, Punjab, Haryana, Madhya Pradesh, Andhra Pradesh and the Union Territory of Chandigarh, arose for consideration in the present matters.

Since the majority of cases are from the States of Punjab & Haryana, this Court heard the matters relating to the State of Haryana before the other matters and for the said purpose, also selected some specific matters, the decision wherein would also govern the rest.

Disposing of all the matters, the Court

HELD:1. In Smt. Ashrafi's case arising out of RFA No.99 of 1997 decided by the Punjab & Haryana High Court on 21st May, 2007, along with several other similar appeals, it was agitated on behalf of the appellants that the compensation fixed by the High Court was on the lower side in view of the fact that in respect of lands acquired under the same Notification dated 20th August, 1989, the District Court had fixed the market value at Rs.328.50 per sq. yard and also at Rs.337/- per sq. yard, in respect of the lands acquired under a Notification issued in July, 1987. In Smt. Kamlesh Kumari's case, in which the facts were the same, as that in Smt. Ashrafi's case, the Reference Court awarded Rs.325/- per sq. yard.

In appeal, the said amount was increased to Rs.280/- per sq. yard. Even the aforesaid enhancement does not appear to have reflected the proper valuation of the lands acquired since soon, thereafter, in Pritam Singh's case, compensation was awarded at Rs.435/- per sq. yard and also at the rate of Rs.392.50 per sq. yard in respect of the lands acquired under Notification dated 5th June, 1992. The enhancement of the compensation from Rs.280/- per sq. yard to Rs.435/- per sq. yard and Rs.392.50 per sq. yard was probably occasioned by the fact that while the lands were acquired under the Notification issued in July, 1987, the comparative rate relating to the same property was Rs.392.50 per sq. yard. In view of the passage of time between the different acquisitions, a just compensation would be at the rate of Rs.325/- per sq. yard instead of Rs.280/- per sq. yard. Similar is the case of Smt. Kamlesh Kumari, where the facts were similar to those in Ashrafi's case. The just compensation in the lands in Smt. Kamlesh Kumari's case also deserves to be increased to Rs.325/- per sq. yard, which had been the amount awarded by the Reference Court. In Sailak Ram's case, different amounts were assessed as compensation in respect of the lands comprised in village Mewla, Maharajpur, acquired under the Notification dated 2nd August, 1989. There too the market rate was assessed at Rs.280/- per sq. yard along with all statutory benefits under the 1894 Act. The compensation in respect of the lands involved has also to be assessed at Rs.325/- per sq. yard. [Paras 35, 36, 37 & 38] [174-C-H; 175-A-H]

2. In Sucha Singh's case, although the land in question fell within the municipal limits, a deduction of 40% was unjustified. On the other hand, a cut of 331/3 per cent would be more realistic. Accordingly, the compensation for the said lands, after taking into consideration the deduction of 331/3 per cent is assessed at Rs.7,25,000/- per acre. [Para 39]

3. As far as the lands within the District of Ambala are concerned, in respect of one set of lands, the Reference Court assessed the market value of the acquired lands to be Rs.57,000/- per acre. However, another Reference Court assessed the market value of the acquired lands at Rs.3,38,800/- per acre. The claim of the land owners, assessed at Rs.300/- per sq. yard is on the high side but Rs.110/- per sq. yard, as had been held by the Punjab and Haryana High Court, is on the low side. On a comparison of the price of lands sold during 1981, or by adding 12% per annum on Rs.70/- per sq. yard on annual compounded basis, the value of the lands is assessed at Rs.180/- per sq. yard on a uniform basis for all lands. [Para 40] [176-D-G]

4. In the lands covered in Atam Singh's case, the Collector had initially assessed the compensation at the rate of Rs.54.75 per sq. yard. The lands acquired in 1987 were adjacent to the lands acquired subsequently in 1993. The value of the lands in 1989 would be about Rs.200/- per sq. yard, and the prices had, in fact, doubled to about Rs.400/- per sq. yard within the next two years, i.e. in 1991. By such standards, the value of the lands acquired in 1987 should be Rs.100/- per sq. yard. [Para 41] [176-G-H; 177-A-B]

5. In Mukesh Kumar's case, having regard to the potentiality of the acquired lands, the belting system should not have been resorted to. Although, the High Court had allowed a yearly increase of 12%, taking 1983 as a base-year, such increase was not commensurate with the yearly escalation of prices and that was required to be calculated on a cumulative basis. Accordingly, in Mukesh Kumar's case and the other cases heard along with the said case, while adding 12% annual increase to the value of the lands acquired, the same should be done on a cumulative basis. In Mukesh Kumar's case, the compensation awarded was at the rate of Rs.235/- per sq.

yard along with all statutory benefits, as provided under Sections 23(1-A), 23(2) and 28 of the Land Acquisition Act. Having discarded the belting system which has been resorted to, the compensation as awarded at the rate of Rs.235/- per sq. yard, has to be reassessed by applying the cumulative rate of increase at the rate of 12% per annum with the base year being the date of the Notification under Section 4 of the Land Acquisition Act, together with the statutory benefits. The stand taken on behalf of the State of Haryana, regarding the amount of escalation fixed at 12% being improper, does not appeal having regard to the potentiality of the lands acquired and the sharp increase in the value of the lands in recent times. The valuation of the compensation of the acquired land at the rate of Rs.235/- per sq. yard by the High Court, appears to have been influenced by the compensation already assessed in Atam Prakash's case, where the market value of the land acquired in Sectors 9 and 11 was assessed at Rs.235/- per sq. yard. The said lands were far away from the lands involved in the present set of cases and, accordingly, the rate of compensation for the lands under consideration should be definitely higher than awarded in respect of the lands covered in Atam Prakash's case. Accordingly, the compensation assessed in respect of the lands covered by these cases is re-assessed by applying the cumulative rate of interest, taking the date of Notification under section 4 of the Land Acquisition Act as the base year for such calculation at Rs.325/- per sq. yard. The said valuation will also be applicable in Mahabir & Anr. vs. State of Haryana & Anr. [SLP(C)No.1512 of 2007], Sarwan Singh & Anr. vs. State of Haryana & Anr. [SLP(C)Nos.20144-20150 of 2007] and State of Haryana & Anr. vs. Partap Singh & Anr. [SLP(C)No.21597 of 2006]. As far as the lands in village Patti Mehar, Saunda and Jandli in Ambala District and forming the subject matter in Surinder Kumar's case [SLP(C)Nos.16372-16404 of 200

Khurana's case and in other cases falling in the same category are concerned, the compensation will be at the above rate on a uniform basis. [Para 42] [177-B-H; 178-A-E]

6. There is yet another set of lands forming the subject matter of the appeals arising out of Special Leave Petition (C) Nos.33637-33638 of 2011, filed by Manohar Singh and others, which are situated in Hansi, District Hisar. In the said cases, the High Court had assessed the compensation payable for the acquired lands at the rate of Rs.805/- per sq. yard along with the statutory sums available under Section 23(1A) of the Land Acquisition Act and solatium on the market value under Section 23(2) thereof. The High Court was justified in taking into consideration the size of the plots, which were exhibited for the purposes of comparison with the size of the plots acquired, but this Court is unable to uphold the cut of 60%, which has been imposed by the High Court, since the acquired lands are already within developed municipal limits. In these cases also, a cut of one-third the value would be appropriate as in the other cases. Accordingly, the valuation arrived at by the High Court is modified and it is directed that the amount of compensation be re-assessed upon imposing a cut of 331/3 per cent while re-assessing the value of the land. In regard to the amount of deduction effected in respect of the various properties, the general cut imposed is at a flat rate of 40%, which is not warranted on account of the fact that the lands in question have lost their character and potentiality as agricultural lands and have more or less been converted into lands which were ready for use for the purpose of construction. Taking factors which determine deduction towards development cost, such as location and potentiality, into account, a deduction of 331/3 per cent would be reasonable on account of the passage of time and the all round development in the

area which has made it impossible for the lands to retain their original character. Accordingly, it is directed that except where provided otherwise, wherever a deduction of 40% had been made, the same should be altered to 331/3 per cent and the compensation awarded is to be modified accordingly. [Paras 43, 44, 45, 46 & 47] [178-F-H; 179-A-H]

7. In regard to the 157.20 acres of land situated in Fatehabad, District Hisar, Haryana, acquired for utilisation and development of residential and commercial purposes in Sector-3, Fatehabad, the Collector had awarded compensation at a uniform rate of Rs. 1,81,200/- per acre along with statutory benefits. The Reference Court determined the compensation at the uniform rate of Rs. 206/- per sq. yard. The High Court modified the said award and awarded compensation at the rate of Rs. 260/- per sq. yard for the land acquired up to the depth of 100 meters abutting National Highway No. 10. The value of the rest of the acquired land was maintained at Rs. 206/- per sq. yard. The area in question being already developed to some extent, a cut of 50% on the value is excessive. Resorting to the belting system by the High Court was improper and at best a standard cut of 1/3rd would have been sufficient to balance the smallness of the exhibits produced. On a comparative basis, the price of lands in the area in 1991 was on an average of about Rs. 420/- per sq. yard. Given the sharp rise in land prices, the value, it is stated, would have doubled to about Rs. 800/- per sq. yard by 1993. Even if one has to apply the formula of 12% increase, the valuation of the lands in question in 1993 would be approximately Rs. 527/- per sq. yard. Imposing a deduction of 1/3rd, valuation comes to about Rs. 350/- per sq. yard, which would be the proper compensation for the lands covered in the case of Mukesh and other connected matters. [Para 48] [180-A-G]

State of Haryana vs. Gurbax Singh r.

(2008) 11 SCC 65: 2008 (11) SCC 65; *Union of India vs. Harinder Pal Singh* **(2005) 12 SCC 564: 2005 (4) Suppl. SCR 669;** *General Manager, Oil and Natural Gas Corporation Limited vs. Rameshbhai Jivanbhai Patel & Anr.* **(2008) 14 SCC 745: 2008 (11) SCR 927;** *Udho Dass Vs. State of Haryana & Ors.* **(2010) 12 SCC 51: 2010 (8) SCR 900;** *General Manager, Oil and Natural Gas Corporation Ltd. Vs. Rameshbhai Jivanbhai Patel* **(2008) 14 SCC 745: 2008 (11) SCR 927;** *Charan Dass Vs. Himachal Pradesh Housing and Urban Development Authority* **(2010) 13 SCC 398: 2009 (14) SCR 163;** *Haridwar Development Authority Vs. Raghubir Singh & Ors.* **(2010) 11 SCC 581: 2010 (2) SCR 201;** *Kasturi & Ors. Vs. State of Haryana* **(2003) 1 SCC 354: 2002 (4) Suppl. SCR 117;** *Subh Ram & Ors. Vs. State of Haryana & Ors.* **(2010) 1 SCC 444: 2009 (15) SCR 287;** *Kanta Devi & Ors. Vs. State of Haryana & Anr.* **(2008) 15 SCC 201: 2008 (10) SCR 367;** *Kasturi & Ors. Vs. State of Haryana* **(2003) 1 SCC 354: 2002 (4) Suppl. SCR 117 and** *Saibanna (Dead) by Lrs. Vs. Assistant Commissioner and Land Acquisition Officer* **(2009) 9 SCC 409: 2009 (13) SCR 401 – cited.**

Case Law Reference:

2008 (11) SCC 65	**cited**	**Para 10**
2005 (4) Suppl. SCR 669	**cited**	**Para 10**
2008 (11) SCR 927	**cited**	**Para 19**
2010 (8) SCR 900	**cited**	**Para 21**
2008 (11) SCR 927	**cited**	**Para 22**
2009 (14) SCR 163	**cited**	**Para 27**
2010 (2) SCR 201	**cited**	**Para 27**
2002 (4) Suppl. SCR 117	**cited**	**Para 27**
2009 (15) SCR	**cited**	**Para 30**
2008 (10) SCR 367	**cited**	**Para 30**

2002 (4) Suppl. SCR 117	**cited**	**Para 32**
2009 (13) SCR 401	**cited**	**Para 33**

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 3279-3287 of 2013.

From the Judgment & Order dated 21.05.2007 of the High Court of Punjab & Haryana at Chandigarh in Regular Second Appeal Nos. 99 of 1997, 2574 of 2000, 1426, 1, 1423, 1394, 1424 of 1997, 2428 of 1996 & 1422 of 1997.

WITH

C.A. Nos. 3288-3299, 3300-3319, 3320, 3321-3323, 3324-3325, 3326-3330, 3331-3333, 3334-3337, 3338-3340, 3341, 3342-3344, 3345, 3346-3347, 3348-3349, 3350-3351, 3352 of 2013, 8719 of 2010, 3353-3433, 3434-3450, 3451-3452, 3453, 3454-3455, 3456-3458, 3459-3488, 3489-3495, 3496-3516, 3517-3521, 3522-3523, 3524, 3525-3532, 3533, 3534, 3535-3576, 3577, 3578-3595, 3596, 3597, 3598-3602, 3603, 3604-3610, 3611, 3612, 3613, 3614, 3615, 3616, 3617, 3618, 3619, 3620, 3621, 3622, 3623, 3624, 3625, 3626, 3627, 3628, 3629, 3630, 3631, 3632, 3633, 3634, 3635, 3636, 3637, 3638, 3639, 3640, 3641, 3642, 3643, 3644, 3645, 3646, 3647, 3648, 3649, 3650, 3651, 3652, 3653, 3654, 3655, 3656, 3657. 3658, 3659, 3660, 3361, 3662, 3663-3677, 3678, 3679, 3680, 3681, 3682, 3683, 3684, 3685, 3686, 3687, 3688, 3689, 3690, 3691, 3692, 3693, 3694, 3695, 3696, 3697, 3698, 3699, 3700, 3701-3704, 3705, 3706-3738, 3844-3852, 3740, 3741, 3742, 3743-3762, 3763-3783, 3784-3787, 3788 of 2013, 319-352 of 2011, 8654-8661, 8642-8645 of 2010, 423-424, 418 419 of 2011, 8637, 8638, 8646-8653 of 2010, 354-411, 412-417 of 2011, 3789-3792, 3793-3800, 3801-3804, 3805-3806 of 2013, 3388-3389, 5206, 5208, 5209, 5210, 5211, 5212, 5213, 5214, 5207, 5215, 5216, 7179-7182 of 2011, 3807-3808, 3853-3854, 3810-3817, 3818-3819, 3820-3821, 3822-3823, 3824-3825, 3826-3827, 3828-3829, 3830-38[illegible]-3835 & 3836-3837 of 2013.

Manjit Singh, AAG, Somvir Singh Deswal, Satbir Singh Pillania, Shree Pal Singh, Dr. Kailash Chand, Dr. Sushil Balwada, R.D. Upadhyay, C.K. Sucharita, C.S.N. Mohan Rao, Ashok K. Mahajan, Kamal Mohan Gupta, Jay Kishor Singh, Jasmer Chand, Rajat Sharma, Dinesh Verma, R.V. Kameshwaran, Shivaji M. Jadhav, C.D. Singh, N. Annapoorani, Manoj Swarup, Ankit Swarup, A.V. Palli, Rekha Palli, Atul Sharma, Anupam Raina, A.P. Mohanty, K.K. Mohan, Prem Malhotra, Anis Ahmed Khan, Ajay Kumar, Temple Law Firm, Rohit Kumar Singh, Vineet Bhagat, Vivek Gupta, Naresh Bakshi, Sharmila Upadhyay, Ugra Shankar Prasad, Tarjit Singh, Anil Antil, Naresh Bakshi, Samir Ali Khan, G.N. Reddy, Nitin Kumar Thakur, Govind Goel, Dr. Monika Gusain, Sanjay Kumar Yadav, Ankit Goel, Rahul Pandey, S.L. Aneja, Yash Pal Dhingra, Kuldip Singh, Jagjit Singh Chhabra, Mohan Lal Sharma, Anubha Agarwal, Manjusha Wadhwa, P.D. Sharma for the appearing parties.

The Judgment of the Court was delivered by

ALTAMAS KABIR, CJI. 1. All these matters involve a common question relating to claims for enhancement of compensation in respect of lands acquired under the Land Acquisition Act, 1894, hereinafter referred to as "the 1894 Act", in several States, such as, Punjab, Haryana, Madhya Pradesh, Andhra Pradesh and the Union Territory of Chandigarh. In some of the Special Leave Petitions, leave has already been granted and they have been listed as Civil Appeals. Leave is also granted in all other Special Leave Petitions which are being heard together in this batch of matters.

2. For the sake of convenience, we have taken up the batch matters State-wise. The major number of cases are from the States of Punjab and Haryana and, accordingly, it was decided to take up the said matters first. We have, therefore, heard the matters relating to the State of Haryana before the other matters and for the said purpose, we have also selected

some specific matters, the decision wherein would also govern the rest. Since in the State of Haryana, the lands acquired were from different districts, such as Faridabad, Ambala, Fatehabad, Hisar, Sonepat and Kurukshetra and under different Notifications published under Section 4 of the 1894 Act, we took up the individual cases of *Ashrafi and Others vs. State of Haryana & Ors. Others,* being SLP(C)Nos.24704-24712 of 2007, relating to the Notification dated 2nd August, 2009, and *Sailak Ram (D) Tr. LRs. & Ors. vs. State of Haryana & Ors.,* being SLP(C)No.28686 of 2010, relating to the Notification dated 7th September, 1992, in respect of the lands situated in Faridabad. In addition, we also took up SLP(C)No.18588 of 2006 filed by the State of Haryana against Surinder Kumar and Others, in respect of the Notification dated 26th May, 1981, relating to the lands situated within the District of Ambala. Another matter relating to the District of Ambala, namely, State of Haryana vs. Manohar Lal Khurana, being SLP(C)No.11527 of 2007, relating to the Notification dated 2nd February, 1989, was also taken up separately. As far as the lands relating to the District of Hisar are concerned, the Special Leave Petition filed by the State of Haryana against Partap Singh and Another, being SLP(C) No.21597 of 2006, relating to the Notification dated 21st March, 1991, was taken up for separate hearing as also some of the cases involving lands in Sonepat, Kurukshetra Districts, in respect of the Notifications published under Section 4 of the 1894 Act, dated 20th April, 1982 and 17th September, 1993, respectively.

3. Some of the Special Leave Petitions (now Appeals) have been filed by the State of Haryana, which is equally aggrieved by the enhancement of the compensation assessed in reference under Section 18 of the 1894 Act. As would be evident shortly, the High Court almost on a uniform basis awarded compensation at the rate of Rs.235/- per sq. yard notwithstanding the type of land involved. Although a distinction had been made between "chahi" lands, "pahar gair mumkin" lands and "gair mumkin" lands while ass[illegible],

ultimately, a uniform rate was awarded in respect of the different types of lands which had been acquired. Different reasons have been given by the High Court in arriving at the uniform figure of Rs.235/- per sq. yard, but what is important is that ultimately by applying different methods, the compensation worked out to be same.

4. In the case of *Smt. Ashrafi & Ors.,* arising out of RFA No.99 of 1997 decided by the Punjab and Haryana High Court on 21st May, 2007, along with several other similar appeals, lands measuring 184.66 acres in village Mewla, Maharajpur, District Faridabad, were acquired for the development of Sector 45 in Faridabad. Notification was published under Section 4 of the 1894 Act on 2nd August, 1989. The Land Acquisition Collector awarded compensation at the rate of Rs.3,50,000/- per acre for chahi lands and Rs.1,50,000/- per acre for other lands. On a reference made by the land owners to the learned District Judge, Faridabad, under Section 18 of the 1894 Act, the Reference Court fixed the compensation at Rs.45/- per sq. yard against which the parties moved the High Court in First Appeal.

5. One of the other cases which was taken up separately was that of *Smt. Kamlesh Kumari vs. State of Haryana & Anr.,* being SLP(C)No.28613-28642 of 2010, wherein 486.61 acres of land in village Mewla, Maharajpur, were also acquired.

6. Coming back to the decision in *Ashrafi's* case, the High Court fixed the compensation at Rs.220/- per sq. yard in respect of the lands situated in village Mewla, Maharajpur, acquired for the purpose of establishing Sector 45, Faridabad.

7. It was sought to be urged that the compensation assessed was extremely low in comparison to the compensation awarded in respect of the lands acquired in the same area and under the same Notification under Section 4 of the 1894 Act. It was urged that the learned Single Judge in

the High Court had wrongly assessed compensation at Rs.220/- per sq. yard, when in respect of the lands acquired under the same Notification dated 28th August, 1989, the learned District Judge had fixed the market value at Rs.328.50 per sq. yard and also at Rs.337/- per sq. yard, in respect of the lands acquired under a Notification issued in July, 1987.

8. In *Smt. Kamlesh Kumari's* case, it was urged by Mr. J.L. Gupta, learned Senior Advocate, that while the Collector had awarded Rs.1,96,000/- per acre in respect of the acquired lands, the Reference Court enhanced the same to Rs.325/- per sq. yard, which would be equivalent to Rs.15,73,000/- per acre. The High Court, however, reduced the rate from Rs.325/- per sq. yard to Rs.90/- per sq. yard, which would be equivalent to approximately Rs.4,35,000/- per acre. Letters Patent Appeals filed against the said decision of the learned Single Judge were dismissed and the matter ultimately came up to this Court in Civil Appeal No. 9808 of 2003, and the case was remanded to the Reference Court for a fresh determination. After remand, the Reference Court, by its Order dated 12th January, 2008, assessed the compensation at Rs.238/- per sq. yard. In appeal, after considering the decision of a learned Single Judge of the same Court in *Sailak Ram's* case, referred to hereinabove, the learned Judge determined the compensation at Rs.280/- per sq. yard. In fact, it was pointed out by Mr. Gupta that in *Sailak Ram's* case, different amounts were awarded as compensation in respect of lands comprised in village Mewla, Maharajpur, acquired under the Notification dated 2nd August, 1989. It was finally held that the market rate for the acquired properties would be Rs.280/- per sq. yard, along with all statutory benefits, as per the provisions of the 1894 Act.

9. Mr. Gupta urged that even the enhancement made by the High Court was not adequate in view of the compensation awarded in other cases, in respect of the lands comprised in the same village. It was highlighted that in *Pritam Singh's* case, compensation had been awarded at th[illegible]er

sq. yard. Even in the case of lands situated in village Ajronda acquired under Notification dated 5th June, 1992, for the development of Sector 20-B, Faridabad, compensation had been awarded at Rs.392.50 per sq. yard. Mr. Gupta submitted that, in such circumstances, the compensation should have been assessed, if not at the said rate, at least at a figure near about the said rate. Mr. Gupta submitted that in yet another case regarding lands acquired from the same village by Notification dated 30th July, 1987, for constructing a link road from Delhi-Mathura road to Sector 46, Faridabad, compensation awarded was at the rate of Rs.337.20 per sq. yard.

10. Mr. Gupta lastly referred to the decision of this Court in *State of Haryana vs. Gurbax Singh (Dead) By LRs. & Anr.* [(2008) 11 SCC 65], in which the decision of this Court in another case, viz., *Union of India vs. Harinder Pal Singh* [(2005) 12 SCC 564] was referred to and quoted. In paragraph 15 thereof, it was indicated that the entire area was in a stage of development and the different villages were capable of being developed in the same manner, as lands situated elsewhere. Mr. Gupta submitted that in the said decision, an enhancement of compensation by adding 12% per annum for a period of two years, was duly accepted by this Court. It was, therefore, submitted that the compensation awarded by the High Court was required to be revised in parity with the compensation awarded in respect of the other lands comprised in the same village, in line with the observations made by this Court in *Sailak Ram's* case and also in *Smt. Kamlesh Kumari's* case.

11. One of the other sets of cases, viz., *Sucha Singh & Ors. vs. Collector, Land Acquisition & Ors.,* being SLP(C)Nos.1678-1697 of 2010, were taken up separately, at the instance of Mr. R.K. Kapoor, learned Advocate, appearing for the Appellants-Claimants. According to Mr. Kapoor, the submissions made on behalf of the Appellant, Sucha Singh, would also cover SLP(C)Nos.13529-13549 of 2011, *Surjit*

Kaur & Ors. vs. Collector, Land Acquisition and Colonisation & Ors., SLP(C)Nos. 15508-15511 of 2011, *Joginder Singh & Ors. vs. Land Acquisition Collector & Ors.,* and SLP(C)..CC 2620 of 2011, *Mehar Singh (D) Tr. LRs. & Ors. vs. Collector, Land Acquisition and Colonisation Department.*

12. Mr. Kapoor contended that the Notification under Section 4 was issued on 10th February, 1984, for acquisition of 79 acres and 5 kanals of land in village Talwandi Bhai, District Ferozepur, for the purpose of construction of a new grain market. In respect of such acquisition, the Land Acquisition Collector awarded compensation to the land owners at the rate of Rs.40,000/- per acre, which was enhanced by the Reference Court to Rs.4,60,000/- up to 1 killa and to Rs.4,00,000/- beyond one killa. On appeal to the High Court, the amounts were reduced. Special Leave Petitions were, thereafter, filed against the said Order in this Court. While issuing notice on 5th January, 2010, confined to the question of deduction, this Court directed stay of recovery of the amounts already paid by way of compensation to the Petitioners therein.

13. Mr. Kapoor contended that having regard to certain plots which were auctioned by the Municipal Committee before acquiring the lands in question, the average rate in respect of various plots was Rs.30,000/- per marla and Rs.6,00,000/- per kanal, which would mean that the value of the land would be Rs.48,00,000/- per acre. Mr. Kapoor submitted that, since apart from the above, sale deeds are also a reliable indicator of the land value in a particular area, if the market value is not taken at Rs.48,00,000/- per acre, the value of sale transactions during the same period could also be taken into consideration in determining the compensation. According to Mr. Kapoor, the High Court took the average value of such transactions for the period 19th September, 1980 up to 3rd June, 1983. The average sale price was found to be Rs.6,23,997/- per acre, which would, therefore, be the market value of the land during the period in question. An added increa[illegible]m

would give a figure of Rs.7,82,746/- per acre. Accordingly, on the date of the Notification under Section 4 of the 1894 Act, i.e., 10th February, 1984, the market value of the land would be Rs.7,82,746/- per acre, even if the auction price of Rs.48,00,000/- per acre is not taken into consideration. Mr. Kapoor submitted that the lands in question fell within the Municipal limits of Talwandi Bhai and no development would be required since the lands had been acquired for constructing a new grain market only. Hence, a deduction of 40% was unjustified in the circumstances. Mr. Kapoor, therefore, prayed that even if the final figure of the market value, as determined by the High Court, i.e., Rs.6,23,997/-, is taken into consideration, then also by adding 12% per annum to the said figure, the compensation would amount to Rs.7,82,746/- per acre.

14. In one of the other matters, *Surinder Kumar vs. State of Haryana,* being SLP(C) Nos.16372-16404 of 2008, 250.51 acres of land situated in village Patti Mehar, Saunda and Jandli in Ambala District, covered by Notification dated 26th May, 1981, were intended to be acquired for development and utilisation of residential areas for an Urban Estate in Ambala. Three Awards were made by the Land Acquisition Collector. When Award No. 4 was pronounced on 27th June, 1984, the market value of the acquired lands was assessed at Rs. 52,000/- per acre, thereafter, two further awards were pronounced wherein some other chahi lands were assessed at Rs.34,500/- per acre, barani land was assessed at Rs.27,520/- per acre and banjar and gair mumkin land was assessed at Rs.13,760/- per acre. On reference, the Reference Court enhanced the market value of the acquired lands to Rs.57,000/- per acre. Subsequently, however, another Reference Court assessed the market value of the acquired lands at Rs.3,38,800/- per acre. Being dissatisfied with the orders of the Reference Courts, the parties approached the High Court. The State of Haryana also filed appeals relating to the judgment of 6th May, 1992. In the appeals filed by the claimants,

they claimed that the acquired land was liable to be assessed at Rs.300/- per sq. yard. The Division Bench of the Punjab and Haryana High Court accepted the contention of the land owners and directed that they would be entitled to the market rate at Rs.110/- per sq. yard for the acquired land, together with all statutory benefits, as per the amended provisions of the Act. The appeals filed by the State of Haryana were dismissed.

15. Appearing for the Appellants, Ms. Indu Malhotra, learned Senior Advocate, submitted that though the compensation was enhanced by the Division Bench from Rs.70/- per sq. yard to Rs.110/- per sq. yard, there was no basis for fixing the value at the said rate. Ms. Malhotra urged that the said rate was fixed despite the fact that a Conveyance of the year 1973 i.e. earlier than the date of acquisition (26.5.1981), had been produced by the Appellants. Apart from the above, Sale Deeds of 1981 were also produced which showed the value of the lands to be Rs.209-213/- per sq. yard. Ms. Malhotra urged that it would be evident from the above that the High Court has erred in fixing the rate of compensation at Rs.110/- per sq. yard, without any basis whatsoever, when Sale Deeds of even previous years and years contemporaneous to the acquisition, indicated a much higher valuation in respect of the acquired lands. Ms. Malhotra submitted that the valuation of the acquired lands was liable to be enhanced in a manner which was commensurate with the value of the lands, as would be evident from the various Sale Deeds produced on behalf of the Appellants.

16. Mr. Manoj Swarup, learned Advocate, appeared in several of the matters relating to acquisition of the lands in Hisar, covered by various Notifications issued under Section 4 of the 1894 Act. Mr. Swarup, firstly, referred to the case of *Atam Singh & Anr. vs. State of Haryana & Ors.,* being SLP(C)Nos.33337-33340 of 2010, involving lands measuring 112 kanals and 12 marlas situated in village Basti Bhiwan, Tehsil Fatehabad, District Hisar, notif[illegible]or

establishing new fruit, vegetable and fodder market, under Section 4 of the aforesaid Act. Mr. Swarup also referred to the case of *Sarwan Singh vs. State of Haryana & Anr.,* being SLP(C)Nos.20144-20150 of 2007, involving lands measuring 429.75 acres of land, which is the subject matter of a Notification dated 21.03.1991, under Section 4 of the above Act for the development of a part of Sectors 11, 13, 15, 16 and 17, Hisar, Haryana. Reference was also made to the case of *Mukesh Kumar vs. State of Haryana & Ors.,* being SLP(C)No.19668 of 2006, involving lands measuring 227.44 acres in Hisar, which was the subject matter of Notification dated 20.08.1992, under Section 4 of the above Act for use as a residential sector by Haryana Urban Development Authority (HUDA). Mr. Swarup, lastly, referred to the case of *Mukesh vs. State of Haryana & Anr.,* being Civil Appeal Nos. 319-352 of 2011, involving lands measuring 157.20 acres situated in Fatehabad, District Hisar, under Notification dated 21.07.1993, also for residential and commercial purposes in Sector 3, Fatehabad.

17. In *Atam Singh's* case, Mr. Swarup, pointed out that the lands had been notified on 15.10.1987 for establishing a new fruit, vegetable and fodder market and that initially compensation was awarded at the rate of Rs.54.75 per sq. yard. Mr. Swarup pointed out that the land acquired in 1987 is adjacent to the land acquired subsequently in 1993. It was urged that the Reference Court had in its judgment found the potentiality of the suit land to be high having regard to the various developments, which had occurred in the said area and also for future development relating to a proposal for a truck union and auto market. Certain contemporaneous private sales, for the purpose of comparison, had been filed, which were accepted by the High Court, which had been held to be genuine, from which it would appear that there has been a steady increase in the valuation of the lands and the chart indicates that the price of land in the year 1989 was about Rs.200/- per sq. yard. The chart also demonstrates that two

years later, the prices had doubled to about Rs.400/- per sq. yard. Taking the same to be a yardstick, Mr. Swarup submitted that the value of the land acquired in 1987 should be taken as the comparative unit and that the value of the land acquired in 1987 should, therefore, be assessed at Rs.100/- per sq. yard.

18. Mr. Swarup pointed out that the decision in *Atam Singh's* case was thereafter followed by the High Court in the case of *Sarwan Singh & Anr.,* being SLP(C)Nos.20144-20150 of 2007. As indicated hereinbefore, the said matter involved acquisition of 429.75 acres of lands similar to the lands acquired in *Atam Singh's* case. However, for the purpose of assessing the value of the land, the methodology followed was to add 12% annually towards the value of the lands for a period of six years, which is also one of the methods for arriving at a valuation taking a base year and, thereafter, computing the annual increase of the value at the accepted rate of 12% per annum.

19. The question which was raised was whether the same should be on the basis of a flat rate annually or by adding to the value at the rate of 12% per annum at a flat rate from the date of notification till the award. In these matters, a connected question arose as to whether instead of flat rate the interest should be added cumulatively, which, according to Mr. Swarup, had been considered and decided in the affirmative by this Court in *General Manager, Oil and Natural Gas Corporation Limited vs. Rameshbhai Jivanbhai Patel & Anr.* [(2008) 14 SCC 745]. Mr. Swarup, therefore, urged that the compensation assessed at Rs.235/- per sq. yard on the basis of an annual increase of 12% was inadequate and the yearly escalation is required to be calculated on a cumulative basis.

20. In the case filed by *Mukesh Kumar,* being SLP(C)No.19668 of 2007, relating to acquisition of 227.44 acres under Notification dated 20.08.1992, Mr. Swarup pointed out that the decision had been arrived at on the reasoning in *Sarwan Singh's* case (supra) and *Atam* d

to hereinabove. Mr. Swarup urged that in *Sarwan Singh's* case, the High Court considered the location of the acquired lands and upon observing that they were situated next to prominent localities to the north of the acquired lands, it had no hesitation in arriving at the conclusion that the entire acquired land fell within the municipal limits of the District of Hisar with substantial potential for its development for residential and commercial purposes. Even the Division Bench in appeal, while rejecting the submissions made on behalf of the State, observed that having regard to the nature of the development of the surrounding areas, it would be improper to resort to the belting system and to award one set of compensation for the entire land.

21. Mr. Swarup then urged that in the case of *Udho Dass Vs. State of Haryana & Ors.* [(2010) 12 SCC 51], this Court had the occasion to observe that although, in the 1894 Act provision has been made for the payment of solatium, interest and an additional amount, the same had not kept pace with the astronomical rise in land prices in many parts of India, and most certainly in North India, and the compensation awarded could not fully compensate for the acquisition of the land. This Court further observed that the 12% per annum increase which had often been found to be adequate in matters relating to compensation, hardly did justice to those land owners whose lands had been taken away and the increase was even at times up to 100% a year for land which had the potential of being urbanised and commercialised, such as in the present case.

22. Mr. Swarup pointed out that similar observations had been made by this Court in *General Manager, Oil and Natural Gas Corporation Ltd. Vs. Rameshbhai Jivanbhai Patel* [(2008) 14 SCC 745], wherein similar views were expressed in a similar vein as in the earlier case that primarily the increase in land prices depends on four factors : (i) situation of the land, (ii) nature of development in surrounding area, (iii) availability of land for development in the area, and (iv) the demand for

land in the area. It was observed that in rural areas, unless there was any prospect of development in the vicinity, increase in prices would be slow, steady and gradual. On the other hand, in urban or semi-urban areas, where the development is faster and the demand for land is high and where there is construction activity all around, the escalation in market price is at a much higher rate, as compared to rural areas and in some pockets in big cities, due to rapid development and high demand for land, the escalation in prices have touched even 30% to 50% or more per year during the nineties.

23. In the light of his aforesaid submissions, Mr. Swarup submitted that although, the High Court had allowed yearly increase of 12%, taking 1983 as the base year, such increase was not commensurate with the yearly escalation of prices and the same was required to be calculated on a cumulative basis, as indicated in *Rameshbhai Jivanbhai Patel's* case (supra).

24. In regard to the 157.20 acres of land situated in Fatehabad, District Hisar, Haryana, acquired for utilisation and development of residential and commercial purposes in Sector-3, Fatehabad, by the Haryana Urban Development Authority (HUDA), the Collector had awarded compensation at a uniform rate of Rs.1,81,200/- per acre along with statutory benefits. As against the claim of the land owners that the market value was Rs.1000/- per square yard, the Reference Court determined the compensation at the uniform rate of Rs.206/- per square yard. The High Court modified the said award and awarded compensation at the rate of Rs.260/- per square yard for the land acquired up to the depth of 100 meters abutting National High Way No.10. The value of the rest of the acquired land was maintained at Rs.206/- per square yard. Mr. Swarup submitted that having regard to the sale instances for the years 1989 and 1991, wherein the prices had doubled, by the same equation the price of the land in 1993 should have been Rs.800/- per square yard. Urging that the High Court had erred in imposing a cut of 50% on the value, it was sub[illegible]s

required to be imposed since the lands forming the subject matter of the sale instances formed part of the acquired land and was comprised in identically situated lands to the rest of the acquired land. Mr. Swarup submitted that at best the standard cut of 1/3rd would have been sufficient to balance the smallness of the exhibits and, in any event, the belting system resorted to by the High Court was erroneous in the light of the observations made by the High Court itself in *Udho Dass* and *Rameshbhai Jivanbhai Patel* (supra).

25. In regard to the lands forming the subject matter of C.A.Nos.3381-89 of 2011 and other connected matters *(Smt. Jamna Bai & Ors. Vs. State of Haryana),* Mr. Anoop G. Choudhary, learned Senior Advocate, appearing for the Appellants, submitted that the price of the plots to be sold by auction by the municipality required an average of four sale transactions to be taken as a sale indice price of the lands in question. Mr. Choudhary urged that out of the four sale transactions taken into consideration the High Court erroneously chose the value of Rs.200/- per square yard, which ought not to have been taken for the purpose of determining the value of the lands acquired.

26. Mr. S.B. Upadhyay, learned Senior Advocate, who appeared for the Petitioners in four of the matters relating to the lands in question, submitted that if all the valuation available were taken together and an average was drawn, the valuation of the land would come to Rs.4572/- per square yard. Furthermore, deduction of 40% from the market value towards development charges was excessive and where the acquired land falls in the midst of already developed land, the reasonable deduction would be not more than 1/3rd of the assessed value of the land.

27. In this regard, reference was firstly made to the decision of this Court in *Charan Dass Vs. Himachal Pradesh Housing and Urban Development Authority* [(2010) 13 SCC 398], wherein quoting from the decision of this Court in *Triveni Devi's*

case, this Court had observed that it had to be noted that in the Building Regulations, setting apart lands for development of roads, drainage and other amenities like electricity, etc., are condition precedent for approval of a layout for building colonies. Therefore, any deduction made should be based upon the situation of the land and the need for development. Where acquired land is in the midst of already developed land with amenities of roads, drainage, electricity, etc. then deduction of 1/3rd would not be justified. Reference was also made to the decision of this Court in *Haridwar Development Authority Vs. Raghubir Singh & Ors.* [(2010) 11 SCC 581], wherein also, taking into consideration the various stages of development, this Court observed that appropriate deduction towards development costs could vary between 20% to 75% depending upon various factors, but that in the said case the deduction of 25% towards development cost was appropriate. Mr. Upadhyay also referred to the decision of this Court in *Kasturi & Ors. Vs. State of Haryana* [(2003) 1 SCC 354], wherein also, as against the normal cut of 1/3rd from the amount of compensation, it was held that a cut of 20% towards development charges was justified.

28. Appearing for the State of Haryana in SLP(C)Nos.32764-32765 of 2011, Ms. Anubha Agarwal, learned Advocate, submitted that the disparity in the sale price of the different sale transactions was mainly on account of the different areas where the said lands were located. Furthermore, the sale transactions relied upon by the Petitioners/ Appellants related to only plots measuring about 60 square yards or so. On account of the above, the sale price of such transactions could not be taken to be an accurate assessment of the valuation of the lands which were acquired in bulk. What was also important was the level of development of the lands acquired. According to Ms. Agarwal, most of the lands forming the subject matter of the acquisition proceedings under different Notifications published under Section 4 of the 1894 Act, at different points of time, were agricu d

comprised the interior portion of lands acquired which were not developed at all. The valuation of the said lands could not, in any way, be compared with the lands which were closer to the main roads and the developed zones and as such the High Court had wrongly relied upon the same in assessing the value of the extent of compensation for the lands forming the subject matter of the present proceedings.

29. Referring to the decision of the Reference Court, Ms. Agarwal pointed out that development work and/or construction had taken place alongside the roads, such as the National Highway, Tosham Road and Bhiwani Road and it was more or less established that the development in the acquired land was along the roads only and the entire acquired land was not a developed block. Even alongside the roads the development was not symmetrical or systematic, but at the same time, it also had to be recognised that the acquired land had potential for being developed for residential, commercial and/or industrial purposes as on the date of the Notification.

30. Referring to the decision of this Court in *Subh Ram & Ors. Vs. State of Haryana & Ors.* [(2010) 1 SCC 444], Ms. Agarwal pointed out that the factors determining percentage of deduction had nothing to do with the purpose for which the land was acquired, nor could the purpose of acquisition be used to increase the compensation awardable with reference to expected profits from future user. In the said judgment it was pointed out that Section 24 of the 1984 Act prohibits Courts from taking into consideration any increase in value of land acquired, or likely to accrue from use to which it is put when required. Ms. Agarwal submitted that it had also been indicated in the judgment that deduction of "development cost" is a concept used to derive the "wholesale price" of a large undeveloped plot. The difference between the value of a small developed plot and the value of a large undeveloped land is the "development cost". Reference was also made to the decision in *Kanta Devi & Ors. Vs. State of Haryana & Anr.*

[(2008) 15 SCC 201], where it had been held that to determine the market value for purposes of compensation, deduction of development charges was normally 1/3rd of the market value which also required the nature of land to be acquired to be taken into consideration. In the said case, relying upon the sale price of a small plot, the High Court had fixed the market value of the acquired land, but deducted 70% therefrom towards development charges to make the land suitable for the purpose for which the land had been acquired. This Court held that since the land was adjacent to the village Abadi which was already developed, the deduction at the rate of 70% was on the high side and a deduction of 60% of the market value would be reasonable. Various other decisions were also cited on the same lines and referring to the same would only amount to repetition.

31. Ms. Agarwal submitted that the deduction towards development cost depended mainly on the area in which the land was located and their potentiality for development and in the instant case, the deduction of 40%, as suggested, was quite apposite and did not require any interference.

32. Mr. R.S. Badharan, learned Advocate for HUDA, in Civil Appeal Nos.3388-89 of 2011, urged that the lands in question could not be compared with the lands under consideration in a review. While referring to other decisions, Mr. Badharan also referred to the decision of this Court in *Kasturi & Ors. Vs. State of Haryana* [(2003) 1 SCC 354], wherein a question had arisen as to whether the deduction of development charges at the rate of 70% in regard to the acquired lands was justified or not. Ultimately, after taking the various factors into consideration, the said Court agreed that a cut of 20% towards the development charges, which was lower than the normal 1/3rd, was understandable and could be justified. However, the same principle as has been relied upon in all the above-mentioned decisions, has also been dealt with in *Kasturi's* case (supra) and Courts ha[illegible]n the normal deduction of 1/3rd of the val[illegible]

33. Responding to the submissions made on behalf of the respective parties, the learned Additional Solicitor General, Mr. A.S. Chandhiok, referred to the decision of this Court in *Saibanna (Dead) by Lrs. Vs. Assistant Commissioner and Land Acquisition Officer* [(2009) 9 SCC 409], wherein the same question, as was considered earlier, once again fell for examination. Relying on the earlier judgments of this Court, the learned Judges reiterated the factors which led to higher rates of deduction in respect of lands within the municipal limits of a city. Their Lordships held that the deduction of 53% as imposed was on the higher side and should not have been more than 1/3rd. Their Lordships observed that though no hard and fast or rigid rule can be laid down, and each case had to be decided on its individual facts, in the case before Their Lordships the deduction of 331/3 per cent towards development charges, was justifiable. Mr. Chandhiok urged that the quantum of compensation, as decided by the High Court in the various cases under consideration, was based on the above-mentioned principles and did not warrant the interference of this Court.

34. As indicated hereinbefore, a common question is involved in all these matters in respect of the lands acquired in the States of Punjab, Haryana, Madhya Pradesh, Andhra Pradesh and the Union Territory of Chandigarh. Since the acquired lands are situated in different areas even within the different States, different quantums of compensation have been awarded for the lands so acquired. The general principles which have been followed in assessing the compensation payable in all these matters are the location of the lands sought to be acquired, their potential for development, their proximity to areas which are already developed and the exorbitant rise in the value of the lands over the years. In some of the cases, the authorities have taken recourse to the comparison method in regard to sale transactions effected in respect of similar plots of land in the area under notifications close to the date of notification by which the lands of the Appellants were acquired. The Courts have also taken recourse to assessing the value

of the lands for the purposes of compensation on a uniform rate in respect of the lands acquired, making a special concession in respect of the lands which are close to the roads and National Highways where a certain amount of development had already taken place.

35. Having resorted to the aforesaid methods, the Collectors of the different areas arrived at different valuations in respect of the lands situated within their respective jurisdictions. In most of the cases, the High Court almost on a uniform basis awarded compensation at the rate of Rs.235/- per sq. yard on a flat rate notwithstanding the type of land involved. In *Smt. Ashrafi's* case arising out of RFA No.99 of 1997 decided by the Punjab & Haryana High Court on 21st May, 2007, along with several other similar appeals, the Land Acquisition Collector awarded compensation at the rate of Rs.3,50,000/- per acre for "chahi" lands and Rs.1,50,000/- per acre for other lands. The Reference Court fixed the compensation at Rs.45/- per sq. yard as against the rate of compensation awarded by the Land Acquisition Collector. In respect of similar lands, the High Court fixed the compensation at Rs.220/- per sq. yard in respect of the lands situated in village Mewla and Maharajpur for establishing Sector 34, Faridabad. It has been agitated on behalf of the Appellants that the said assessment of compensation fixed by the High Court was on the lower side in view of the fact that in respect of lands acquired under the same Notification dated 20th August, 1989, the District Court had fixed the market value at Rs.328.50 per sq. yard and also at Rs.337/- per sq. yard, in respect of the lands acquired under a Notification issued in July, 1987. In *Smt. Kamlesh Kumari's* case, in which the facts were the same, as that in *Smt. Ashrafi's* case, the Collector had awarded Rs.1,96,000/- per acre in respect of the acquired lands which figure had been enhanced by the Reference Court to Rs.325/- per sq. yard, which would be equivalent to Rs.15,73,000/- per acre. The High Court reduced the rate from Rs.325/- per sq. yard to Rs.90/- per sq. yard, but ultima[illegible]n

was assessed at Rs.238/- per sq. yard. In appeal, the said amount was increased to Rs.280/- per sq. yard.

36. Even the aforesaid enhancement does not appear to have reflected the proper valuation of the lands acquired since soon, thereafter, in *Pritam Singh's* case (supra), compensation was awarded at Rs.435/- per sq. yard and also at the rate of Rs.392.50 per sq. yard in respect of the lands acquired under Notification dated 5th June, 1992, in village Ajronda.

37. In our view, the enhancement of the compensation from Rs.280/- per sq. yard to Rs.435/- per sq. yard and Rs.392.50 per sq. yard was probably occasioned by the fact that while the lands were acquired under the Notification issued in July, 1987, the comparative rate relating to the same property was Rs.392.50 per sq. yard. In view of the passage of time between the different acquisitions, in our view, a just compensation would be at the rate of Rs.325/- per sq. yard instead of Rs.280/- per sq. yard. Similar is the case of *Smt. Kamlesh Kumari,* where the facts were similar to those in *Ashrafi's* case. In *Smt. Kamlesh Kumari's* case, initially the amount of compensation assessed by the Reference Court at the rate of Rs.325/- per sq. yard was reduced to Rs.90/- per sq. yard by the High Court and, ultimately, the amount of compensation was increased to Rs.280/- per sq. yard, in appeal. In our view, the just compensation in the lands in *Smt. Kamlesh Kumari's* case also deserves to be increased to Rs.325/- per sq. yard, which had been the amount awarded by the Reference Court.

38. In *Sailak Ram's* case, different amounts were assessed as compensation in respect of the lands comprised in village Mewla, Maharajpur, acquired under the Notification dated 2nd August, 1989. There too the market rate was assessed at Rs.280/- per sq. yard along with all statutory benefits under the 1894 Act. In our view, the compensation in respect of the lands involved has also to be assessed at Rs.325/- per sq. yard.

39. In *Sucha Singh's* case, Mr. Kapoor had submitted that the Land Acquisition Collector had awarded the compensation at the rate of Rs.40,000/- per acre, which was enhanced by the Reference Court to Rs.4,60,000/- up to one killa and to Rs.4,00,000/- beyond one killa. On appeal to the High Court, the amounts were reduced to Rs.3,74,400/- per acre up to one acre and Rs.2,24,640/- per acre beyond one acre. According to Mr. Kapoor, while the average sale price had been found to be Rs.6,23,997/- per acre, together with increase of 12% per annum, the figure would amount to Rs.7,82,746/- per acre. However, although the land belonging to Mr. Kapoor's clients fell within the municipal limits of Talwandi Bhai, a deduction of 40% was unjustified. On the other hand, a cut of 331/3 per cent would be more realistic. Accordingly, the compensation for the said lands, after taking into consideration the deduction of 331/3 per cent is assessed at Rs.7,25,000/- per acre.

40. As far as the lands within the District of Ambala are concerned, in respect of one set of lands, the Reference Court assessed the market value of the acquired lands to be Rs.57,000/- per acre. However, another Reference Court assessed the market value of the acquired lands at Rs.3,38,800/- per acre. In our view, the claim of the land owners, assessed at Rs.300/- per sq. yard is on the high side but Rs.110/- per sq. yard, as had been held by the Division Bench of the Punjab and Haryana High Court, is on the low side. On a comparison of the price of lands sold during 1981, or by adding 12% per annum on Rs.70/- per sq. yard on annual compounded basis, the value of the lands is assessed at Rs.180/- per sq. yard on a uniform basis for all lands, as also submitted by Ms. Malhotra.

41. In the lands covered in *Atam Singh's* case, the Collector had initially assessed the compensation at the rate of Rs.54.75 per sq. yard. Having regard to Mr. Manoj Swarup's submissions that the lands acquired in 1987 were adjacent to the lands acquired subsequently in 1993 [illegible]s

in 1989 would be about Rs.200/- per sq. yard, the prices had, in fact, doubled to about Rs.400/- per sq. yard within the next two years. Mr. Swarup's submission that by such standards, the value of the lands acquired in 1987 should be Rs.100/- per sq. yard, is, in our view, justifiable.

42. In *Mukesh Kumar's* case (Supra), Mr. Manoj Swarup had pointed out that having regard to the potentiality of the acquired lands, the belting system should not have been resorted to. We are inclined to accept Mr. Swarup's contention on this score. We are also inclined to accept Mr. Swarup's other submissions that, although, the High Court had allowed a yearly increase of 12%, taking 1983 as a base-year, such increase was not commensurate with the yearly escalation of prices and that was required to be calculated on a cumulative basis, as was held in *Rameshbhai Jivanbhai Patel's* case (supra). Accordingly, in *Mukesh Kumar's* case and the other cases heard along with the said case, we are of the view that while adding 12% annual increase to the value of the lands acquired, the same should be done on a cumulative basis. In *Mukesh Kumar's* case, the compensation awarded was at the rate of Rs.235/- per sq. yard along with all statutory benefits, as provided under Sections 23(1-A), 23(2) and 28 of the Land Acquisition Act. Having discarded the belting system which has been resorted to, we are of the view that the compensation as awarded at the rate of Rs.235/- per sq. yard, has to be reassessed by applying the cumulative rate of increase at the rate of 12% per annum with the base year being the date of the Notification under Section 4 of the Land Acquisition Act, together with the statutory benefits, as indicated hereinabove. The stand taken on behalf of the State of Haryana, regarding the amount of escalation fixed at 12% being improper, does not appeal to us having regard to the potentiality of the lands acquired and the sharp increase in the value of the lands in recent times. The valuation of the compensation of the acquired land at the rate of Rs.235/- per sq. yard by the High Court, appears to have been influenced by the compensation already

assessed in *Atam Prakash's* case, where the market value of the land acquired in Sectors 9 and 11 was assessed at Rs.235/- per sq. yard. According to Mr. Swarup, the said lands were far away from the lands involved in the present set of cases and, accordingly, the rate of compensation for the lands under consideration should be definitely higher than awarded in respect of the lands covered in *Atam Prakash's* case. Accordingly, we re-assess the compensation assessed in respect of the lands covered by these cases by applying the cumulative rate of interest, taking the date of Notification under section 4 of the Land Acquisition Act as the base year for such calculation at Rs.325/- per sq. yard. The said valuation will also be applicable in *Mahabir & Anr. vs. State of Haryana & Anr.* [SLP(C)No.1512 of 2007], *Sarwan Singh & Anr. vs. State of Haryana & Anr.* [SLP(C)Nos.20144-20150 of 2007] and *State of Haryana & Anr. vs. Partap Singh & Anr.* [SLP(C)No.21597 of 2006]. As far as the lands in village Patti Mehar, Saunda and Jandli in Ambala District and forming the subject matter in *Surinder Kumar's* case [SLP(C)Nos.16372-16404 of 2008], in *Manohar Lal Khurana's* case and in other cases falling in the same category are concerned, the compensation will be at the above rate on a uniform basis.

43. There is yet another set of lands forming the subject matter of the appeals arising out of Special Leave Petition (C) Nos.33637-33638 of 2011, filed by Manohar Singh and others, which are situated in Hansi, District Hisar. The said lands also form the subject matter of several other Special Leave Petitions, which will be covered by the decision in the above-mentioned Special Leave Petitions (now appeals). In the said cases, the High Court had assessed the compensation payable for the acquired lands at the rate of Rs.805/- per sq. yard along with the statutory sums available under Section 23(1A) of the Land Acquisition Act and solatium on the market value under Section 23(2) thereof. It was also indicated that the land owners would also be entitled to interest as provided under Section 28 of the Act.

44. While deciding the valuation of the lands, the High Court applied a cut of 60% and also took into consideration that the lands in question were small plots, the value whereof was definitely higher than the lands which had been acquired which were much larger in area.

45. In our view, the High Court was justified in taking into consideration the size of the plots, which were exhibited for the purposes of comparison with the size of the plots acquired, but we are unable to uphold the cut of 60%, which has been imposed by the High Court, since the acquired lands are already within developed municipal limits. In these cases also, a cut of one-third the value would be appropriate as in the other cases. Accordingly, we modify the valuation arrived at by the High Court upon imposing a cut of 60% and direct that the amount of compensation be re-assessed upon imposing a cut of 331/3 per cent while re-assessing the value of the land.

46. This brings us to the last part of the submissions made with regard to the amount of deduction effected in respect of the various properties. The general cut imposed is at a flat rate of 40%, which, in our view, is not warranted on account of the fact that the lands in question have lost their character and potentiality as agricultural lands and have more or less been converted into lands which were ready for use for the purpose of construction. Taking Ms. Agarwal's submissions regarding the factors which determine deduction towards development cost, such as location and potentiality, into account, we are of the view that a deduction of 331/3 per cent would be reasonable on account of the passage of time and the all round development in the area which has made it impossible for the lands to retain their original character.

47. Accordingly, we direct that except where we have provided otherwise, wherever a deduction of 40% had been made, the same should be altered to 331/3 per cent and the compensation awarded is to be modified accordingly.

48. In regard to the 157.20 acres of land situated in Fatehabad, District Hisar, Haryana, acquired for utilisation and development of residential and commercial purposes in Sector-3, Fatehabad, the compensation in respect thereof has been questioned in Civil Appeal Nos. 319-352 of 2011 by one Mukesh and a number of appeals have been tagged with the said matter, including the one filed by the Haryana Urban Development Authority, being SLP(C) Nos. 26772-26779 of 2009 (now appeals). As indicated hereinbefore, in paragraph 24, the Collector had awarded compensation at a uniform rate of Rs. 1,81,200/- per acre along with statutory benefits. The Reference Court determined the compensation at the uniform rate of Rs. 206/- per sq. yard. The High Court modified the said award and awarded compensation at the rate of Rs. 260/- per sq. yard for the land acquired up to the depth of 100 meters abutting National Highway No. 10. The value of the rest of the acquired land was maintained at Rs. 206/- per sq. yard. The area in question being already developed to some extent, a cut of 50% on the value is, in our view, excessive. We agree with Mr. Swarup that resorting to the belting system by the High Court was improper and that at best a standard cut of 1/3rd would have been sufficient to balance the smallness of the exhibits produced. It has been pointed out by Mr. Swarup that on a comparative basis, the price of lands in the area in 1991 was on an average of about Rs. 420/- per sq. yard. Given the sharp rise in land prices, the value, according to Mr. Swarup, would have doubled to about Rs. 800/- per sq. yard by 1993. Even if we have to apply the formula of 12% increase, the valuation of the lands in question in 1993 would be approximately Rs. 527/- per sq. yard. Imposing a deduction of 1/3rd, valuation comes to about Rs. 350/- per sq. yard, which, in our view, would be the proper compensation for the lands covered in the case of *Mukesh* (supra) and other connected matters.

49. This disposes of all the various matters which were heard along with lead matters, a tab n

supplied by Mr. Swarup.

50. The decision rendered in the appeals arising out of SLP(C)Nos.24704-24712 of 2007 *(Ashrafi & Ors. vs. State of Haryana & Ors.)* will govern SLP(C)Nos.13415-13426 of 2008, SLP(C)Nos.12263- 12282 of 2008, SLP(C)No.15648 of 2008, SLP(C)Nos. 5392-5394 of 2008, SLP(C)Nos. 15485-15486 of 2009, SLP(C)Nos.8592-8596 of 2009, SLP(C)Nos.34118-34120 of 2010, SLP(C)Nos.4176-4179 of 2010, SLP(C)Nos. 11156-11158 of 2009, SLP(C)No. 28895 of 2008, SLP(C)....CC 863-865 of 2011, SLP(C)No.33257 of 2010, SLP(C)Nos.11171-11172 of 2009, SLP(C)Nos. 3125-3126 of 2011, SLP(C)Nos.29721-29722 of 2009, SLP(C)No.31281 of 2009, C.A. No.8719 of 2010, SLP(C)Nos.18744-18824 of 2008, SLP(C)Nos. 1089-1105 of 2008, SLP(C)Nos.27923-27924 of 2008, SLP(C)No. 246 of 2009, SLP(C)Nos.3367-3368 of 2010 and SLP(C) Nos.9268-9270 of 2011. **The decision rendered in appeals arising out of SLP(C)Nos.28613-28642 of 2010** *(Kamlesh Kumari Etc. Etc. vs. State of Haryana and Anr.)* **and SLP(C)No.28686 of 2010** *(Sailak Ram Vs. State of Haryana)* will govern the appeals arising out of SLP(C)Nos.7233-7239 of 2011, SLP(C)Nos.35673-35693 of 2010, SLP(C)Nos.12083- 12087 of 2011, SLP(C)Nos. 14389-14390 of 2011, SLP(C)No.13613 of 2011, SLP(C)Nos.674-681 of 2011, SLP(C)No.33749 of 2010, SLP(C)No.3647 of 2011, SLP(C)Nos.28644-28685 of 2010, SLP(C)No.31832 of 2010, SLP(C)Nos.27706-27723 of 2010, SLP(C)No.14425 of 2011 and SLP(C)Nos. 31772-31776 of 2011. **The decision rendered in the appeal arising out of SLP(C)No.19668 of 2007** *(Mukesh Kumar Vs. State of Haryana)* will govern the appeals arising out of SLP(C)No.16005 of 2006, SLP(C)No.16262 of 2006, SLP(C)No.16271 of 2006, SLP(C)No.16302 of 2006, SLP(C)No.16303 of 2006, SLP(C)No.16304 of 2006, SLP(C)No.16378 of 2006, SLP(C)No.16379 of 2006, SLP(C)No.16407 of 2006, SLP(C)No.16536 of 2006, SLP(C)No.16537 of 2006, SLP(C)No.16538 of 2006,

SLP(C)No.19384 of 2006, SLP(C)No.16793 of 2006, SLP(C)No.16794 of 2006, SLP(C)No.18564 of 2006, SLP(C)No.19381 of 2006, SLP(C)No.19379 of 2006, SLP(C)No.19382 of 2006, SLP(C)No.19380 of 2006, SLP(C)No.19419 of 2006, SLP(C)No.19489 of 2006, SLP(C)No.19603 of 2006, SLP(C)No.21851 of 2006, SLP(C)No.21850 of 2006, SLP(C)No.20188 of 2006, SLP(C)No.5509 of 2007, SLP(C)No.6175 of 2007, SLP(C)No.8129 of 2007, SLP(C)No.7001 of 2007, SLP(C)No.5571 of 2007, SLP(C)No.5895 of 2007, SLP(C)No.5572 of 2007, SLP(C)No.6167 of 2007, SLP(C)No.7002 of 2007, SLP(C)No.11527 of 2007, SLP(C)No.29447 of 2008, SLP(C)No.18448 of 2006, SLP(C)No.18876 of 2006, SLP(C)No.18877 of 2006, SLP(C)No.19133 of 2006, SLP(C)No.19231 of 2006, SLP(C)No.5487 of 2007, SLP(C)No.18588 of 2006, SLP(C)No.7601 of 2007, SLP(C)No.21848 of 2006, SLP(C)No.21846 of 2006, SLP(C)No.3416 of 2007, SLP(C)No.3468 of 2007, SLP(C)No.2420 of 2007, SLP(C)Nos.6866-6880 of 2008, SLP(C)No.3356 of 2007, SLP(C)No.3415 of 2007, SLP(C)No.3411 of 2007, SLP(C)No.17564 of 2006, SLP(C)No.14642 of 2006, SLP(C)No.14536 of 2006, SLP(C)No.17361 of 2006, SLP(C)No.6326 of 2006, SLP(C)No.7165 of 2006, SLP(C)No.7106 of 2006, SLP(C)No.14161 of 2006, SLP(C)No.9990 of 2006, SLP(C)No.18583 of 2006, SLP(C)No.16272 of 2006, SLP(C)No.17268 of 2006, SLP(C)No.12661 of 2006, SLP(C)No.16273 of 2006, SLP(C)No.3646 of 2011, SLP(C)No.3350 of 2007, SLP(C)No.6899 of 2006, SLP(C)No.7036 of 2006, SLP(C)No.7247 of 2006, SLP(C)No.19676 of 2007, SLP(C)Nos.19539-19542 of 2007, SLP(C)No.20667 of 2007, SLP(C)Nos.16372-16404 of 2008, SLP(C)No.....(CC 2754 of 2007), SLP(C)No..... (CC 9752 of 2007), SLP(C)No.6332 of 2007 and SLP(C)No.6335 of 2007. **The decision rendered in the appeals arising out of SLP(C)Nos.1678-1697 of 2010** *(Sucha Singh Vs. Collector)* wi s

arising out of SLP(C)Nos.13529-13549 of 2011, SLP(C)Nos.15508-15511 of 2011 and SLP(C).....(CC 2620 of 2011). **The decision rendered in C.A.Nos.319-352 of 2011** *(Mukesh etc. etc. Vs. State of Haryana and Another)* will govern C.A.Nos.8654-8661 of 2010, C.A.Nos.8642-8645 of 2010, C.A.Nos.423-424 of 2011, C.A.No.418 of 2011, C.A.No.419 of 2011, C.A.No.8637 of 2010, C.A.No.8638 of 2010, C.A.Nos.8646-8653 of 2010, C.A.Nos.354-411 of 2011, C.A.Nos.412-417 of 2011, SLP(C)Nos. 26772-26779 of 2009 and SLP(C)Nos.31842-31845 of 2009. **The decision rendered in the appeals arising out of SLP(C)Nos.33637-33638 of 2011** *(Manohar Singh vs. State of Haryana & Anr.)* will govern Civil Appeal Nos.3388-3389 of 2011, C.A.No.5206 of 2011, C.A.No.5208 of 2011, C.A.No.5209 of 2011, C.A.No. 5210 of 2011, C.A.No.5211 of 2011, C.A.No.5212 of 2011, C.A.No.5213 of 2011, C.A.No.5214 of 2011, C.A.No.5207 of 2011, C.A.No.5215 of 2011, C.A.No. 5216 of 2011, C.A.Nos.7179-7182 of 2011, SLP(C)Nos. .....(CC 14220-14221 of 2011), SLP(C)No.....(CC 14164 of 2011), SLP(C)Nos.21344-21351 of 2011,SLP(C)Nos.32764-32765 of 2011, SLP(C)Nos.32766-32767 of 2011, SLP(C)Nos.32770- 32771 of 2011, SLP(C)Nos. 32772-32773 of 2011, SLP(C)Nos.32790-32791 of 2011, SLP(C)Nos.32792-32793 of 2011, SLP(C)Nos.32796-32797 of 2011, SLP(C)Nos.32798-32799 of 2011, SLP(C)Nos.32801-32802 of 2011 and SLP(C)Nos.32806-32807 of 2011.

51. Having regard to the facts of the various cases disposed of by this judgment, the parties will bear their own costs.

B.B.B. Matters disposed of.

HARNEK SINGH
v.
PRITAM SINGH & ORS.
(Civil Appeal Nos.3895-3896 of 2013)

APRIL 17, 2013

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

Family Law – Custom – Adoption – Validity – Plea of plaintiff-appellant that he had been adopted by defendant no.1 – Parties belonged to the Jat community in District Ambala, Haryana – At the time of alleged adoption, plaintiff was about 23 years old and a married man having children – For valid adoption, required condition that the person who may be adopted has not completed the age of 15 years unless there is a custom and usage applicable – Concurrent findings of both the first appellate court and the High Court that neither the custom was proved nor the factum of adoption was established by conclusive evidence – On appeal, held: Question with regard to the custom prevalent amongst the Jats to take in adoption a married man having children not required to be gone into – Evidence brought on record goes against the plaintiff and on that basis it cannot be held that there was a valid adoption – Defendant no.1 filed written statement asserting that he never took the plaintif in adoption, and also denied that plaintiff resided with him or helped him in cultivating the land – Further during pendency of the case, when defendant No.1 died, the plaintiff did not even perform the last ritual and other ceremonies of the deceased – Normally, concurrent findings recorded by two courts need not be interfered with, unless they appear to be perverse in law – On facts, evidence goes against the appellant and, therefore, it cannot be held that there was perversity in the judgment passed by the two appellate courts – Hindu Adoption and Maintenance Act, 1956 – ss. 10 & 11.

The plaintiff (appellant) filed a suit for declaration that the gift deed alleged to have been executed by defendant No.1 in favour of defendant Nos. 2 and 3, in respect of the suit land was illegal, void, ineffective and liable to be set aside. The plaintiff averred that he was the adopted son of defendant No.1; that the plaintiff along with defendant No.1 constituted a Joint Hindu family and was having title in the ancestral property and that defendant Nos.2 and 3 got the alleged gift deed executed in their favour by giving threat and undue coercion, taking advantage of the unsound and mental weakness of defendant no.1.

The defendant Nos. 2 and 3 filed their joint written statement taking preliminary objection that the plaintiff is not the adopted son of defendant no.1 as he never adopted the plaintiff and, therefore, the plaintiff had no *locus standi* to file the suit. The further case of the said defendants was that that defendant No.1 was the absolute owner of the suit property and was fully competent to alienate the same in favour of defendants; and that he executed the gift deed in their favour out of love and affection.

The trial court held that the plaintiff was the legally adopted son of deceased defendant No.1, however, the suit property was not the ancestral property; hence, defendant no.1 was entitled to alienate the property. Consequently, the suit filed by the plaintiff was dismissed. The first appellate court observed that when the appellant claimed to have been taken in adoption, he was more than fifteen years of age (about 23 years old) and a married man having children, and thus it was incumbent upon him to at least plead that his adoption was in consonance with the custom prevalent amongst his community (Jat community of District Ambala) but he did not so plead in the plaint. Further observing that the

suit was filed during the life time of defendant no.1, who had filed a written statement wherein he denied the very factum of adoption; the first appellate Court held that once the adoptive father himself alleged that he never took the plaintiff-appellant in adoption, the court cannot substitute its own decision that he was taken in adoption by defendant no.1. The first appellate court held that *prima facie* the alleged adoption was violative of the provision of Section 10 of the Hindu Adoption and Maintenance Act 1956 and accordingly the same cannot be held to be a valid adoption. The High Court affirmed the findings recorded by the first appellate court, and therefore the instant appeals.

Dismissing the appeals, the Court

HELD: 1. Under clause (iv) of Section 10 of the Hindu Adoption and Maintenance Act, 1956, one of the conditions *inter alia* is that the person who may be adopted has not completed the age of 15 years unless there is a custom and usage applicable to the parties which permit persons who completed the age of 15 years being taken in adoption. The other condition for a valid adoption has been provided in Section 11 of the Act. Clause (vi) of Section 11 specifically provides that the child to be adopted must be actually given and taken in adoption by the parents or guardian concerned or under their authority with the intent to transfer the child from the family of its birth. A child who is abandoned or whose parentage is not known may also be taken in adoption provided the given and taken ceremony is done from the place of family where it has been brought up to the family of its adoption. [Paras 12, 13 & 14] [195-G; 196-H; 197-A]

2.1. Both the first appellate court and the High Court finally came to the conclusion that neither the custom has been proved nor the factum of adoption has been established by conclusive evide[illegible]e

concurrent findings recorded by the two courts need not be interfered with, unless the findings appear to be perverse in law. Without going into the question with regard to the custom prevalent amongst the Jats to take in adoption a married man having children, the evidence which has been brought on record goes against the plaintiff-appellant on the basis of which it cannot be held that there was a valid adoption. [Paras 15, 16] [197-B-D]

2.2. The plaintiff-appellant impleaded his adoptive father as defendant No.1 and alleged that he was adopted by defendant No.1. Curiously enough, defendant No.1, the so called adoptive father, contested the suit by filing written statement making an averment that he never adopted him as his son. If the adoptive father himself asserted that he never took the appellant in adoption, the court cannot come to the conclusion that appellant was taken in adoption by defendant No.1. It is strange enough that when during the pendency of the case defendant No.1 adoptive father died the plaintiff-appellant who claims himself to be the adopted son has not even performed the last ritual and other ceremonies of the deceased. It has also come in evidence that during the period when the alleged adoption took place, the appellant's natural father was *Sarpanch* of the village and the register which was produced in court to show that there was some entry with regard to adoption remained with the said *Sarpanch*. Apart from that, defendant No.1 adoptive father in his detailed written statement has denied each and every allegation and claimed to be in cultivating possession of the land and further denied that the appellant ever resided with him in his house or helped him in cultivating the land. The evidence goes against the appellant and, therefore, it cannot be held that there is perversity in the judgment passed by the two appellate courts. [Para 17] [197-E-H; 198-A]

Kishan Singh and Others vs. Shanti and Others **AIR 1938 Lahore 299 – referred to.**

Case Law Reference:

AIR 1938 Lahore 299 referred to Para 9

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3895-3896 of 2013.

From the Judgment & Order dated 11.05.2009 of the High Court of Punjab & Haryana at Chandigarh in RFA Nos. 122 & 123 of 2008.

Jyoti Mendiratta for the Appellant.

Geeta Luthra, Aman Pal, Rupinder Sheoren, Ajay Pal for the Respondents.

The Judgment of the Court was delivered by

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

2. The plaintiff-appellant assailed the common judgment and order dated 11.05.2009 passed in RSA Nos.122/2008 and 123/2008 whereby the learned Single Judge dismissed both the appeals and affirmed the order passed by the lower appellate court.

3. The facts leading to these appeals may be summarized thus:-

4. The plaintiff (appellant herein) filed a suit being Title Suit No. 80/1985 on 23.04.1985 for declaration that the gift deed dated 28.02.1985 registered on 22.03.1985 alleged to have been executed by defendant No.1 Sarup Singh (since deceased) in favour of defendant Nos. 2 and 3, Pritam Singh and Surjan Singh, in respect of the suit land is illegal, void, ineffective and is to be set aside. A decree for permanent injunction was also sought for restraining

Singh (now deceased) from alienating the land fully described in the schedule of the plaint. The plaintiff filed the said suit with the averments that he is the adopted son of Sarup Singh *alias* Sarupa (now deceased) (defendant No.1 in the original suit). The plaintiff's case is that Sarup Singh and his wife Prem Kaur (now both deceased) had no child and were issueless. They approached the natural father of the plaintiff Kesar Singh and expressed their desire to adopt the plaintiff as their son to which Kesar Singh agreed. Consequently, the plaintiff was adopted as their own son by Sarup Singh and his wife on 16.12.1982 at Village Khatoli, District Ambala. There was actual giving and taking i.e. the plaintiff was allegedly put in the lap of Sarup Singh and Prem Kaur by the natural father Kesar Singh and declared that from 16.12.1982 the plaintiff became their son. It was alleged that all necessary ceremonies including religious and customary formalities were observed and sweets were distributed and since then the plaintiff became the son of deceased defendant No.1 Sarup Singh and his wife. Plaintiff's further case is that since the adoptive father and mother had become old, the plaintiff started managing the entire property of the family including the land, houses etc., and has been cultivating the suit land. The plaintiff's further case is that for a few days when he went out of the village, defendant Nos.2 and 3 who are very strong headed and clever fellows removed the deceased Sarup Singh from his house and by misrepresentation and putting pressure to him and by giving threat and undue coercion got the alleged gift deed executed in their favour taking advantage of the unsound and mental weakness of the deceased Sarup Singh. The plaintiff, therefore, filed the suit being No. 80/1985 against Sarup Singh (defendant No. 1) and defendant Nos. 2 and 3 challenging the said alleged gift deed. The plaintiff also alleged that defendant Nos. 2 and 3 have obtained a decree against defendant No.1 regarding the suit property. Plaintiff's further case is that the plaintiff along with defendant No.1 constituted a Joint Hindu family and was having title in the ancestral property.

5. On being summoned, defendant Nos. 2 and 3 filed their joint written statement taking preliminary objection that the plaintiff is not the adopted son of Sarup Singh as Sarup Singh never adopted the plaintiff and, therefore, the plaintiff has no *locus standi* to file the suit. Defendants also denied that the plaintiff is in possession of the disputed land. The entire story of giving and taking and celebration was denied. It was also denied that any religious and customary formalities were ever observed in respect of the alleged adoption. Defendants' further case is that defendant No.1 Sarup Singh executed a gift deed in their favour out of love and affection and in view of the services rendered by them. It was stated that defendant No.1 was the absolute owner of the suit property and was fully competent to alienate the same in favour of defendants.

6. It is pertinent to mention here that earlier defendant Nos. 2 and 3 had also filed a suit being Suit No. 784 of 1984 titled as Hari Singh vs. Sarupa (defendant No. 1) for declaration that they are the owners in possession of the suit land on the basis of Gift Deed dated 22.03.1985 which was decreed by the Civil Judge vide his judgment and decree dated 15.04.1985. The plaintiff who was having no knowledge of the decree dated 15.04.1985 could not challenge the same in his aforementioned Suit No. 80 of 1985 filed on 23.04.1985 and had to file a second suit being Suit No. 46 of 1987 challenging the decree dated 15.04.1985 alleging therein that the decree is a collusive one and has been obtained by committing fraud upon the Court and thus the same is invalid and ineffective. The pleadings of the parties in Suit No. 46 of 1987 are alleged to be similar to the pleadings in Suit No. 80 of 1985.

7. Both the suits were taken up together by the trial court and the following consolidated issues were framed:-

1. Whether the plaintiff is adopted son of Sarup Singh as alleged? OPP

2. Whether the judgment and de

liable to be set aside as alleged? OPP

3. If issue No.1 is proved, whether the land was ancestral in the hand of Sarupa Singh, if so to what effect? OPP

4. Whether the plaintiff was in possession of the suit land as alleged? OPP

5. Whether the plaintiff is entitled for possession of suit land as alleged? OPP

6. Whether if the adoption deed if any is a result of forgery as alleged? OPD

7. Whether gift deed dated 8.2.1985 is liable to be set aside as alleged? OPP

8. Whether the present suit is not maintainable in the present form? OPD

9. Whether the suit is bad for non joinder of necessary parties? OPD

10. Whether the defendants are entitled for special costs? OPD

11. Whether the plaintiff has no cause of action to file the present suit? OPD

8. The trial court in its judgment dated 31.08.2007 after analyzing the evidence and considering the facts of the case recorded its findings and decided Issue Nos.1 and 6 in favour of the plaintiff holding that the plaintiff is the legally adopted son of deceased defendant No.1 Sarup Singh. However, the trial court decided Issue Nos. 2 and 7 against the plaintiff and in favour of defendant-respondents. So far Issue No.3 is concerned, the trial court held that the suit property was not the ancestral property; hence, Sarup Singh was entitled to alienate the property. Consequently, the suit filed by the plaintiff was dismissed.

9. Aggrieved by the judgment passed by the trial court, the plaintiff-appellant filed appeals before the District Judge being Civil Appeal Nos. 84 and 85 of 2007. The first appellate court while narrating the facts in its judgment dated 13.12.2007, first of all noticed that the suit was filed by the plaintiff during the lifetime of his adoptive father Sarup Singh making him defendant No.1. The said Sarup Singh contested the suit by filing written statement denying the averments made in the plaint that he ever adopted the plaintiff-appellant as his son. The said Sarup Singh also denied the allegations that the gift deed was executed by him in favour of the defendant-respondents under any pressure or coercion. After analysing the pleadings and the evidence, the appellate court observed that although the plaintiff came up with a definite plea that he was being treated as adopted son of Sarup Singh since 1970 but the alleged actual giving and taking ceremony took place in the year 1982; hence the plaintiff-appellant was not sure as to whether the adoption had taken place in the year 1970 or in the year 1982. Strangely enough, no date or month has been provided in the pleadings of the year 1970 when the alleged adoption might have taken place. Admittedly, when the appellant was taken in adoption, he was about 23 years old in the year 1982 and was a married man having children. The appellate court held that since the appellant was more than 15 years of age in 1982, it was incumbent upon him to prove that there was valid customs amongst Jats under which he could have been given in adoption. The appellate court after noticing the fact that custom prevalent amongst the community has not been pleaded or proved, relied upon the decision of Lahore High Court in *Kishan Singh and Others vs. Shanti and Others,* AIR 1938 Lahore 299 for the proposition that if any party wants the Court to rely on a custom, onus is on that party to plead the custom in the precise terms and lead evidence to establish the said custom. The first appellate court while dismissing the appeals discussed the other decisions on the point of custom and finally recorded the following findings:-

" I have considered the respectful submissions of the learned counsel for the appellant at length but before the appellant could succeed in his claim it was incumbent upon the appellant to at least plead that his adoption is in consonance with the custom prevalent amongst his community. This fact has no where been pleaded in the plaint. This court is further of the view that it should have been established beyond doubt that there existed such custom in the area of district Ambala that jats can adopt a child who may be more than fifteen years of age and may be married. The cited ruling of Madhya Pradesh High Court and of our own Hon'ble High Court pertains to the area of M.P. and district Rohtak are of no avail to the case of the appellant as custom differs from place to place and from tribe to tribe. It cannot be laid down as a general rule that simply because there was a custom in Rohtak amongst Jat to adopt even a married person, the same will hold good in District Ambala also. There was no dispute about this proposition of law that once a custom is recognized through judicial pronouncements, then it need not be proved in subsequent cases but at the same time this court is constrained to lay down that no judgment has been produced by the learned counsel for the appellant with respect to jats living in the area of District Ambala. The custom amongst jats who are habitants of district Ambala may be different then custom of jats who are residents of district Rohtak. It reminds this court that our own Hon'ble High Court has laid down in one of the decided case reported in **Hari Singh** Vs. **Bidhi Chand** as reported in 1997 MLJ 224 that jats of tehsil Naraingarh district Ambala lack the capacity to adopt. From all this it can be safely inferred that the custom differs from place to place and from tribe to tribe and as such evidence should have been led beyond shadow of doubt that there existed custom amongst jats of Ambala under which a married man and man beyond age of 15 years could have been given in adoption. Strangely enough, the custom has not

been pleaded in the present case and thus findings cannot be returned on issues no.1 and 6 in favour of the appellant. Not only this, the suit was filed during the life time of Sarup Singh, alleged adopted father of the appellant and in pursuance to the notice given by the court Sarup Singh duly put in appearance before the court and filed a written statement wherein he denied the very factum of adoption. Once the adoptive father himself is alleging that he never took the appellant in adoption, this court cannot substitute its own decision that the appellant was taken in adoption by Sarup singh. Prima facie the alleged adoption is violative of the provision of section 10 of the Hindu Adoption and Maintenance Act 1956 and accordingly the same cannot be held to be a valid adoption. The findings of the learned trial court on issues no.1 and 6 thus cannot be sustained and are accordingly reversed."

10. The plaintiff-appellant assailed the judgment of the first appellate court by filing second appeals in the High Court being R.S.A. Nos. 122 and 123 of 2008. The High Court after discussing the judgments relied upon by the first appellate court and considering the facts and evidence on record came to the conclusion *vide* judgment dated 11.05.2009 that no fault could be found with the findings recorded by the first appellate court holding that in absence of pleading and proof of custom, no reliance could be placed on adoption deed, specially when the stand of the plaintiff-appellant himself in the suit was that he was governed by personal law, and the plea of custom was in the alternative. The High Court, therefore, affirmed the findings recorded by the first appellate court and dismissed the appeals. Hence, the plaintiff-appellant has moved this Court by filing the instant appeals by special leave.

11. Ms. Jyoti Mendiratta, learned counsel appearing for the appellant assailed the judgment and order passed by the first appellate court and that by the High Court as being contrary to law settled by judicial pronouncements

prevalent amongst the Jats in Haryana to adopt even a married person. Learned counsel submitted that in view of the judicial pronouncements both the courts have misdirected itself by holding that neither the custom has been pleaded nor the same has been proved. Learned counsel submitted that it is well recognized that the Hindu Jats are governed by their customs and, therefore, even in the absence of a pleading, the appellate courts ought to have affirmed the judgment passed by the trial court. Learned counsel drew our attention to various decisions favoured and against on this issue which have been fully discussed by the courts below.

12. Section 10 of the Hindu Adoption and Maintenance Act, 1956 needs to be quoted hereinbelow:-

> **"10. Persons who may be adopted** - No person shall be capable of being taken in adoption unless the following conditions are fulfilled, namely:-
>
> (i) he or she is a Hindu;
>
> (ii) he or she has not already been adopted;
>
> (iii) he or she has not been married, unless there is a custom or usage applicable to the parties which permits persons who are married being taken in adoption;
>
> (iv) he or she has not completed the age of fifteen years, unless there is a custom or usage applicable to the parties which permits persons who have completed the age of fifteen years being taken in adoption."

13. Under clause (iv) of Section 10, one of the conditions *inter alia* is that the person who may be adopted has not completed the age of 15 years unless there is a custom and usage applicable to the parties which permit persons who completed the age of 15 years being taken in adoption. The other condition for a valid adoption has been provided in Section 11 of the Act which reads as under:-

> "11**. Other conditions for a valid adoption** - In every adoption, the following conditions must be complied with:-
>
> (i) if the adoption is of a son, the adoptive father or mother by whom the adoption is made must not have a Hindu son, son's son or son's son's son (whether by legitimate blood relationship or by adoption) living at the time of adoption;
>
> (ii) if the adoption is of a daughter, the adoptive father or mother by whom the adoption is made must not have a Hindu daughter or son's daughter (whether by legitimate blood relationship or by adoption) living at the time of adoption;
>
> (iii) if the adoption is by a male and the person to be adopted is a female, the adoptive father is at least twenty-one years older than the person to be adopted;
>
> (iv) if the adoption is by a female and the person to be adopted is a male, the adoptive mother is at least twenty-one years older than the person to be adopted;
>
> (v) the same child may not be adopted simultaneously by two or more persons;
>
> (vi) the child to be adopted must be actually given and taken in adoption by the parents or guardian concerned or under their authority with intent to transfer the child from the family of its birth or in the case of an abandoned child or a child whose parentage is not known, from the place or family where it has been brought up to the family of its adoption:
>
> Provided that the performance of *datta homam* shall not be essential to the validity of adoption."

14. Clause (vi) of Section 11 specifically provides that the child to be adopted must be actually given and taken in adoption by the parents or guardian co ir

authority with the intent to transfer the child from the family of its birth. A child who is abandoned or whose parentage is not known may also be taken in adoption provided the given and taken ceremony is done from the place of family where it has been brought up to the family of its adoption.

15. Both the first appellate court and the High Court have considered all the decisions relied upon by the parties and finally came to the conclusion that neither the custom has been proved nor the factum of adoption has been established by conclusive evidence. Normally, the concurrent findings recorded by the two courts need not be interfered with unless the findings appear to be perverse in law.

16. Without going into the question with regard to the custom prevalent amongst the Jats to take in adoption a married man having children, the evidence which has been brought on record goes against the plaintiff-appellant on the basis of which it cannot be held that there was a valid adoption.

17. The plaintiff-appellant impleaded his adoptive father Sarup Singh as defendant No.1 and alleged that he was adopted by defendant No.1. Curiously enough, defendant No.1, the so called adoptive father, contested the suit by filing written statement making an averment that he never adopted him as his son. If the adoptive father himself asserted that he never took the appellant in adoption, the court cannot come to the conclusion that appellant was taken in adoption by defendant No.1. It is strange enough that when during the pendency of the case defendant No.1 adoptive father died the plaintiff-appellant who claims himself to be the adopted son has not even performed the last ritual and other ceremonies of the deceased. It has also come in evidence that during the period when the alleged adoption took place, the appellant's natural father was *Sarpanch* of the village and the register which was produced in court to show that there was some entry with regard to adoption remained with the said *Sarpanch*. Apart from that, defendant No.1 adoptive father in his detailed written statement

has denied each and every allegation and claimed to be in cultivating possession of the land and further denied that the appellant ever resided with him in his house or helped him in cultivating the land. The evidence, in our view, goes against the appellant and, therefore, it cannot be held that there is perversity in the judgment passed by the two appellate courts.

18. In the light of the findings recorded by the two appellate courts and the discussion made hereinbefore, we do not find any reason to interfere with the judgments passed by the first appellate court and the High Court.

19. For the reasons aforesaid, we do not find any merit in these appeals which are accordingly dismissed.

B.B.B. Appeals dismissed.

U.P. AVAS EVAM VIKAS PARISHAD & ORS.
v.
OM PRAKASH SHARMA
(Civil Appeal Nos. 3908-3909 of 2013)

APRIL 18, 2013

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

Contract Act, 1872 – ss. 3 and 4 – Auction of plot – Held by Housing Board – Under supervision of an officer of the Board – Plaintiff being the highest bidder deposited earnest money – Later the bid amount rejected by the competent authority – Suit filed to declare the rejection order as illegal and void – Decreed by trial court – Decree set aside in first appeal – High Court in second appeal confirmed the decree – Held: Until final acceptance of the bid, the highest bidder acquires no-vested right to have the auction concluded in his favour – An authority falling under Article 12 of the Constitution, is not bound to accept the highest bid in the interest of public revenue – In the present case, since the final bid was not accepted, there was no concluded contract in favour of the highest bidder – Thus, no legal right accrued in favour of the plaintiff to invoke remedy available u/s. 34 of Specific Relief Act, seeking declaratory relief – Uttar Pradesh Avas Evam Vikas Parishad Adhiniyam, 1965 – ss. 12 and 16 – Uttar Pradesh Avas Evam Vikas Parishad (Delegetion of Powers by the Board and the Housing Commissioner) Rules, 1968 – r.3 – Constitution of India, 1950 – Article 12 – Specific Relief Act, 1963 – s.34.

Uttar Pradesh Avas Evam Vikas Parishad Adhiniyam, 1965 – s.88(2) – Suit against the Housing Board – Without issuing notice – Maintainability of the suit – Held: Notice u/s. 88(2) is mandatory – Hence suit instituted without issuing notice, not maintainable.

Practice and Procedure – New plea – Raising of – Permissibility – Held: A plea on legal ground can be raised even at appellate stage.

Appellant-authority conducted public auction of the plot in question, under supervision of Assistant Housing Commissioner of the appellant-authority. The respondent offered highest bid, and as per the terms and conditions of the auction, deposited the earnest money. Thereafter, the respondent was informed that the Housing Commissioner of the Board rejected the bid amount of the respondent.

The respondent filed a suit seeking declaration that the auction held in favour of the respondent was binding on the appellant-Board and rejection thereof was illegal and void. Trial court decreed the suit. First appellate court allowed the appeal of the appellant-Board setting aside the decree. The High Court, in second appeal, confirmed the decree, setting aside order of first appellate court. Review against the order of the High Court was also dismissed. Hence the present appeal.

Allowing the appeal, the Court

HELD: 1.1. The bidder who has participated in tender process has no other right except the right to equality and fair treatment in the matter of evaluation of competitive bids offered by interested persons in response to the notice inviting tenders in a transparent manner and free from hidden agenda. So long as an order regarding final acceptance of the bid had not been passed by the Chairman of the Housing Board, the highest bidder acquires no vested right to have the auction concluded in his favour and the auction proceedings could always be cancelled. The 'State' or the Authority, which can be held to be a 'State' within the meaning of Article 12 of the Constitu

accept the highest tender/offer or bid and the Government could validly retain its power to accept or reject the highest bid in the interest of public revenue. [Paras 27 and 28] [219-H; 220-A; 221-C-E]

1.2. The plaintiff-respondent had not acquired any right and no vested right has been accrued in his favour in respect of the plot in question, merely because his bid amount was highest and he had deposited 20% of the highest bid amount along with earnest money with the Board. In the absence of acceptance of bid offered by the plaintiff to the competent authority of the first defendant, there is no concluded contract in respect of the plot in question. [Para 29] [224-B]

State of U.P. vs. Vijay Bahadur Singh **1982 (2) SCC 365;** *RajasthanHousing Board vs. G.S. Investments and Anr.* **2007 (1) SCC 477: 2006 (7) Suppl. SCR 868;** *Laxmikant vs. Satyawan* **1996 (4) SCC 208: 1996 (3) SCR 532;** *State of Orissa v. Harinarayan Jaiswal* **1972 (2) SCC 36: 1972 (3) SCR 784 – relied on.**

1.3. The relief sought by the plaintiff in the original suit that non-acceptance of his bid was illegal and void, is not maintainable in law as the plaintiff did not acquire legal right in respect of the plot in question. It is an undisputed fact that the final bid was not accepted by the third defendant. Further, even assuming that the Assistant Housing Commissioner had the authority to supervise and conduct the public auction and the authority to accept the final bid of the plaintiff, he did not accept the bid of the plaintiff in writing and communicated the same to him. Therefore, there was no concluded contract in favour of the plaintiff in relation to the offer made by him, whose offer was highest in public auction. [Paras 32 and 33] [225-D; 226-D-E]

1.4. Section 16 of the Act confers power upon the

Board to dispose of its property as per Rule 3 of the U.P. Avas Avam Vikas Parishad (Delegation of Powers by the Board and the Housing Commissioner) Rules, 1968. The Board has power under Section 12(1) of the Act to delegate its power either to a Committee or the Housing Commissioner or any other officer in exercise of its power to discharge its functions. It was the case of the defendants that the Assistant Housing Commissioner was not delegated this power by the Board. In this regard, there was no pleading of the plaintiff except the averments made in the plaint. Further there is no communication by the first defendant regarding acceptance of the proposal of the highest bid of the plaintiff as required under Section 3 of the Contract Act, 1872. Unaccepted offer of the plaintiff does not create any right or any obligation on the part of the defendant to execute the lease deed. [Paras 34 and 35] [227-B-D]

Bhagwan Das Goverdhan Das Kedia vs. Girdhari Lal and Co. **AIR 1966 SC 543: 1966 SCR 656 – relied on.**

Pharmaceutical Society of Great Britain vs. Boots Cash Chemists(Southern) Ltd. **(1952) 2 QB 795 – referred to.**

1.5. The proposal is said to have been completed when the same is accepted by the competent authority, which has not been done in the instant case. Neither the Housing Commissioner nor the Assistant Housing Commissioner accepted the proposal in writing; therefore, there is no communication of acceptance of the offer of the plaintiff. The communication of acceptance of the highest bid is necessary for concluding the contract. Therefore, there is no concluded contract in favour of the plaintiff in respect of the plot in question and the plaintiff cannot claim any legal right and question of enforcement of the said right as provided under Section 34 of the Specific Relief Act seeking declaratory relief. [Para 36] [228-C-E]

Haridwar Singh vs. Begum Sumbrui **AIR 1972 SC 1942: 1972 (1) SCR 673 – relied on.**

1.6. The substantial questions framed by the court in the second appeal did not arise for its consideration. The High Court ought to have noticed that the legal right claimed by the plaintiff seeking relief under Section 34 of the Specific Relief Act on the basis of the pleadings, is wholly untenable in law. In view of the fact that no legal right accrued in favour of the plaintiff in the absence of a concluded contract, no right was accrued upon the bidder in relation to the property in question. Therefore, the suit itself is not maintainable and the suit filed on the basis of the alleged cause of action did not arise. Hence, the trial court could not have granted any relief by not framing the relevant and proper issue and answering the same. The conclusion arrived at by the first appellate court in dismissing the suit is perfectly legal and valid. The said judgment has been erroneously interfered with by the High Court by framing substantial questions of law. In fact and in law, the aforesaid substantial questions do not arise for its consideration and answer the same in favour of the plaintiff, which are erroneous in law. [Para 37] [228-G; 229-A-E]

2. To institute a suit against the first defendant-appellant, the plaintiff-respondent was required to issue notice under Section 88(2) of the Act which is mandatory in law. No such notice was issued to the first defendant. The plea taken by the plaintiff that the defendants have waived their right in urging their plea that the suit is not maintainable for non-issuance of notice under Section 88(2) to the first defendant for institution of suit, is wholly untenable in law. The maintainability of the suit on the ground of non issuance of a statutory notice to the first defendant prior to institution of the suit is a legal ground, which can be raised at any point of time, even in the

second appeal; this is well established principle of law. This aspect of the matter has not been considered by the trial court while answering the relevant contentious issues. The second appellate court too did not consider this important legal aspect of the case. Therefore, the plaintiff has no right to institute a suit in absence of the notice under Section 88(2) of the Act, which is mandatory in law. [Para 31] [224-F-H; 225-A-C]

Pradyat Kumar vs. Chief Justice of Calcutta **AIR 1956 SC 285: 1955 SCR 1331;** *Sahni Silk Mills (P) Ltd. vs. ESI Corpn.* **1994 (5) SCC 346: 1994 (1) Suppl. SCR 626;** *Director General, ESI vs. T. Abdul Razak* **1996 (4) SCC 708: 1996 (3) Suppl. SCR 80;** *The Barium Chemicals Ltd. vs. The Company Law Board and Ors.* **AIR 1967 SC 295: 1966 SCR 311;** *State of Orissa vs. Commissionr of Land Records and Settlement* **1998 (7) SCC 162: 1998 (1) Suppl. SCR 130;** *CESC vs. Subhash Chandra Bose* **1992 (1) SCC 441: 1991 (2) Suppl. SCR 267;** *Hassan Co-operative Milk Producers's Union Ltd. vs. ESI.* **2010 (11) SCC 537: 2010 (5) SCR 232 – cited.**

Case Law Reference:

1955 SCR 1331	**cited**	**Para 10**
1994 (1) Suppl. SCR 626	**cited**	**Para 14**
1996 (3) Suppl. SCR 80	**cited**	**Para 14**
1966 SCR 311	**cited**	**Para 14**
1998 (1) Suppl. SCR 130	**cited**	**Para 15**
1991 (2) Suppl. SCR 267	**cited**	**Para 16**
2010 (5) SCR 232	**cited**	**Para 16**
2009 (6) SCR 663	**cited**	**Para 27**
1982 (2) SCC 365	**rel**	

2006 (7) Suppl. SCR 868	**relied on**	**Para 28**
1996 (3) SCR 532	**relied on**	**Para 28**
1972 (3) SCR 784	**relied on**	**Para 28**
(1952) 2 QB 795	**referred to**	**Para 34**
1966 SCR 656	**relied on**	**Para 35**
1972 (1) SCR 673	**relied on**	**Para 36**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3908-3909 of 2013.

From the Judgment & Order dated 28.5.2010 in SA No. 113 of 2001, dated 18.4.2011 in CMRA No. 215947 of 2010 in SA No. 113 of 2001 of the High Court of Judicature at Allahabad.

Rakesh Dwivedi, Vishwajit Singh, Abhindra Maheshwari, Sansriti Pathak, Pankaj Singh for the Appellants.

Ranjeet Kumar, Varun Goswami, Rajesh Singh, R.C. Kaushik for the Respondents.

The Judgment of the Court was delivered by

V. GOPALA GOWDA, J. 1. Leave granted.

2. These appeals are directed against the judgment and orders dated 28.5.2010 and 18.4.2011 passed in Second Appeal No.113 of 2001 and CMRS No.215947/2010 by the High Court of Allahabad in allowing the second appeal by answering the substantial questions of law framed in favour of the respondent-plaintiff and rejecting the CMRS No.215947/2010 in the aforesaid second appeal urging relevant facts and legal contentions in support of the appellant-defendant's case. The brief facts are stated for the purpose of appreciating the factual and rival legal contentions urged on behalf of the parties, in view to find out as to whether the impugned judgment and

orders under challenge in these appeals are required to be set aside by this Court in exercise of its jurisdiction.

3. The ranking of the parties is referred to in the judgment as has been assigned before the 1st Additional Civil Judge, Bareilly for the sake of convenience.

4. The first defendant (appellant herein) is a statutory body created under the Uttar Pradesh Avas Evam Vikas Parishad Adhiniyam, 1965 for development of colonies, residential plots, commercial plots and complexes in the State of Uttar Pradesh. The first defendant on 4.3.1977 published in the local newspapers for auction of nine shops and a plot earmarked for Cinema Hall measuring 3441.94 sq. meters in Izzat Nagar, Scheme No.1, Block C and D in Bareilly District specifying the date of auction and furnishing necessary information. According to the plaintiff, the reserved price of the Cinema plot was fixed at Rs.1,80,200/- and the auction of the property was conducted on 11.3.1977 under the supervision of one Mr. Raj Kumar Singh Bisen, the then Assistant Housing Commissioner of the first defendant Board. In the auction, the plaintiff (respondent herein) offered the highest bid of Rs.1,31,500/- and as per the terms and conditions of the auction, he had deposited Rs.26,300/- i.e. 20% of the bid amount, plus Rs.500/- as earnest money.

5. In response to the plaintiff's representations made to the first defendant on 24.5.1977 and 1.6.1977 asking for issuance of the allotment letter in his favour, the Assistant Housing Commissioner informed the plaintiff vide his letters dated 26.5.1977 and 8.7.1977 stating that the third defendant Housing Commissioner of the Board had rejected the bid amount deposited by the plaintiff and the same was refunded by way of demand draft.

6. The plaintiff filed original suit bearing No.143 of 1977 in the Civil Court, Bareilly challenging the action of the first defendant with regard to the allotment

suit the first defendant filed written statement. The learned Civil Judge, Bareilly after conducting the trial, answered the issues framed by it, on proper appreciation of documentary and oral evidence in favour of the plaintiff and passed its judgment and order dated 17.12.1977 decreeing the suit as prayed by the plaintiff.

7. Aggrieved by the aforesaid judgment and order passed by the trial court, the first defendant filed First Appeal No.107 of 1978 before the High Court urging various legal contentions. The High Court by its order dated 20th May, 1987 after examining rival factual and legal contentions set aside the judgment and order of the trial court and remanded the matter to the trial court for its reconsideration. After the remand order passed by the High Court, the first defendant filed its additional written statement before the trial court. The trial court considered the entire pleadings, evidence on record and examined three more witnesses. Again it passed the decree in favour of the plaintiff by order dated 24.9.1993. Against the said judgment, the defendant filed first Appeal No.67 of 98 before the District Judge. The learned District Judge allowed the appeal with costs by setting aside the impugned judgment and decree of the trial court by its order dated 2.2.2000.

8. On 10.2.2000, aggrieved by the impugned judgment and decree passed by the first appellate court, the plaintiff filed Second Appeal No.113 of 2001 before the High Court urging various legal contentions. The High Court on 28.5.2010 allowed the appeal by answering the substantial questions of law framed by it in the Second Appeal and set aside the judgment dated 2.2.2000 of the first appellate court.

9. While answering the substantial questions of law framed by it, the High Court has held that the judgment of the first appellate court was contrary to record as the same is passed without proper application of mind. It is the case of the defendants that the High Court while passing the impugned judgment has completely ignored to consider the provisions of

Section 12 of the U.P. Avas Evam Vikas Parishad Adhiniyam, 1965 (hereinafter referred to as 'the Act'). Section 12 of the Act, reads as under:

"12. Delegation of powers.-

(1) Subject to the provisions of this Act and the rules, the Board may by general or special order delegate, either unconditionally or subject to such conditions, including the condition of review by itself, as may be specified in the order, to any committee appointed by it or to the Housing Commissioner or any officer of the Board such of its powers and duties under this Act, as it may deem necessary.

(2) Subject to the provisions of this Act and the rules, the Housing Commissioner may by general or special order delegate, either unconditionally or subject to such conditions, including the condition of review by himself, as may be specified in the order, to any officer of the Board such of his powers and duties under this Act, not being powers and duties delegated to him under sub-section (1), as he may deem necessary."

Section 12 provides powers to the Board for delegation of its powers to the Housing Committee or to the Housing Commissioner or any officer of the Board.

10. The defendants aggrieved by the said judgment filed a review application challenging the findings and reasons recorded in the impugned judgment contending that there was an error apparent on the face of the record and therefore prayed for review of the said judgment and order, which was dismissed by the High Court after hearing the parties vide its order dated 18.4.2011. Therefore, the defendants have filed these appeals urging the following legal questions and grounds:-

a. Whether the High Court was e

fact that the Housing Commissioner had never made any delegation of power with regard to accept/reject the bid in favour of the Assistant Housing Commissioner, hence the question of producing any order of delegation by first defendant Parishad never arose and as it was the plaintiff who based his contention that the power to accept the highest bid was delegated by the Housing Commissioner to the Asstt. Housing Commissioner, therefore, he ought to have produced such delegation power in support of his claim?

b. Whether the High Court was correct in ignoring that as per the terms and conditions of the auction of the properties mentioned in the booklet/printed format, the auction was subject to the approval of the Housing Commissioner and, therefore, the conclusion of the High Court in this regard is contrary to the facts and the same is sustainable in law?

c. Whether the High Court was correct in ignoring that the then Assistant Housing Commissioner was deputed only to supervise and conduct the auction as a ministerial officer and had neither any authority to accept the bid nor did he accept the said bid at any stage?

d. Whether the High Court was correct in ignoring that the Housing Commissioner was the only Competent authority to accept or reject the bid and the bid of the plaintiff was rejected by him and consequently, there was no concluded contract of sale of the property in his favour as claimed by him and no allotment letter was ever issued to him?

e. Whether the High Court was correct in ignoring that

as per the maxim "delegatum non protest delegare", the statutory power must be exercised only by the body and office to whom it has been conferred and none else can discharge the function entrusted to it by law?

f. Whether the Hon'ble High Court was correct in ignoring the judgment of this Hon'ble Court in the case of *Pradyat Kumar vs. Chief Justice of Calcutta*[1] wherein the Supreme Court observed that "it is well recognized that the statutory functionaries exercising the power of delegation cannot be said to have delegated such functions merely by deputing responsible and competent officials to enquire and report. This is the ordinary mode of exercise of any administrative power"?

11. Mr. Rakesh Dwivedi, learned senior counsel on behalf of the defendants submitted that the High Court was not correct in ignoring the fact that the Housing Commissioner had never made any delegation of power in favour of the then Assistant Housing Commissioner of the Board, in regard to accept or reject the bid of the plaintiff, therefore, the question of producing the order of delegation of his power said to have been given by the first defendant in his favour did not arise and it was the plaintiff who based his claim contending that power to accept the highest bid was delegated by the Housing Commissioner to the then Assistant Housing Commissioner though there is no such specific plea in the plaint presented by the him except pleading the averments at paragraph 5 that as per the terms and conditions of acceptance of bid it was final and binding on the fall of hammer and the same did not require the acceptance or rejection by defendants or any authority what so ever. Therefore, the High Court has committed serious error in law in framing the substantial question of law in this aspect and

1. AIR 1956 SC 285.

answered the same in favour of the plaintiff, by concurring with the findings of the trial court in drawing an adverse inference under Section 114 of the Evidence Act with regard to non-production of the order of delegation purported to have passed by the Housing Board in favour of the then Assistant Housing Commissioner or the Housing Commissioner delegating his power to the then Assistant Housing Commissioner. In the absence of such pleading, and also in the absence of evidence and contentions urged on behalf of the plaintiff, neither the trial court nor the High Court should have accepted it and it could not have framed the substantial question of law in this regard and answered the same in favour of the plaintiff.

12. It is further contended by the learned senior counsel that the High Court was not right in ignoring the terms and conditions of the public auction mentioned in the booklet/printed format particularly Condition No.5 by which the auction of the property in question was subject to the approval of the Housing Commissioner. The High Court has recorded the finding of fact while answering the substantial questions of law framed at (c) in favour of the plaintiff by placing reliance upon Section 106 of the Indian Evidence Act. Therefore, the finding recorded by the High Court is erroneous in law and the same is liable to be set aside.

13. Further, it is urged by the learned senior counsel that the High Court has committed an error both on facts and in law and also that it has ignored the fact that the then Assistant Housing Commissioner was deputed only to supervise and conduct auction of the property as ministerial officer and he had neither any authority to accept the bid nor he had accepted the bid at any stage.

14. Another ground urged by the learned senior counsel on behalf of the defendant is that the High Court has ignored the fact that Housing Commissioner of the Board was the only competent authority to accept or reject the bid of the plaintiff and in fact he had rejected the offer and there was no

concluded contract of sale of the plot in favour of the plaintiff as claimed by him. No allotment letter was ever issued in his favour and in the absence of the same, the prayer of the plaintiff that the auction of the property was held in relation to the plot in question under Scheme No.1 at Bareilly in favour of the plaintiff, is final and binding and non-acceptance of the same by the third defendant-Housing Commissioner who has rejected the bid of the plaintiff and communicated the same vide its letters dated 26.5.77 and 8.7.77 by the then Assistant Housing Commissioner in relation to Cinema Hall was illegal and void and the same has no effect on the status of plaintiff as owner/allottee thereof is wholly untenable in law. Another contention urged by the learned senior counsel is that the third defendant-Housing Commissioner has no power to delegate his authority to another officer in exercise of authority under Section 12(2) of the Act. Section 12(2) provides for a statutory bar upon him from further delegation of the functions and powers which have been delegated upon him by the Board. He has placed reliance on the decisions of this Court in Sahni *Silk Mills (P) Ltd. vs. ESI Corpn.*[2]*, Director General, ESI vs. T. Abdul Razak*[3] and *The Barium Chemicals Ltd. vs. The Company Law Board & Ors*[4]*..*

15. Further, the learned senior counsel placed reliance upon the judgment of this Court in *State of Orissa vs. Commissioner of Land Records and Settlement*[5]*,* in support of the proposition of law that a principal does not lose his powers merely because those powers have been delegated to another body.

Also, placing reliance upon the aforesaid proposition of law laid down by this Court in the decision referred to above, it

2. 1994 (5) SCC 346 Para 6-8),
3. 1996 (4) SCC 708 (para 14-15)
4. AIR 1967 SC 295.
5. 1998 (7) SCC 162 (para 34).

is urged by the learned senior counsel that nothing prevents the third defendant from reviewing the order passed by the delegatee, that is, the then Assistant Housing Commissioner which becomes evident from bare reading of Section 12(2) of the Act. Further, he has placed reliance upon Section 11 of the Act which provides that Housing Commissioner shall exercise supervision and control over all officers and servants of the Board.

16. The power of supervision and control has been interpreted by this Court to include power of supervision, management or authority to direct, restrict or regulate. Learned senior counsel placed reliance on the judgments of this Court in support of the above legal submissions in *CESC vs. Subhash Chandra Bose*[6] and *Hassan Co-operative Milk Producers's Union Ltd. vs. ESI*[7].

17. Further, the learned senior counsel placed strong reliance on the judgments of this Court in *Meerut Development Authority vs. Association of Management Studies*[8], and *State of U.P. vs. Vijay Bahadur Singh*[9], regarding rights of the bidder in participating in auction process and contended that though the bidders can participate in the tender process, they will not have any other right except the right to equality and fair treatment in the matter of evaluation of competitive bids offered by interested persons in response to notice inviting tenders in a transparent manner and free from hidden agenda.

18. Further, the learned senior counsel placed reliance on the law laid down by this Court in *Rajasthan Housing Board vs. G.S. Investments & Anr*[10] in support of his submissions that bidder has no vested interest in relation to the auctioned

6. 1992 (1) SCC 441.
7. 2010 (11) SCC 537.
8. 2009 (6) SCC 171.
9. 1982 (2) SCC 365.
10. 1996 (4) SCC 208.

property unless the bid is accepted, even though the auction is concluded in his favour and the auction proceedings can always be cancelled by the competent authority of the first defendant.

19. Further the learned senior counsel placed reliance upon the judgment of this Court in *Laxmikant vs. Satyawan*[11] in support of his legal contention that this Court has repeatedly pointed out that 'State' or the authority which can be held to be 'State' within the meaning of Article 12 of the Constitution is not bound to accept the highest tender or bid and the Government authority could validly retain its power either to accept or reject the highest bid in the interest of public revenue. In support of this legal contention, learned senior counsel placed reliance upon another decision of this Court in *State of Orissa v. Harinarayan Jaiswal*[12] and submitted that the High Court could have noticed that the trial court has proceeded under impression that the then Assistant Housing Commissioner had been authorized to supervise and conduct the auction in relation to the plot in question and that power automatically carried with him the authority to accept the highest bid to conclude the contract. In this regard the learned senior counsel referred to the decision of this Court in *Pradyat Kumar vs. Chief Justice, Calcutta,* wherein this Court has observed that no delegation is involved where the statutory authority requires another person exercising ministerial function to retain the decision and responsibility of it in its hands.

20. Further, learned senior counsel contended that the High Court while remanding the case in the earlier first appeal proceedings vide its judgment dated 20th May, 1987 to the trial court after setting aside the impugned judgment of the trial court, it had given specific directions to it for deciding the case afresh in the light of certain observations. The following

11. 1996 (4) SCC 208.
12. 1972 (2) SCC 36 (para 13)

observations were made with reference to Section 11, which reads as under:

> "The Housing Commissioner is thus an overall controlling authority over all officers and servants of the Board. In the provisions referred to earlier, the officers of the Board including the authority and functions. The officers of the Board (which include the Assistant Commissioner) are required under the Act to discharge such functions as are delegated to them."

21. The High Court has also directed the trial court to trace out the source of power stated to have been delegated by the Housing Commissioner to the then Assistant Housing Commissioner under Section 12 since there must be an order of delegation in favour of another and it is implied that delegation must be in express terms and it cannot be by implication. Further, the High Court also directed the trial court to find out as to whether the Commissioner, the third defendant authorized the then Assistant Housing Commissioner to conduct an auction of the plot in question in writing or oral. Whether in the face of the record, it could be said that it was a case of seeking assistance only or a case of delegation in favour of the then Assistant Housing Commissioner and that finding recorded by the trial court on the basis of mis-reading of statement of evidence of DW-1, the then Assistant Housing Commissioner. Further, the case of the plaintiff was that the auction officer carried with him the authority to conclude the contract, whether such entrustment of authority was by an oral order or in writing. There is no pleading in the plaint regarding the same and therefore, the plaintiff should have been directed to prove the same and the evidence of DW1 could not have been accepted by the trial court to prove the negative fact that no such order was made in writing in favour of the then Assistant Housing Commissioner either by the Board or third defendant as provided under Section 12(1) of the Act. Further, the High Court has noted in its remand order the term of

condition No.5 which enunciated that the power of final approval by an authority other than the auction officer and issuance of the allotment order in favour of the plaintiff was a condition precedent to the contract. The trial court has neither adverted to the aforesaid aspect of the case nor has referred to the conditions in its judgment. It is contended by the learned senior counsel while answering the contentious issue that the aforesaid observations made by the High Court in the earlier remand order by allowing the first appeal of the defendants which was binding on the trial court, the said directions have not been complied with. Therefore, the High Court could not have exercised its appellate jurisdiction and set aside the judgment of the first appellate court. Learned senior counsel further placed reliance upon the judgment of this Court in *Sahni Silk Mills (P) Ltd.'s* case (supra) regarding the scope of Section 100 of CPC to exercise its jurisdiction. It could not have disturbed the findings of fact recorded by the first appellate court after the judgment was passed by the trial court on remand and set aside the said findings holding that the grant of decree in favour of the plaintiff is erroneous in law, and therefore, the exercise of jurisdiction under Section 100 CPC by the High Court is contrary to the judgment of this Court in *Sahni Silk Mills (P) Ltd.'s* case (supra).

22. On the other hand, the learned senior counsel for the plaintiff, Mr. Ranjit Kumar sought to justify the impugned judgment contending that DW1, the then Assistant Housing Commissioner has admitted that he has got the authority to auction, therefore the finding of fact on the contentious issue is rightly recorded by the trial court, which was erroneously set aside by the first appellate Court. That finding of the first appellate court was found fault with by the High Court and therefore rightly framed the substantial questions of law and answered the same in favour of the plaintiff. The learned senior counsel also placed reliance upon the scheme of the first defendant which does not enumerate the condition for approval of the present bid of the plaintiff by the H[illegible]er

in relation to the plot in question. In the absence of the same the Housing Commissioner was ahead of authority in not accepting the bid and it was only a formal allotment letter which was required to be issued by him. The same has not been issued, but on the other hand the third defendant-Housing Commissioner has rejected the bid of the plaintiff which was communicated vide its letters dated 26.5.77 and 8.7.77 by the then Assistant Housing Commissioner and also 20% of the bid amount with earnest money was refunded which is erroneous in law.

23. Further, the learned senior counsel submits that the trial court has recorded the finding of fact in the impugned judgment regarding non-production of the file by the first defendant in relation to the delegation of power in favour of the then Assistant Housing Commissioner for conducting auction and accepting the bid in favour of the plaintiff and rightly adverse inference was drawn against it under Section 114 of the Evidence Act by not accepting the explanation given by the first defendant through its officer that the file was misplaced in transit from Bareilly to Lucknow stating that it is untenable. The burden of proof is on the first defendant by producing record to show that the then Assistant Housing Commissioner was only deputed to supervise and conduct auction of the plot as ministerial officer and did not have any authority to accept the bid. Further, it is stated by the learned senior counsel that three other shops, auction of which was held by the Assistant Housing Commissioner on 11.3.1977, were allotted in favour of the highest bidders by accepting their offer and executing necessary documents. It would clearly go to show that the findings recorded by the trial court accepted by the High Court in exercise of its second appellate jurisdiction and answering the substantial questions of law in favour of the plaintiff in the impugned judgment is based on the pleadings and the legal evidence on record. Therefore, this Court need not interfere with the concurrent findings of fact recorded by the High Court and the findings recorded on the substantial questions of law in the

impugned judgment particularly in view of the pleadings at paragraph 5 of the plaint which has been referred to in the earlier portion of the judgment while narrating the legal contentions urged on behalf of the defendants. Therefore, he has prayed for dismissal of the appeals.

24. With reference to the aforesaid rival factual and legal contentions urged on behalf of the parties, the following points would arise for consideration of this Court:

a. What are the rights of the plaintiff/bidder participating in the auction process in relation to the plot in question?

b. Whether there is any vested right upon the plaintiff/bidder until the bid is accepted by the competent authority in relation to the property in question? Merely because the plaintiff is the highest bidder by depositing 20% of the bid amount without there being approval of the same by the competent authority and it amounts to a concluded contract in relation to the plot in question?

c. Whether the plaintiff could have maintained the suit in the absence of a concluded contract?

d. Whether the plaintiff proves that the Assistant Housing Commissioner had the authority to accept the bid in relation to the plot in question which was put to auction and was empowered to allot the plot in favour of the plaintiff being the highest bidder?

e. Whether the trial court is right in holding that non-issuance of notice to the first defendant as provided under Section 88(2) of the Act for institution of the suit and not taking the plea in this regard by the defendant in the initial stage rather taking the plea subsequently amounts to a waiver of the defence of the defendants?

f. Whether the suit for declaratory relief on the basis of the cause of action as pleaded by the plaintiff, in the absence of allotment letter issued by the competent authority in relation to the plot in question as provided under Section 12(1) of the Act, is maintainable?

g. Whether the substantial questions of law framed by the High Court in the second appeal would arise for its consideration and whether the findings in the second appeal are erroneous in law?

25. The points (a) to (d) are required to be answered against the plaintiff by assigning the following reasons:-

It is an undisputed fact that public auction was held in relation to the property of the first defendant vide public notice dated 4.3.1977 published in the local newspapers by the Parishad for auction of nine shops and the plot earmarked for cinema hall measuring 3441 sq. meters. The auction was supervised and conducted on 11.3.1977 by one Mr. Ram Kumar Singh Bisen the then Assistant Housing Commissioner. It was also an admitted fact that the plaintiff was the highest bidder as he had quoted Rs.1,31,500/- in relation to the plot and he has deposited a sum of Rs.26,500/- that is 20% of the amount of bid plus Rs.500/- as earnest money.

26. It is also an undisputed fact that the offer of the plaintiff is highest as per the terms and conditions of the sale of plot in question by public auction are concerned, 20% of the bid amount deposited by him that by itself does not amount to accepting his bid by the competent authority for grant of lease hold rights of plot in his favour.

27. This Court in the case of *Meerut Development Authority case (*supra) has laid down the legal principle that the bidder who has participated in tender process have no other right except the right to equality and fair treatment in the matter

of evaluation of competitive bids offered by interested persons in response to the notice inviting tenders in a transparent manner and free from hidden agenda. The relevant paragraphs are extracted hereunder:

"**27.** The bidders participating in the tender process have no other right except the right to equality and fair treatment in the matter of evaluation of competitive bids offered by interested persons in response to notice inviting tenders in a transparent manner and free from hidden agenda. One cannot challenge the terms and conditions of the tender except on the abovestated ground, the reason being the terms of the invitation to tender are in the realm of the contract. No bidder is entitled as a matter of right to insist the authority inviting tenders to enter into further negotiations unless the terms and conditions of notice so provided for such negotiations.

……. ….. …..

29. The Authority has the right not to accept the highest bid and even to prefer a tender other than the highest bidder, if there exist good and sufficient reasons, such as, the highest bid not representing the market price but there cannot be any doubt that the Authority's action in accepting or refusing the bid must be free from arbitrariness or favouritism."

28. In support of the said proposition, learned senior counsel for the defendant, Mr. Rakesh Dwivedi has also placed reliance upon another decision of this Court in *State of U.P vs. Vijay Bahadur Singh* (supra). The learned senior counsel has rightly placed reliance upon the judgment of this Court in *Rajasthan Housing Board* case (supra) which reads as under:

"9. This being the settled legal position, the respondent acquired no right to claim that the auction be concluded in its favour and the Hig n

entertaining the writ petition and in not only issuing a direction for consideration of the representation but also issuing a further direction to the appellant to issue a demand note of the balance amount. The direction relating to issuance of the demand note for balance amount virtually amounted to confirmation of the auction in favour of the respondent which was not the function of the High Court."

The law laid down by this Court in the aforesaid paragraph in support of the proposition of law that so long as an order regarding final acceptance of the bid had not been passed by the Chairman of the Housing Board, the highest bidder acquire no vested right to have the auction concluded in his favour and the auction proceedings could always be cancelled. Further, he has placed reliance on another decision of this Court in the case of *Laxmikant* referred to supra . In support of the proposition of law this Court has rightly pointed out that the 'State' or the Authority, which can be held to be a 'State' within the meaning of Article 12 of the Constitution, is not bound to accept the highest tender/offer or bid and the Government could validly retain its power to accept or reject the highest bid in the interest of public revenue. In support of this contention, he has placed reliance on the *State of Orissa vs. Harinarayan Jaiswal* case (supra), relevant paragraph of which reads as under:

"13. Even apart from the power conferred on the Government under Sections 22 and 29, we fail to see how the power retained by the Government under clause (6) of its order, dated January 6, 1971, can be considered as unconstitutional. As held by this Court in *Cooverjee B. Bharucha case*, one of the important purpose of selling the exclusive right to sell liquor in wholesale or retail is to raise revenue. Excise revenue forms an important part of every State's revenue. The Government is the guardian of the finances of the State. It is expected to protect the financial interest of the State. Hence quite naturally, the Legislature

has empowered the Government to see that there is no leakage in its revenue. It is for the Government to decide whether the price offered in an auction sale is adequate. While accepting or rejecting a bid, it is merely performing an executive function. The correctness of its conclusion is not open to judicial review. We fail to see how the plea of contravention of Article 19(1)(*g*) or Article 14 can arise in these cases. The Government's power to sell the exclusive privileges set out in Section 22 was not denied. It was also not disputed that those privileges could be sold by public auction. Public auctions are held to get the best possible price.

Once these aspects are recognised, there appears to be no basis for contending that the owner of the privileges in question who had offered to sell them cannot decline to accept the highest bid if he thinks that the price offered is inadequate. There is no concluded contract till the bid is accepted. Before there was a concluded contract, it was open to the bidders to withdraw their bids — see *Union of India v. Bhimsen Walaiti Ram*[13]. By merely giving bids, the bidders had not acquired any vested rights. The fact that the Government was the seller does not change the legal position once its exclusive right to deal with those privileges is conceded. If the Government is the exclusive owner of those privileges, reliance on Article 19(1)(*g*) or Article 14 becomes irrelevant. Citizens cannot have any fundamental right to trade or carry on business in the properties or rights belonging to the Government—nor can there be any infringement of Article 14, if the Government tries to get the best available price for its valuable rights. The High Court was wholly wrong in thinking that purpose of Sections 22 and 29 of the Act was not to raise revenue. Raising revenue as held by this Court in *Cooverjee B. Bharucha vs.The Excise Commissioner and the Chief*

13. 1969 (3) SCC 146.

Commissioner, Ajmer & Ors' case was one of the important purposes of such provisions. The fact that the price fetched by the sale of country liquor is an excise revenue does not change the nature of the right. The sale in question is but a mode of raising revenue. Assuming that the question of arbitrary or unguided power can arise in a case of this nature, it should not be forgotten that the power to accept or reject the highest bid is given to the highest authority in the State i.e. the Government which is expected to safeguard the finances of the State. Such a power cannot be considered as an arbitrary power. If that power is exercised for any collateral purposes, the exercise of the power will be struck down. It may also be remembered that herein we are not dealing with a delegated power but with a power conferred by the Legislature.

The High Court erroneously thought that the Government was bound to satisfy the Court that there was collusion between the bidders. The High Court was not sitting on appeal against the order made by the Government. The inference of the Government that there was a collusion among the bidders may be right or wrong. But that was not open to judicial review so long as it is not proved that it was a make-believe one. The real opinion formed by the Government was that the price fetched was not adequate. That conclusion is taken on the basis of Government expectations. The conclusion reached by the Government does not affect any one's rights. Hence, in our opinion, the High Court misapplied the ratio of the decision of this Court in *Barium Chemicals Ltd. & Anr. v. Company Law Board* and *Rohtas Industries Ltd. v. S.T. Agarwal*."

(emphasis supplied)

29. In view of the law laid down by this Court in the aforesaid decisions, learned senior counsel Mr. Rakesh Dwivedi has rightly placed reliance upon the same in support

of the case of the first defendant, which would clearly go to show that the plaintiff had not acquired any right and no vested right has been accrued in his favour in respect of the plot in question merely because his bid amount is highest and he had deposited 20% of the highest bid amount along with earnest money with the Board. In the absence of acceptance of bid offered by the plaintiff to the competent authority of the first defendant, there is no concluded contract in respect of the plot in question, which is evident from letters dated 26.5.1977 and 8.7.1977 wherein the third defendant had rejected the bid amount deposited by the plaintiff and the same was refunded to him by way of demand draft, which is an undisputed fact and it is also not his case that the then Assistant Housing Commissioner who has conducted the public auction had accepted the bid of the plaintiff.

30. Therefore, points (a) to (d) are answered in favour of the defendants. In fact, these aspects have not been dealt with either by the trial court or by the second appellate court in the impugned judgments.

Answer to Point No. (e)

31. To institute a suit against the first defendant, the plaintiff was required to issue notice under Section 88(2) of the Act which is mandatory in law. Undisputedly, no such notice was issued to the first defendant. The plea taken by the plaintiff that the defendants have waived their right in urging their plea that the suit is not maintainable for non-issuance of notice under Section 88(2) to the first defendant for institution of suit by the plaintiff is wholly untenable in law and the finding recorded by the trial court while answering the issue Nos. 5 and 6 in the impugned judgment of the trial court dated 24.9.1993 that defendants did not take this plea in its original written submissions is also wholly untenable in law. Also the plea that after the remand order the said plea was taken belatedly by the first defendant, therefore, it has waived its right, is erroneous finding recorded by the trial court. The

court, which has been accepted by the second appellate court, also suffers from error in law. The maintainability of the suit on the ground of non issuance of a statutory notice to the first defendant prior to institution of the suit is a legal ground, which can be raised at any point of time, even in the second appeal; this is well established principle of law. This aspect of the matter has not been considered by the trial court while answering the relevant contentious issue Nos. 5 and 6. The second appellate court too did not consider this important legal aspect of the case. Therefore, we have to answer the said point against the plaintiff holding that the plaintiff has no right to institute a suit in absence of the notice under Section 88(2) of the Act, which is mandatory in law.

Answer to Point (f):

32. The declaratory relief sought by the plaintiff in the original suit is not maintainable in law as the plaintiff did not acquire legal right in respect of the plot in question.

The prayer at para 12 (a) of the plaint is extracted below for consideration of this Court:

> "12 (a). That the auction held on 11.3.1977 in respect of the Cinema Plot in Izzatnagar (Scheme No.2) Bareilly in favour of the plaintiff is final and binding on the defendants and the non-acceptance thereof by the Housing Commissioner (defendant No.3) as communicated to the plaintiff by the defendant no.1 by letter No.8851/S.P. 3/6 Bareilly/Cinema plot dated 26.5.1977 is illegal and void and has no effect on the status of the plaintiff as owner/ allottee thereof."

33. In this regard, it is also necessary to extract Section 34 of the Specific Relief Act, 1963 for the purpose of appreciating the tenability of the above prayer of the plaintiff, which reads as under:

> "34. Discretion of court as to declaration of status or right.- Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief:
>
> Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so. Explanation.- A trustee of property is a" person interested to deny" a title adverse to the title of some one who is not in existence, and for whom, if in existence, he would be a trustee."

It is an undisputed fact that the final bid has not been accepted by the third defendant. This is borne out from the letters dated 26.5.1977 and 8.7.1977. Further, even assuming that the Assistant Housing Commissioner had the authority to supervise and conduct the public auction and the authority to accept the final bid of the plaintiff in relation to the plot which was auctioned on 11.3.1977, it is also an undisputed fact that he did not accept the bid of the plaintiff in writing and communicated the same to him. Therefore, there is no concluded contract in favour of the plaintiff in relation to the offer made by him, whose offer is highest in public auction held on 11.3.1977. Hence, the suit filed by the plaintiff seeking for declaratory relief as prayed in the plaint is wholly misconceived and is not maintainable in law. Thus, the judgment and order passed by the second appellate court is wholly unsustainable in law and is liable to be set aside.

34. It is an undisputed fact that Section 16 of the Act confers power upon the Board to dispose of its property as per Rule 3 of the U.P. Avas Avam Vikas Parishad (Delegation of Powers by the Board and the Housing Commissioner) Rules, 1968. The Board has power under Section 12(1) of the Act to delegate its power either to a Comm g

Commissioner or any other officer in exercise of its power to discharge its functions. It is the case of the defendants that the Assistant Housing Commissioner was not delegated this power by the Board. In this regard, there is no pleading of the plaintiff except the averments made at para 5 of the plaint, the relevant para is noted in the submissions made by the learned senior counsel on behalf of the defendants. Further there is no communication by the first defendant regarding acceptance of the proposal of the highest bid of the plaintiff as required under Section 3 of the Contract Act, 1872. This principle of law is well settled as per the decision of the Queen's Bench in *Pharmaceutical Society of Great Britain v. Boots Cash Chemists (Southern) Ltd.*[14]

35. Further, unaccepted offer of the plaintiff does not create any right or any obligation on the part of the defendant to execute the lease deed. In fact, this principle is well settled by this Court in the case of *Bhagwan Das Goverdhan Das Kedia v. Girdhari Lal & Co.*[15] wherein this Court has held that mere making of an offer does not form part of the cause of action for claiming damages for breach of contract. In the case in hand, the aforesaid principle, without recourse, is applicable in the fact situation for the reason that the plaintiff was the highest bidder and his offer was merely accepted but no communication was sent to him as required under Section 3 of the Contract Act. Therefore, no legal right accrued in favour of the plaintiff to invoke remedy available under Section 34 of the Specific Relief Act, seeking declaratory relief as prayed in the original suit filed by the plaintiff.

36. Further, the communication under Section 4 of the Contract Act speaks of when the communication will complete. It says:

> "4. **Communication when complete**. - The communication of a proposal is complete when it comes to the knowledge of the person to whom it is made.
>
> The communication of an acceptance is complete,—
>
> as against the proposer, when it is put in a course of transmission to him so as to be out of the power of the acceptor;
>
> as against the acceptor, when it comes to the knowledge of the proposer."

The proposal is said to have been completed when the same is accepted by the competent authority, which has not been done in the instant case. Neither the Housing Commissioner nor the Assistant Housing Commissioner accepted the proposal in writing; therefore, there is no communication of acceptance of the offer of the plaintiff. In this regard, this court in *Haridwar Singh v. Begum Sumbrui*[16] has held that the communication of acceptance of the highest bid is necessary for concluding the contract. In view of the aforesaid factual and legal proposition of law and the highest bid offered to take the property on lease for a period of 90 years with renewal for further 20 years for construction of the cinema hall, the same was neither accepted by the competent authority nor was the same communicated. Therefore, there is no concluded contract in favour of the plaintiff in respect of the plot in question and the plaintiff cannot claim any legal right and question of enforcement of the said right as provided under Section 34 of the Specific Relief Act seeking declaratory relief by the plaintiff the same did not arise in the case in hand. The above important factual and legal aspects have not been examined in proper and constructive manner either by the trial court or by the second appellate court. Therefore, the impugned judgment, order and decree are liable to be set aside.

Answer to point (g)

37. The substantial questions framed by the court in the

14. (1952) 2 QB 765.

15. AIR 1966 SC 543.

16. AIR 1972 SC 1942.

second appeal did not arise for its consideration. The High Court ought to have noticed that the legal right claimed by the plaintiff seeking relief under Section 34 of the Specific Relief Act on the basis of the pleadings is wholly untenable in law. In view of the fact that no legal right accrued in his favour in the absence of a concluded contract which was said to have existed by mere offering of highest bid in relation to the property in question to obtain the property on lease for a period of 90 years amounting to disposal of the property of the first defendant being an authority under Article 12 of the Constitution, no right was accrued upon the bidder in relation to the property in question. Therefore, the suit itself is not maintainable and the suit filed on the basis of the alleged cause of action did not arise. Hence, the trial court could not have granted any relief by not framing the relevant and proper issue and answering the same. This aspect of the matter is not considered by the trial court. Therefore, the impugned judgment is set aside by the first appellate court by recording reasons. It also did not address and examine the points that arose for consideration as framed by this Court in this judgment. However, the conclusion arrived at by the first appellate court in setting aside the impugned judgment and dismissing the suit is perfectly legal and valid. The said judgment has been erroneously interfered with by the High Court by framing substantial questions of law. In fact and in law, the aforesaid substantial questions do not arise for its consideration and answer the same in favour of the plaintiff, which are erroneous in law.

38. We are of the view that the findings recorded by the trial court and the second appellate court are totally erroneous both on facts and in law and therefore required to be interfered with by this Court and hence the appeals must succeed. The impugned judgment, decree and orders of the High Court are hereby set aside and the original suit No.143 of 1977 filed by the plaintiff is also dismissed. The appeals are allowed, with no order as to costs.

K.K.T. Appeals allowed.

S. MALLA REDDY

v.

M/S. FUTURE BUILDERS CO-OPERATIVE HOUSING SOCIETY & ORS.

(Civil Appeal No. 3914 OF 2013)

APRIL 18, 2013

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

Code of Civil Procedure, 1908 – Or.VI, rr.16 and 17 and Or.VIII, r.9 – Suit for declaration of title and for perpetual injunction – Petition filed by the defendants-appellants u/ Or.VI, r.17 seeking amendment of the written statement – Challenge to – Held: The relief sought for by the defendants in the petition u/Or.VI r.17 was elaborately dealt with in two earlier petitions filed by defendants u/Or.VI, r.16 and Or.VIII, r.9 which came to be rejected – Filing of petition by the defendants u/Or.VI, r.17 after about 13 years when the hearing of the suit had already commenced and some of the witnesses were examined, was wholly misconceived – Filing of subsequent application for the same relief was an abuse of the process of the Court – Abuse of Court.

Code of Civil Procedure, 1908 – Or.VI, r.16 and Or.VI, r.17 – Distinction between – Discussed.

The plaintiff-respondent Society filed a suit for declaration of title in respect of property and for perpetual injunction restraining the defendants-appellants from interfering with possession. The defendants filed written statement admitting the claim of the plaintiff and praying to the court to decree the suit. Subsequently, the defendants filed petition under Order VI Rule 16 CPC praying that the earlier written statement be struck out since the same was against their interests. Another petition was filed by the defendants under Order VIII Rule

9 and Order VI Rule 5 of CPC seeking leave of the court to permit them to file a detailed written statement. The trial court dismissed both the petitions holding that the defendant-appellants cannot be allowed to substitute their written statement in the suit whereunder there was an admission of the claim of the plaintiff-Society. The defendant- appellants challenged the said order but lost the claim upto this Court. Thereafter, the defendants-appellants filed petition under Order VI Rule 17 CPC seeking amendment of the written statement. The amendment petition was allowed by the trial court and against that the plaintiff-Society preferred revision petitions. The High Court allowed the revision petitions and set aside the order of the trial court, and therefore the instant appeals.

Dismissing the appeals, the Court

HELD: 1. Order VI Rule 16 CPC deals with the amendment or striking out of the pleadings, which a party desires to be made in his opponent's pleadings. In other words, the plaintiff or the defendant may ask the court for striking out pleadings of his opponent on the ground that the pleadings are shown to be unnecessary, scandalous, frivolous or vexatious. This Rule is based on the principle of *ex debito justitia.* The court is empowered under this Rule to strike out any matter in the pleadings that appears to be unnecessary, scandalous, frivolous or vexatious or which tends to prejudice, embarrass or delay the fair trial of the suit. On the other hand, Order VI Rule 17 CPC empowers the court to allow either party to alter or amend his own pleading and on such application the court may allow the parties to amend their pleadings subject to certain conditions enumerated in the said Rule. [Para 22 and 23] [249-E-H; 250-A]

2. In the instant case, although the defendant-appellants filed the petition for striking out their own

pleading i.e. written statement, labelling the petition as under Order VI Rule 16 CPC, but in substance the application was dealt with as if under Order VI Rule 17 CPC inasmuch as the trial court discussed the facts of the case and did not permit the defendants to substitute the written statement whereunder there was an admission of the suit claim of the plaintiff-Society. The trial court while rejecting the aforementioned petition held that the defendant-appellants cannot be allowed to substitute their earlier written statement filed in the suit whereunder there was an admission of the claim of the plaintiff-Society (respondent). Similarly in the revision filed by the defendants, the High Court considered all the decisions referred by the defendants on the issue as to whether the defendants can withdraw the admission made in the written statement and finally came to the conclusion that the defendant-appellants cannot be allowed to resile from the admission made in the written statement by taking recourse to Order VIII Rule 9 or Order VI Rule 16 CPC by seeking to file a fresh written statement. In the aforesaid premises, filing of a fresh petition by the defendants under Order VI Rule 17 CPC after about 13 years when the hearing of the suit had already commenced and some of the witnesses were examined, is wholly misconceived. The High Court in the impugned order has rightly held that filing of subsequent application for the same relief is an abuse of the process of the court. The relief sought for by the defendants in a subsequent petition under Order VI Rule 17 CPC was elaborately dealt with on the two earlier petitions filed by the defendant-appellants under Order VI Rule 16 and Order VIII Rule 9 CPC and, therefore, the subsequent petition filed by the defendants labelling the petition under Order VI Rule 17 CPC is wholly misconceived and was not entertainable. [Para 24] [250-B-H]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3914 of 2013.

From the Judgment & Order dated 28.12.2007 in CRP No. 5139/2007 of the High Court of A.P. at Hyderabad.

WITH

C.A. Nos. 3915 and 3916 of 2013.

Dushyant A. Dave, Huzefa A. Ahmadi, L.Nageshwar Rao, P.S. Narasimha, S. Udaya Kumar Sagar, Bina Madhavan, Anindita Pujari, Anand Kumar Kapoor (for Laywer's Knit & Co.), A. Venayagam Balan, M.P. Shorawala, Sridhar Potaraju, Prabhakar, Gaichangpou Gangmei, Ananga Bhattacharyya, A. Venayagam Balan, Radha Shyam Jena, John Mathew for the appearing parties.

The Judgment of the Court was delivered by

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

2. The defendants (appellants herein) have assailed the common order dated 28.12.2007 passed by a learned Judge of the Andhra Pradesh High Court, whereby the Revision Petitions filed by the plaintiff-respondent (M/s Future Builders Coop Society) under Article 227 of the Constitution of India have been allowed and the order passed by the trial court allowing amendment in the written statement has been set aside.

3. The facts of the case lie in a narrow compass.

4. The plaintiff-respondent M/s. Future Builders Co-op. Housing Society (in short "the plaintiff Society") filed a suit against the defendant-appellants for declaration of title in respect of the property mentioned in the schedule of the plaint (in short "the suit property") and for perpetual injunction restraining the defendants from interfering with possession. The

case of the plaintiff-Society is that the Society is a registered Society under the Andhra Pradesh Co-operative Societies Act with the object to acquire or purchase land for the benefit of its members and render it fit for habitation. The Society was founded by several promoters including the first defendant-S. Malla Reddy (appellant herein). The plaintiff's further case is that for the purpose of registration under Co-operative Societies Act, it was necessary to show to the Registrar that they have entered into an agreement for purchase of land for the benefit of its members. It was alleged that before the Society was registered, its promoters identified the suit land as fit for the purpose and negotiated with the owner and entrusted the work to the first defendant for effecting purchase after measurement and a sum of Rs. 10,000/- was paid to him. The first defendant alleged to have executed an agreement on 8.3.1978 in favour of the Chief Promoter of the Society, *inter alia,* agreeing that the first defendant will get the land measured and obtain legal opinion and pay the money to the land owner. It was agreed that the sale deed would be obtained in the name of the first defendant and a patta would be got transferred in his name or of his nominee for the benefit of the Society. The Society was registered on 28.08.1981 and defendant No.1 having obtained a Sale Deed dated 02.01.1979 and transfer of patta in the name of himself and defendant Nos. 2 to 4 (appellants herein), who are his wife and sons in respect of the suit property, had delivered possession to the Society and they further agreed to secure the patta in the name of the plaintiff-Society. A Memorandum of Agreement dated 16.09.1981 was also executed to the effect that the plaintiff would hold the land as owner. It was alleged by the plaintiff-Society that the defendants, in spite of several requests and demands, were postponing the transfer of patta in respect of the suit property in its name on one pretext or the other. Hence, suit.

5. On being summoned, the defendants appeared and filed a joint written statement on 19.01.1995 admitting the claim of the plaintiff stating that after filing c a

mediation wherein the dispute was settled and, accordingly, a sum of Rs. 1,00,000/- was paid to them and they were then willing to transfer the patta in respect of the suit property in favour of the plaintiff who had already acquired title. The defendants, therefore, prayed to the court to decree the suit.

6. Controversy started when the defendants after filing of the written statement and admitting the claim of the plaintiff filed a petition being I.A. No.2217 of 1995, later renumbered as I.A. No.162 of 2000, seeking permission to change their advocates on the ground that they were acting detrimental to their interest by filing written statement contrary to the instructions. The said petition was objected by the plaintiff. The trial court by order dated 07.02.2000 permitted the defendants to change their advocates without prejudice to the rights of the parties. Thereafter, defendants filed another petition under Order VI Rule 16 of the Code of Civil Procedure (CPC) being I.A. No.415 of 2000 on 28.02.2000 seeking leave of the court to strike out the pleadings in the written statement or to expunge the written statement and to permit them to file a detailed written statement. It was alleged that the written statement filed earlier was in collusion with the plaintiff contrary to the instructions given by them to their advocate. Another petition was filed by the defendants being I.A. No.416 of 2000 under Order VIII Rule 9 and Order VI Rule 5 of CPC seeking leave of the court to permit them to file a detailed written statement. Some more developments took place during the pendency of those petitions. The youngest son of the first defendant filed a petition being I.A. 1819 of 2000 seeking leave of the court to implead him as party to those two interlocutory petitions which was, however, allowed and the said son was brought on record.

7. The trial court after hearing the parties dismissed both the petitions being I.A. Nos.415 and 416 of 2000 by common order dated 04.01.2002. The defendant- appellants challenged the said order by filing Civil Revisions in the High Court being CRP Nos.502 and 505 which were ultimately dismissed on

18.09.2002. The defendant-appellants then filed review petition being Review CMP No. 2102 of 2003 which was also dismissed on 25.06.2003. The defendants then preferred appeals to this Court in Civil Appeal Nos. 7940 to 7942 of 2004 which were also dismissed on 15.03.2007.

8. After the defendants lost the claim upto this Court and their prayer was refused, a fresh petition under Order VI Rule 17 CPC was filed seeking leave of the Court to amend the written statement. The said application was registered as I.A. SR No. 593 of 2007. The trial court rejected the said application by a non-speaking order. The order was challenged in the High Court in Revision which was disposed of with the directions to the trial court to register the application and dispose of the same by passing a reasoned order. The trial court in compliance of the aforesaid directions finally heard the amendment petition and by order dated 27.09.2007 allowed the petition permitting the defendants to amend the written statement.

9. The plaintiff-Society challenged the aforesaid order allowing amendment of the written statement by filing revision petitions before the High Court. The said revision petitions filed by the plaintiff-Society under Article 227 were heard at length and finally those petitions were allowed by the High Court vide order dated 28.12.2007 and the order of the trial court allowing amendment of the written statement was set aside. Hence, these appeals by special leave filed by the defendant-appellants.

10. We have heard the learned counsel appearing for the parties. Mr. Dushyant A. Dave, Senior Advocate and Mr. Huzefa A. Ahmadi, Senior Advocate appearing for the defendant-appellants drew our attention to various decisions of this Court for the proposition that the admission made in the written statement can be withdrawn and inconsistent plea can be taken in the written statement. Learned counsel also tried to impress us that the order passed on t[illegible]er

VI Rule 16 and Order VIII Rule 9 will not operate as *res judicata* on the subsequent application filed under Order VI Rule 17 of CPC. Learned counsel submitted that the High Court has not correctly appreciated the settled principle of law and has passed the impugned order without considering the entire gamut of the case.

11. On the other hand, Mr. L. Nageswara Rao, learned Senior Advocate appearing for the plaintiff-Society (respondent herein) firstly contended that the application for amendment is liable to be rejected on the sole ground that it was filed 13 years after the institution of the suit and that too when the trial of the suit had begun and the plaintiff's witness was cross- examined. Mr. Rao contended that the disruptive plea cannot be allowed to be taken by way of amendment in the written statement. According to the learned counsel, the ground taken by the defendants for amending the written statement has already been discussed in the earlier petition filed under Order VI Rule 16 and that under Order VIII Rule 9 and Order VI Rule 5 CPC. The said applications were rejected by the trial court and the order was affirmed by this Court also.

12. Before appreciating the rival contentions, we would like to first reproduce the written statement filed by the defendant-appellants in the suit. The written statement contains of only four paragraphs, which are as under:-

"WRITTEN STATEMENT FILED UNDER ORDER 8 RULE 1 CVIL PROCEDURE CODE by Defendants 1 to 4

1. The first defendant was entrusted with the work of purchase of the land for the Plaintiff's Society before its incorporation. Since there was delay in the registration and incorporation of the Society, the suit land was purchased in the name of the First Defendant who is also one of the Promoters from Sri Mohammad Sarvar and others and the patta was transferred in the name of these defendants. These defendants held it for the benefit of the plaintiffs and

after the Society was incorporated on 28.8.2001, delivered the land to the plaintiff and also executed a Memorandum dated 16.9.1981 which was ratified by the Plaintiff Society.

2. One of the terms of the Memorandum was that the plaintiff agreed to pay the expenses incurred by the defendants for the development and protection of the land. Since the plaintiff postponed the settlement of accounts, these defendants did not apply for transfer of patta in favour of the plaintiff.

3. After the suit is filed there is mediation and settlement and a sum of Rs. 1,00,000/- (Rupees one lakhs only) is paid as full quid to these defendants and these defendants are willing to transfer of the patta in favour of the plaintiff who has already acquired the title as stated in the plaint.

4. Hence the suit may be decreed as prayed for but without costs.

Defendants

1.

2.

3.

4.

Counsel for the Defendants 1 to 4

Verification

The facts stated above are true to the best of our knowledge, belief and information."

13. From bare perusal of the written statement, it is manifestly clear that the defendant-appellants categorically admitted not only the case of the plaintiff and

receipt of Rs. 1,00,000/- and their willingness for transfer of patta in favour of the plaintiff. The defendants, on the basis of such admission, prayed to the court that the suit be decreed but without any costs.

14. As noticed above, the defendant-appellants filed application on 28.02.2000 under Order VI Rule 16 of CPC being I.A. No. 415 of 2000 praying that the earlier written statement be struck out since the same was against their interests. Another application being I.A.No.416 of 2000 under Order VIII Rule 9 CPC was filed praying that the defendants may be permitted to file detailed written statement in the suit since the earlier written statement filed by them was against their interests. Both applications were taken up together by the trial court and disposed of by common order dated 04.01.2002. The trial court while rejecting the aforementioned two applications held that the defendant-appellants cannot be allowed to substitute their written statement in the suit whereunder there was an admission of the claim of the plaintiff-Society. While rejecting the applications, the trial court elaborately discussed the facts of the case and considered the arguments advanced by the lawyers as also the decisions relied upon by them with regard to withdrawal of admission by filing fresh written statement.

15. At this stage, we must mention that even before the suit was instituted by the plaintiff-Society, the defendants had filed a caveat duly supported by affidavit through the same advocate wherein the entire claim of the plaintiff-Society was admitted. The only grievance made in the caveat was that without settlement of the amount due as agreed under the Memorandum of Agreement, the plaintiff-Society was trying to lay out the suit land and to dispose of the same without paying the amount due. The relevant paragraphs of the trial court order dated 04.01.2002 are quoted hereinbelow (from pages 165-170 of paper book):

"16. The learned counsel for the petitioner, referring to the

earlier suit litigation between the defendants and others, contended that there is no reason for the defendants to admit the suit claim of the plaintiffs society but for the reasons that fraud was played upon the defendants in filing their written statement. The learned counsel for the petitioner relying upon the decision in BHIKAJI KESHAO JOSHI AND ANOTHER vs. BRIJLAL NANDLAL BIYANI and OTHERS (AIR 1955 SC 610) contended that the Court can order strike out of the written statement and permit the defendants to file substituted written statement with specific pleadings. In the said decision, the petitioner in the said election petition made vague allegations of corrupt practices of the respondent and in the said circumstances it was found that the court can exercise its powers and call for better particulars. It is not the case of the petitioners – defendants herein that their written statement pleadings are vague and that therefore, to furnish better particulars the earlier written statement filed on their behalf may be struck out and they may be permitted to file a detailed substituted written statement. In the written statement filed on behalf of the defendants in the suit OS No.408/94 (OS 1 of 2000 on the file of this court) the defendants had categorically admitted the entire suit claim and have further mentioned that they had no objection for the suit to be decreed. No doubt, it is the contention of the petitioners that their advocate Sri Sunil Kumar obtained their signatures on blank paper and that is contrary to their instructions he prepared the written statement in collusion with the plaintiff- society admitting the suit claim for which they had complained against the said advocate to Bar Council of Andhra Pradesh. Ex.B.1 is the Xerox certified copy of caveat number 178/94 on the file of IIIrd Additional Judge, City Civil Court, against the plaintiff society on 07.07.1994. In the said caveat petition also, the defendants in the suit admitted the entire claim of the plaintiff-society but the grievance of the defendants under that caveat was without settlement of the amount du e

memorandum of agreement, the plaintiff society was trying to lay out the suit land and to dispose it of without paying his amount and that, therefore, if any injunction suit is filed against him with respect to the said property, he may be given notice. There is no explanation given by the petitioners herein in these petitions with respect to the said admission of the defendants herein in the said caveat petition. In fact, it was pleaded in the written statement in question by the defendants that after the suit was filed there was mediation and sum of Rs. 1,00,000/- was paid to them towards settlement. No doubt the said caveat petition was also filed by the same advocate Sri Sunil Kumar but in the affidavit filed in support of these two petitions, the 1st defendant did not explain about his admissions in the said caveat petition with respect to the suit schedule properties in favour of the plaintiff society.

17. The learned counsel for the 1st defendant-plaintiff Society relying upon the decisions in *MODI SPINNING AND WEAVING MILLS COMPANY LIMITED AND ANOTHER VS. M/S LADHA RAM AND COMPANY* (AIR 1977 Supreme Court 680), *B.K. NARAYANA PILLAI AND PARAMESWARAN PILLAI AND ANOTHER* (2000) 1 Supreme Court Cases 712) and *HEERALAL AND KALYAN MALAND AND OTHERS* (1998) 1 Supreme Court Cases 278) contended that any amendment introducing entirely different new case and seeking to displace the plaintiff the benefit completed from the admission made by the defendants in the written statement, is not permissible. In the decision in *MODI SPINNING AND WEAVING MILLS COMPANY LIMITED VS. M/S LADHA RAM AND COMPANY* (AIR 1988 Supreme Court 680) by means of an amendment the defendant wanted to introduce an entirely different case. In the facts and said circumstances, it was held that the defendants cannot be allowed to change completely the case made out in their written statement and to substitute

an entirely different new case and that if such amendments are allowed the plaintiffs will be irretrievably prejudiced by being denied the opportunity of extracting the admission from the defendants. In *HEERALAL vs. KAYALAN MAL AND OTHERS* (1998) 1 Supreme Court Cases 278, and *HEERALAL vs. KAYALAN MAL AND OTHERS* (AIR 1998 Supreme Court 618), it was held that once the written statement contains an admission in favour of the plaintiff, the amendment of such admission of the defendants cannot be allowed to be withdrawn and such withdrawal would amount to totally displacing the case of the plaintiff which would cause him irretrievable prejudice. In B.K. Narayana Pillai and Parameshwaran Pillai and Another (2000) 1 Supreme Court Cases 712, it was held though the defendant has a right to take alternative pleas in defence by way of amendment, it would be subject to qualification that (i) Proposed amendment should not result in injustice to the other side; (ii) any admission made in favour of plaintiff should not be withdrawn; and (iii) inconsistent and contradictory allegations which negate admitted facts should not be raised. Under the present petitions, the petitioners – defendants are intending to take away the admission made by them in regard to the suit claim of the plaintiff society. The law is that no additional written statement should not set up a totally new case or state facts at direct variance with the original written statement so as to completely change the issue in the case. This is not a case where the defendants are intending to take alternative pleas or that they are intending to explain the vague pleadings made by them in their written statement filed. This is also not a petition to file additional written statement but as a petition to substitute the original written statement to get over the admissions made in favour of the plaintiff society. There is no material placed before the court to substantiate their affidavit. As already stated, the documents filed are not helpful to support the affidavit of the petiti[illegible]e

allegations made against their previous advocate so as to request the court to permit them to file a detailed written statement, in the place of their earlier written statement in which they had admitted the entire claim of the plaintiff society. A perusal of written statement which is sought to be substituted in the place of the earlier written statement discloses that the defendants plead an entire new case against the admissions made by them in the written statement. In view of the settled law of the Apex Court the petitioners cannot be permitted to request the court to strike out the earlier written statement filed by them or to permit them to substitute a fresh written statement in contrary to the admission made by them in their written statement.

18. No doubt, the petitioner had filed criminal proceedings against the said Advocate and others and copies of those criminal proceedings are filed in this petition. Admittedly, the said Criminal Case is pending. Moreover, it was subsequent to the filing of I.A. 2217/95. It is well–established principle of law that the decisions of the Civil Courts are binding on the criminal courts and the converse is not true (vide decision in Karamchand vs. Union of India (AIR 1977 Supreme Court 1244). The plaintiff society is not a party to the earlier civil proceedings, which are filed in this petition on the behalf of the Petitioners. Therefore, those documents, which are filed on behalf of the petitioners – defendants are not binding on the first respondent – plaintiff society. The revenue records, filed are also not helpful for the petitioners in support of their contention in this petition. Whether the chief promoter was by the date of the agreement was a minor as contended by the petitioners is also not a question relevant for the purpose of this petition. Thus, this court holds that the documents filed on behalf of the petitioner do not advance the claim of the petitions. For the foregoing reasons and in view of the law enunciated by the Hon'ble Apex Court,

the petitioners–defendants cannot be permitted to substitute the earlier written statement filed by them in the suit whereunder there was an admission of the suit claim of the plaintiffs society, by way of an entirely new written statement taking contradicting pleas. Thus this court does not find any merits in the petitions.

19. In the result, the petitions are dismissed but without costs."

16. On the basis of the findings recorded by the trial court, defendants' two petitions under Order VIII Rule 9 and Order VI Rule 16 CPC were dismissed holding that the defendants cannot be permitted to substitute the earlier written statement wherein there was an admission of the suit claim of the plaintiff-Society.

17. Aggrieved by the aforesaid order, the defendants preferred revision petitions before the High Court. Before the High Court, it was argued that though some admissions were made in the written statement, the same can be withdrawn by filing a fresh detailed written statement. Dismissing the said revision petitions, the High Court in its order dated 18.09.2002 (pages 184 to 186 of paperbook) observed:-

"The court below had elaborately discussed this aspect I agree with the reasoning and finding thereof given by the court below on this aspect and I hold that they are perfect and valid.

Before the court below the defendant relied on a Judgment reported in Bhikaji Keshao Joshi and another vs. Brijlal Nadanlal Biyani and others (AIR 1955 SC 610) and contended that the court can order striking out of the written statement and permit the defendants to file substituted written statement with specific pleadings. The court below rightly distinguished the same and held that it is not applicable.

The lower appellate court while dismissing the I.As. relied on a judgment of the Apex Court reported in *HEERALAL vs. KAYALAN MAL AND OTHERS* (AIR 1998 SC 618), wherein it was held that once the written statement contains an admission in favour of the plaintiff, the amendment of such admission of the defendants cannot be allowed to be withdrawn and such withdrawal would amount to totally displacing the case of the plaintiff which would cause him irretrievable prejudice. In another decision of the Supreme Court referred to by the Court below in *B.K. NARAYANA PILLAI vs. PARAMESHWARAN PILLAI AND ANOTHER* (2000 (1) SCC 712) it was held that though the defendant has a right to take alternative pleas in defence by way of amendment, it would be subject to qualifications which are (1) proposed amendment should not result in injustice to the other side and (2) any admission made in favour of the plaintiff should not be withdrawn and (3) inconsistent and contradictory allegations which negate admitted facts should not be raised.

In the present case the question now is whether the admission made by the defendant in favour of the plaintiff can be withdrawn and the answer in the language of the apex court, is 'not permissible'.

As already discussed the admissions made in the written statement are absolutely matching with the original stand taken by the 1st defendant in the affidavit filed to his caveat petition and also with the pleadings and the only dispute raised is with regard to payment of money to the defendant. In such a case, I am of the strong view that the defendant had not approached the court with clean hands in filing the present I.As.

It has to be further noticed that the allegations made against the counsel are not established so far. Mere filing of a complaint before the police or before the Bar Council

of India, in the circumstances like the present one would only jeopardize the decency and dignity of the profession of the Advocate. This attitude of making wild and baseless allegations against the counsel has to be dissuaded by all means. However, this observation shall not be understood as an opinion expressed by this court on the proceedings already initiated and pending against the said counsel. To put in a different way, the original stand of the defendant as stated in the affidavit filed in support of the caveat petition, demolishes or cuts across the very basis for filing the present I.As. I am of the further view that if these types of allegations are made without substantiating them and if they are encouraged, it would lead to a situation where litigants with false cases would resort to smudging the career of genuine or innocent advocates. The conduct on the part of the defendant is palpably mischievous and this court cannot lend any kind of support to a litigant like the defendant, who has approached the court with unclean hands.

It is also brought to the notice of this Court that in another suit which is not connected with the present suit, the defendant resorted to similar type of allegations against another counsel, and of course the trial court did not take into consideration those allegations.

The court below had discussed in detail all the aspects and dismissed the I.As. with cogent and convincing reasons and I do not find any valid ground to interfere with the same. Accordingly, I pass the order as under.

The revisions petitions are dismissed with costs."

18. The relevant paragraphs of the orders passed by the trial court and the High Court have been quoted hereinbefore mainly for the reason that while considering the petitions under Order VIII Rule 9 and Order VI Rule 16 [illegible] e

also gone into the question as to whether those admissions could be withdrawn by permitting the defendants to file a fresh written statement or by striking out of the earlier written statement.

19. Aggrieved by the above said orders, the appellants moved this Court in Civil Appeal No.7940-7942 of 2004. Finding no merit, this Court dismissed the appeals by order dated 15.03.2007.

20. Instead of participating in the suit, the defendant-appellants filed another petition purported to be under Order VI Rule 17 CPC seeking amendment of the written statement. The said amendment petition was allowed by the trial court and against that the plaintiff-Society preferred revision before the High Court. The High Court by passing the impugned order dated 28.12.2007 allowed the revision petitions and set aside the order passed by the trial court. The High Court held as under :-

> "15. The ratio in *THE UNITED PROVINCES ELECTRIC SUPPLY CO. LTD.* case (AIR 1972 SC 1201) that decision on any particular point given in an order of remand does not operate as *res judicata* in an appeal filed against the final order passed after the remand; does not apply to the facts of this case because there is no 'order of remand' in this case as plaintiff is not relying on any of the observations in an 'order of remand' to contest the applications made by the defendants.
>
> 16. In view of the ratio in *SATYADHYAN GHOSAL* case (AIR 1960 SC 941), *ARJUN SINGH* case (AIR 1964 SC 993) and *THE UNITED PROVINCES ELECTRIC SUPPLY CO. LTD.* case (..supra) successive applications for the same relief cannot be permitted, and they can even be rejected as an abuse of the process of Court.
>
> 17. It is contended by the learned counsel for the

> defendants that subsequent to the filing of I.A. No.416 of 2000, defendants came to know through the report of an expert that the written statement filed on their behalf was typed on the same typewriter on which the plaint was typed. In the common order challenged in these revisions, the trial Court considered that contention and held that that contention has to be decided at the time of trial, but cannot be considered at this stage. For the reasons given by the trial court, that finding cannot be said to be erroneous.
>
> 18. As rightly contended by the learned counsel for the plaintiff, the trial Court which agreed with the contention of the plaintiff that defendants cannot by invoking the plea of fraud seek the amendment sought, allowed the petitions only on the basis of the observations made in *UDAY SHANKAR TRIYAR V. RAM KALEWAR PRASAD SINGH* AIR 2006 SC 269**.** In the very same judgment the apex Court held that procedure, a hand maiden to justice, should never be made a tool to carry justice or perpetuate injustice by any oppressive or punitive use. The trial Court without keeping in view the fact the defendants cannot repeatedly file the petition for the same relief which was negatived earlier, in a different form by quoting different provisions of law, thought it fit to allow the petitions and thereby virtually set at naught the order of dismissal of I.A.Nos.415 and 416 of 2000 passed by it earlier which order was confirmed by this Court and the Apex Court also."

21. Before going into the merits of the case, we would like to refer two of the provisions viz. Order VI Rule 16 and Order VI Rule 17 CPC which are involved in the instant case. These two provisions read as under:-

> "**16. Striking out pleadings**— The Court may at any stage of the proceedings order to be struck out or amended any matter in any pleading

(a) which may be unnecessary, scandalous, frivolous or vexatious, or

(b) which may tend to prejudice, embarrass or delay the fair trail of the suit, or

(c) which is otherwise an abuse of the process of the Court.]

17. Amendment of pleadings— The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.

Provided that no application for amendment shall be allowed after the trial has commenced, unless the court comes to the conclusion that in spite of due diligence, the party could not have raised the matter before the commencement of trial."

22. Order VI Rule 16 CPC has been substituted by the CPC (Amendment) Act, 1976. This provision deals with the amendment or striking out of the pleadings, which a party desires to be made in his opponent's pleadings. In other words, the plaintiff or the defendant may ask the court for striking out pleadings of his opponent on the ground that the pleadings are shown to be unnecessary, scandalous, frivolous or vexatious. This Rule is based on the principle of *ex debito justitia.* The court is empowered under this Rule to strike out any matter in the pleadings that appears to be unnecessary, scandalous, frivolous or vexatious or which tends to prejudice, embarrass or delay the fair trial of the suit.

23. On the other hand, Order VI Rule 17 CPC empowers the court to allow either party to alter or amend his own pleading and on such application the court may allow the parties to

amend their pleadings subject to certain conditions enumerated in the said Rule.

24. Although the defendant-appellants filed the petition for striking out their own pleading i.e. written statement, labelling the petition as under Order VI Rule 16 CPC, but in substance the application was dealt with as if under Order VI Rule 17 CPC inasmuch as the trial court discussed the facts of the case and did not permit the defendants to substitute the written statement whereunder there was an admission of the suit claim of the plaintiff-Society. The relevant portion of the order quoted hereinabove reveals that the trial court while rejecting the aforementioned petition held that the defendant-appellants cannot be allowed to substitute their earlier written statement filed in the suit whereunder there was an admission of the claim of the plaintiff-Society (respondent herein). Similarly in the revision filed by the defendants, the High Court considered all the decisions referred by the defendants on the issue as to whether the defendants can withdraw the admission made in the written statement and finally came to the conclusion that the defendant-appellants cannot be allowed to resile from the admission made in the written statement by taking recourse to Order VIII Rule 9 or Order VI Rule 16 CPC by seeking to file a fresh written statement. In the aforesaid premises, filing of a fresh petition by the defendants under Order VI Rule 17 CPC after about 13 years when the hearing of the suit had already commenced and some of the witnesses were examined, is wholly misconceived. The High Court in the impugned order has rightly held that filing of subsequent application for the same relief is an abuse of the process of the court. As noticed above, the relief sought for by the defendants in a subsequent petition under Order VI Rule 17 CPC was elaborately dealt with on the two earlier petitions filed by the defendant-appellants under Order VI Rule 16 and Order VIII Rule 9 CPC and, therefore, the subsequent petition filed by the defendants labelling the petition under Order VI Rule 17 CPC is wholly misconceived and was not entertainable.

25. After giving our full consideration on the matter, we do not find any error in the impugned order passed by the High Court. Hence, these appeals have no merit and are accordingly dismissed. No order as to costs.

B.B.B. Appeals dismissed.

STATE OF RAJASTHAN

v.

BHERU LAL

(Criminal Appeal No. 36 of 2006)

MAY 28, 2013

[DR. B.S. CHAUHAN AND DIPAK MISRA, JJ.]

Narcotic Drugs and Psychotropic Substances Act, 1985 – s.42 – Scope and applicability of – Search, seizure and arrest carried out by Sub-Inspector in temporary charge as Station House Officer – Whether can be held to be carried out by unauthorized officer and hence violative of s.42 – Held: As per Government Notification a Sub-Inspector can be posted as Station House Officer – The officer in the instant case (a Sub-Inspector) was posted as Station House Officer at the relevant time – Hence search, seizure and arrest by the officer not violative of s.42 – Notification No. F1(3)FD/Ex/85-1 dated 16.10.1986.

The question for Consideration in the present appeal was whether the search, seizure and arrest by the Sub-Inspector, (given temporary charge as Station House Officer at the relevant time), is violative of s. 42 of Narcotic Drugs and Psychotropic Substances Act, 1985 and whether on this account the whole trial becomes *void ab initio.*

Allowing the appeal, the Court

HELD: 1. In view of the Notification No. F1(3) FD/Ex/85-1 dated 16.10.1986, it is manifest that the Sub-Inspectors of Police, posted as Station House Officers were authorised by the State to exercise the powers enumerated in Section 42 of the Narcotic Drugs and Psychotropic Substances Act, 1985. There cannot be

literal interpretation of Section 42(1) of the Act. The provision employs the words "empowered in this behalf by general or special order of the State Government." The notification has stated "any Sub-Inspector posted as Station House Officer". [Paras 10, 11 and 14] [258-D-E, H; 259-A; 261-D-E]

2. The High Court acquitted the respondent solely on the ground that PW-9 was posted as the Station House Officer and not PW-2 who conducted the search, seizure and arrest. It is the accepted position that PW-2 was given temporary charge of the Station House Officer at the relevant time. He received information from the reliable source. He complied with the other necessary requirements and proceeded to the spot to trap the accused. Any delay would have allowed the accused to escape. As per the Notification, a Sub Inspector of Police can be posted as Station House Officer and at the relevant time PW-2 was in-charge Station House Officer. There is no justification to place unnecessary importance on the term "posted". PW-2 was, in fact, in-charge of the post of Station House Officer at that juncture. Therefore, the search, seizure and arrest carried out by him would not make the trial ab initio void. Thus, the High Court has fallen into grave error by opining that Section 42(1) of the Act was not complied with as the entire exercise was carried out by an officer who was not authorised. [Para 14] [261-E-H; 262-A-B]

Karnail Singh v. State of Haryana **(2009) 8 SCC 539: 2009 (11) SCR 470 – followed.**

Abdul Rashid Ibrahim Mansuri v. State of Gujarat **(2000) 2 SCC513: 2000 (1) SCR 542;** *Sajan Abraham v. State of Karala* **(2001) 6SCC 692: 2001 (1) Suppl. SCR 335 – referred to.**

Case Law Reference:

2009 (11) SCR 470	**followed**	**Para 12**

2000 (1) SCR 542	**referred to**	**Para 12**
2001 (1) Suppl. SCR 335	**referred to**	**Para 12**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 36 of 2006.

From the Judgment and Order dated 09.04.2004 of the High Court of Judicature for Rajasthan at Jodhpur in S.B. Crl. Appeal No. 659 of 2002.

Dr. Manisha Singhvi, AAG, Milind Kumar for the Appellant.

Atul Agarwal, Nitin Jain, Dr. Vipin Gupta for the Respondent.

The Judgment of the Court was delivered by

DIPAK MISRA, J. 1. The present appeal is directed against the judgment of acquittal dated 9.4.2004 passed by the learned single Judge of the High Court of Judicature of Rajasthan in S.B. Criminal Appeal No. 659 of 2002 whereby he has reversed the judgment of conviction and order of sentence passed by the learned Special Judge, NDPS cases, Chittorgarh on 7.8.2002 and acquitted the respondent of the offences punishable under Sections 8/18 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short "the Act").

2. The broad essential facts leading to trial of the respondent are that on 4.4.2001 about 5.45 p.m. Parveen Vyas, temporary in-charge S.H.O., Police Station Chittorgarh, received information from a reliable informer that the respondent would come with illegal opium on his Hero Honda Motor Cycle No. 5902 from Phkhliya towards Chittorgarh and would sell it to some person. The information was entered into Daily Diary at report No. 146 and dispatched to higher officers through Constable Davender Singh. Thereafter, Parveen Vyas, along with other police officials and independent witnesses, namely, Abdul Kareem and Haider Ali

Kheri Road and when the respondent came to the spot with a plastic bag, he was informed about his right to be searched by a gazetted officer or a Magistrate and, thereafter, after proper search two polythene bags containing 3 Kgs. opium in each bag were seized. Following due procedure, the samples were sent for chemical analysis and, after completing the investigation, charge-sheet was placed for the offences punishable under Sections 8/18 of the Act.

3. The accused denied the charges, pleaded false implication and claimed to be tried.

4. The prosecution to bring home the charges examined Abdul Raheem, PW-1, Parveen Vyas, PW-2, Rais Mohammad, PW-3, Narayan, PW-4, Madan Lal, PW-5, Arjun Lal, PW-6, Mithu Lal, PW-7, RodSingh, PW-8, Rameshwar Prasad, PW-9, Davender Singh, PW-10, and Kailash, PW-11. The accused examined Bheru Lal, DW-1, and Shanti Lal, DW-2.

5. The learned trial Judge, analyzing the evidence and other material brought on record, and considering the contentions raised by the learned counsel for the prosecution and defence, found the accused guilty of the offence punishable under Sections 8/18 of the Act and sentenced the accused to undergo rigorous imprisonment for ten years and to pay a fine of rupees one lakh and in default of payment of fine, to suffer further rigorous imprisonment for one year.

6. Challenging the conviction and sentence an appeal was preferred by the respondent before the High Court. The principal contention that was raised in appeal was that Parveen Vyas was not authorised under Section 42 of the Act to search, seize or arrest a person and hence, the whole trial was ab initio void. The High Court, scanning the statutory provision and the notification issued by the Government, came to hold that Parveen Vyas was not the Station House Officer of Police Station, Chittorgarh, as Rameshwar Prasad was the only Station House Officer and hence, Parveen Vyas did not have

the authority to conduct any search, seizure and arrest and, therefore, the whole trial was vitiated. Being of this view, the learned single Judge dislodged the judgment of conviction and acquitted the accused.

7. We have heard Dr. Manish Singhvi, learned Additional Advocate General for the State of Rajasthan, and Mr. Atul Agarwal, learned counsel appearing for the respondent. It is submitted by Dr. Manish Singhvi that the High Court has failed to appreciate the language employed in the Section 42 of the Act and the notification issued by the State of Rajasthan in that behalf as a consequence of which the ultimate conclusion of the High Court has become wholly unsustainable. It is urged by him that Rameshwar Prasad, Station House Officer of the police station, had gone out of police station and handed over the charge to Parveen Vyas, Sub-Inspector and he had conducted the search and seizure and, therefore, there has been substantial compliance of the provision in view of the Constitution Bench decision in *Karnail Singh v. State of Haryana*[1].

8. Mr. Atul Agarwal, learned counsel for the respondent, would submit that the High Court has correctly interpreted the provision and as per the notification only those Sub Inspectors of Police who are posted as Station House Officers are authorised to carry out the search and seizure and Praveen Vyas, not being the permanent S.H.O. could not have carry out the search and seizure, and hence, the judgment of acquittal cannot be flawed.

9. To appreciate the rival submissions raised at the Bar, it is necessary to refer to the ununamended Section 42 of the Act as the said provision was applicable at the relevant time. The original Section 42 of the Act has been substituted by Act 9 of 2001 with effect from 2.10.2001. Prior to the amendment Section 42 read as follows: -

1. (2009) 8 SCC 539.

"**42. Power of entry, search, seizure and arrest without warrant or authorization**. – (1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government or of the Border Security Force as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from personal knowledge or information given by any person and taken down in writing, that any narcotic drug, or psychotropic substance, in respect of which an offence punishable under Chapter IV has been committed or any document or other article which may furnish evidence of the commission of such offence is kept or concealed in any building, conveyance or enclosed place, may, between sunrise and sunset, -

(a) enter into and search any such building, conveyance or place;

(b) in case of resistance, break open any door and remove any obstacle to such entry;

(c) seize such drug or substance and all materials used in the manufacture thereof and any other article and any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under Chapter IV relating to such drug or substance; and

(d) detain and search, and if he thinks proper, arrest

any person whom he has reason to believe to have committed any offence punishable under Chapter IV relating to such drug or substance:

Provided that if such officer has reason to believe that a search warrant or authorization cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sun set and sun rise after recording the grounds of his belief.

(2) Where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall forthwith send a copy thereof to his immediate official superior."

10. In pursuance of the aforesaid Section the State of Rajasthan had issued a notification No. F.1(3) FD/Ex/85-1 dated 16.10.1986, which reads as follows: -

"S.O. 115. In exercise of the powers conferred by Section 42 of the Narcotic Drugs and Psychotropic Substances Act, 1985 the State Government hereby authorise all Inspectors of Police, and Sub Inspectors of Police posted as Station House Officers, to exercise the powers mentioned in Section 42 of the said Act with immediate effect:

Provided that when power is exercised by Police Officer other than Police Inspector of the area concerned such officer shall immediately hand over the person arrested and articles seized to the concerned Police Inspector or SHO of the Police Station concerned."

11. On a perusal of the aforesaid notification it is manifest that the Sub Inspectors of Police, posted as Station House Officers, were authorised by the State of Rajasthan to exercise the powers enumerated in Section 42

cogent and reliable evidence on record that Rameshwar Prasad had left the police station for certain length of time and at that juncture, he had given charge of the Station House Officer to Parveen Vyas, PW-2. The learned single Judge has accepted that he was handed over temporary charge of the Station House Officer by Rameshwar Prasad, PW-9. However, he had taken note of the fact that he was not posted as Station House Officer at the police station and by the time the search and seizure had taken place about 8.00 p.m., Rameshwar Prasad had already returned to the police station. As far as the timing is concerned, we are not at all impressed as there are circumstances to negative such a conclusion. However, as far as charge is concerned, there is no difficulty in holding that he was in-charge Station House Officer. The question that emanates for consideration is whether he could have carried out the search, seizure and arrest or there has been violation of the requirements as contained in Section 42 of the Act by which the whole trial becomes ab initio void.

12. In *Karnail Singh* (supra) the Constitution Bench was required to resolve the conflicting opinions expressed regarding the scope and applicability of Section 42 of the Act in the matter of conducting search, seizure and arrest without warrant or authorization. The larger Bench analysed the ratio laid down in *Abdul Rashid Ibrahim Mansuri v. State of Gujarat*[2] and *Sajan Abraham v. State of Karala*[3] and opined that *Abdul Rashid* did not require literal compliance with the requirements of Sections 42(1) and 42(2) and similarly in *Sajay Abraham's* case it was not held that requirements of Sections 42(1) and 42(2) need not be fulfilled at all. The Constitution Bench in paragraph 34 of the report observed as follows: -

> "**34.** The advent of cellular phones and wireless services in India has assured certain expectation regarding the quality, reliability and usefulness of the instantaneous

2. (2000) 2 SCC 513.

3. (2001) 6 SCC 692.

> messages. This technology has taken part in the system of police administration and investigation while growing consensus among the policymakers about it. Now for the last two decades police investigation has gone through a sea change. Law enforcement officials can easily access any information anywhere even when they are on the move and not physically present in the police station or their respective offices. For this change of circumstances, it may not be possible all the time to record the information which is collected through mobile phone communication in the register/records kept for those purposes in the police station or the respective offices of the authorised officials in the Act if the emergency of the situation so requires. As a result, if the statutory provision under Sections 41(2) and 42(2) of the Act of writing down the information is interpreted as a mandatory provision, it will disable the haste of an emergency situation and may turn out to be in vain with regard to the criminal search and seizure. These provisions should not be misused by the wrongdoers/ offenders as a major ground for acquittal. Consequently, these provisions should be taken as a discretionary measure which should check the misuse of the Act rather than providing an escape to the hardened drug peddlers."

13. After so observing, the Constitution Bench stated in seriatim the effect of the two earlier decisions. Paragraph 35(d), being relevant for the present purpose, is reproduced below: -

> "(*d*) While total non-compliance with requirements of sub-sections (1) and (2) of Section 42 is impermissible, delayed compliance with satisfactory explanation about the delay will be acceptable compliance with Section 42. To illustrate, if any delay may result in the accused escaping or the goods or evidence being destroyed or removed, not recording in writing the information received, before initiating action, or non-sending of a copy of such information to the official superior [illegible]e

treated as violation of Section 42. But if the information was received when the police officer was in the police station with sufficient time to take action, and if the police officer fails to record in writing the information received, or fails to send a copy thereof, to the official superior, then it will be a suspicious circumstance being a clear violation of Section 42 of the Act. Similarly, where the police officer does not record the information at all, and does not inform the official superior at all, then also it will be a clear violation of Section 42 of the Act. Whether there is adequate or substantial compliance with Section 42 or not is a question of fact to be decided in each case. The above position got strengthened with the amendment to Section 42 by Act 9 of 2001."

14. Though the principle was stated in a different context, yet the dictum laid down therein is clear as crystal that there cannot be literal interpretation of Section 42(1) of the Act. The provision employs the words "empowered in this behalf by general or special order of the State Government." The notification has stated "any Sub Inspector posted as Station House Officer". The High Court has acquitted the respondent solely on the ground that Rameshwar Prasad was posted as the Station House Officer and not Parveen Vyas, who conducted the search, seizure and arrest. It is the accepted position that Parveen Vyas, PW-2, was given temporary charge of the Station House Officer at the relevant time. He received information from the reliable source. He complied with the other necessary requirements and proceeded to the spot to trap the accused. Any delay would have allowed the accused to escape. As per the notification a Sub Inspector of Police can be posted as Station House Officer and at the relevant time PW-2 was in-charge Station House Officer. There is no justification to place unnecessary importance on the term "posted". He was, in fact, in-charge of the post of Station House Officer at that juncture. In our considered view, such a literal and technical approach would defeat the principle laid down by the

Constitution Bench in *Karnail Singh's* case. Therefore, the search, seizure and arrest carried out by him would not make the trial ab initio void. Thus, the irresistible conclusion is that the High Court has fallen into grave error by opining that Section 42(1) of the Act was not complied with as the entire exercise was carried out by an officer who was not authorised.

15. In view of the aforesaid analysis, the appeal is allowed, the judgment passed by the High Court is set aside and the judgment rendered by the learned trial Judge is restored. The learned trial Judge is directed to take steps for arrest of the respondent so that he can undergo rest of the sentence.

K.K.T. Appeal allowed.

ARUN KUMAR YADAV
v.
STATE OF U.P. THRU DIST. JUDGE
(Criminal Appeal No. 1430 of 2010)

MAY 29, 2013

[DR. B.S. CHAUHAN AND DIPAK MISRA, JJ.]

Contempt of Courts Act, 1971 – s.12 – Contempt of Court – Accused (a litigant) using loud threatening utterances and using unparliamentary language for Judicial Officer, while he was conducting court – Complaint—Charge-sheet framed by High Court – Accused initially denying the charges, but later tendered unconditional apology – High Court did not accept the apology and convicted the accused u/s.12 and sentenced him to suffer simple imprisonment for one month and imposed fine of Rs.2,000/- with default clause – Appeal – Held: Judicial proceeding has its own solemnity and sanctity – It is obligation of everyone to behave with propriety when a judicial proceeding is conducted – The sanctity of law, which is sustained through dignity of courts cannot be marred by errant behaviour of any counsel or litigant or judge himself – The apology was rightly rejected as the same was neither prompt nor genuine – A concept of mercy and compassion is ordinarily attracted keeping in view the infirmities of man's nature and the fragile conduct – Conviction and sentence upheld – However, the court expressed its displeasure on the issue that High Court took a lenient view in sentencing the accused.

R.K. Garg, Advocate vs. State of Himachal Pradesh **(1981) 3 SCC 166: 1981 (3) SCR 536;** *Mahabir Prasad Singh vs. M/s. Jacks Aviation Pvt. Ltd.* **AIR 1999 SC 287: 1998 (2) Suppl. SCR 675;** *Lt. Col. S.J. Chaudhary vs. State (Delhi Administration)* **AIR 1984 SC 618: 1984 (2) SCR 438;**

M.B. Sanghi vs. High Court of Punjab and Haryana **(1991) 3 SCC 600: 1991 (3) SCR 312;** *L.D. Jaikwal vs. State of U.P.* **(1984) 3 SCC 405: 1984 (3) SCR 833 – relied on.**

In Re: Sanjiv Datta, Deputy Secretary, Ministry of Information and Broadcasting, New Delhi, Kailash Vasdev, Advocate and Kitty Kumaramanglam (Smt.), Advocate **1995 (3) SCC 619: 1995 (3) SCR 450 – referred to.**

Case Law Reference:

1981 (3) SCR 536	**relied on**	**Para 6**
1998 (2) Suppl. SCR 675	**relied on**	**Para7**
1984 (2) SCR 438	**relied on**	**Para 7**
1995 (3) SCR 450	**referred to**	**Para 9**
1991 (3) SCR 312	**relied on**	**Para 9**
1984 (3) SCR 833	**relied on**	**Para 11**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 1430 of 2010.

From the Judgment and Order dated 17.08.2007 of the High Court of Judicature at Allahabad in Criminal Contempt No. 13 of 2006.

T.N. Saxena, Jyoti Saxena, M.P. Shorawala for the Appellant.

The following Order of the Court was delivered

O R D E R

1. This appeal has been filed under Section 19 of the Contempt of Courts Act, 1971 (hereinafter referred to as "the Act") against the judgment and order dated 17.08.2007 passed by the High Court of Judicature at Allahabad in Criminal

Contempt No. 13 of 2006, by way of which the High Court has convicted the appellant for committing the contempt of court under Section 12 of the Act and sentenced him to suffer simple imprisonment for one month and to pay a fine of Rs2,000/- in default, to undergo simple imprisonment for a further period of two weeks.

2. On 5.9.2005 the appellant moved an application to surrender Chhandra Pal @ Badara s/o Shri Mathura under various sections of the Indian Penal Code in pursuance of the order passed under Section 82 of the Code of Criminal Procedure (for short "the Code") by the learned Judicial Magistrate. As the offences mentioned in the application and the process issued under Section 82 of the Code were different, the court asked a report from the police station concerned fixing the next date for disposal. About 3.45 p.m., when the Presiding Officer of the Court was in the midst of dictation of the order to his stenographer in another case, i.e., Original Suit No. 200/90 titled Balraj V. Rangpal, the appellant came inside the Court and shouted loudly uttering as under: -

> "As to why you did not take my accused in judicial custody. You have passed arbitrary orders. Now, my accused would be arrested and he would be encountered. You have done injustice. I will see you. If you have your official force I am also having my own force."

3. Apart from the aforesaid loud threatening utterances the appellant had also used unparliamentary language for the said Judicial Officer. The Judicial Officer sent a complaint to the High Court against the appellant through proper channel, the cognizance of which was taken by the High Court, first on administrative side and, thereafter, on judicial side. After hearing the parties, the High Court framed the charges against the contemnor on 6.10.2006 in respect of this incident dated 5.9.2005 at Khaga Court, District Fatehpur, using abusive language to Abdul Qayum, learned Civil Judge, (Junior Division/ Judicial Magistrate, Khaga, District Fatehpur) and interrupted

him from working and shouting loudly while he was dictating the order to his stenographer in other case. To the said charge-sheet, the appellant filed the counter affidavit dated 20.7.2006 denying all the allegations made in the report of the Presiding Officer. However, at a later stage by filing an affidavit dated 14.11.2006 he tendered unconditional apology to the court. The matter was heard at length. The High Court discussed the entire facts and law and came to the conclusion that it was not a fit case wherein unconditional apology tendered by the appellant should be accepted and, thus, considering the gravity of the charge against him, he had been convicted and sentenced as referred to hereinabove.

4. We have heard Mr. T.N. Saxena, learned counsel appearing for the appellant in detail, who has argued all the legal and factual aspects before us. However, we can express our anxiety and displeasure only on the issue that we fail to understand how the High Court could afford to take such a lenient view sentencing the appellant for one month's simple imprisonment only.

5. It has been reiterated by this Court time and again that the Bar and the Bench are required to maintain the decorum of the Court, for Court is the temple of justice for all. No one has the authority to conduct in a manner which would demean and disgrace the majesty of justice which is dispensed by a court of law. The administration of justice is the paramount role of the court and both Bar and the Bench have an equal role in performance of the said sacrosanct duty.

6. In this context, we may refer with profit to the pronouncement in *R.K. Garg, Advocate* v. *State of Himachal Pradesh*[1], wherein the Court has observed thus:-

> "The Bar and the Bench are an integral part of the same mechanism which administers justice to the people. Many members of the Bench are drawn from the Bar and their

1. (1981) 3 SCC 166.

past association is a source of inspiration and pride to them. It ought to be a matter of equal pride to the Bar. It is unquestionably true that courtesy breeds courtesy and just as charity has to begin at home, courtesy must begin with the Judge. A discourteous Judge is like an ill-tuned instrument in the setting of a court room. But members of the Bar will do well to remember that such flagrant violations of professional ethics and cultured conduct will only result in the ultimate destruction of a system without which no democracy can survive."

7. In *Mahabir Prasad Singh v. M/s. Jacks Aviation Pvt. Ltd.*[2], this Court has observed that judicial function cannot and should not be permitted to be stonewalled by browbeating or bullying methodology whether it is by litigants or by counsel. In the said case the two learned Judges, after referring to a three-Judge Bench decision in *Lt. Col. S.J. Chaudhary v. State (Delhi Administration)*, has opined thus: -

"It was further reminded that "having accepted the brief, he will be committing a breach of his professional duty, if he so fails to attend".

"A lawyer is under obligation to do nothing that shall detract from the dignity of the Court, of which he is himself a sworn officer and assistant. He should at all times pay deferential respect to the Judge, and scrupulously observe the decorum of the Court room."

(Warevelle's Legal Ethics at p. 182)

Of course, it is not a unilateral affair. There is a reciprocal duty for the Court also to be courteous to the members of the Bar and to make every endeavour for maintaining and protecting the respect which members of the Bar are entitled to have from their clients as well as from the litigant public. Both the Bench and the Bar are the

2. AIR 1999 SC 287.

two inextricable wings of the judicial forum and therefore the aforesaid mutual respect is sine qua non for the efficient functioning of the solemn work carried on in Courts of law. But that does not mean that any advocate or group of them can boycott the courts or any particular Court and ask the Court to desist from discharging judicial functions. At any rate, no advocate can ask the Court to avoid a case on the ground that he does not want to appear in that Court."

8. In *In Re: Sanjiv Datta, Deputy Secretary, Ministry of Information and Broadcasting, New Delhi, Kailash Vasdev, Advocate and Kitty Kumaramanglam (Smt.), Advocate*[4] certain observations were made, though in different context, yet we think it apt to reproduce the same:-

"The legal profession is a solemn and serious occupation. It is a noble calling and all those who belong to it are its honourable members. Although the entry to the profession can be had by acquiring merely the qualification of technical competence, the honour as a professional has to be maintained by its members by their exemplary conduct both in and outside the court. The legal profession is different from other professions in that what the lawyers do, affects not only an individual but the administration of justice which is the foundation of the civilised society. Both as a leading member of the intelligentsia of the society and as a responsible citizen, the lawyer has to conduct himself as a model for others both in his professional and in his private and public life. The society has a right to expect of him such ideal behaviour."

9. In *M.B. Sanghi v. High Court of Punjab and Haryana*[5], it has been opined that

3. AIR 1984 SC 618.
4. 1995 (3) SCC 619
5. (1991) 3 SCC 600.

"The tendency of maligning the reputation of judicial officers by disgruntled elements who fail to secure the desired order is ever on the increase and it is high time it is nipped in the bud. And, when a member of the profession resorts to such cheap gimmicks with a view to browbeating the Judge into submission, it is all the more painful. When there is a deliberate attempt to scandalise which would shake the confidence of the litigating public in the system, the damage caused is not only to the reputation of the Judge concerned but also to the fair name of the judiciary."

10. From the aforesaid enunciation of law it is clear as noon day that the judicial proceeding has its own solemnity and sanctity. No one has any authority to sully the same. It is the obligation of everyone to behave with propriety when a judicial proceeding is conducted. Any kind of deviancy not only affects the system but corrodes the faith of the collective at large. Neither any counsel nor a litigant can afford to behave in this manner. This being the position, it is really shocking that a counsel who was in his mid fiftees could afford to behave like that. Hence, we have expressed our displeasure.

11. The learned counsel for the appellant has endeavoured had to impress us that when the appellant had offered unconditional apology, the same should have been accepted. In *L.D. Jaikwal v. State of U.P.*[6] it has been observed as follows: -

"We do not think that merely because the appellant has tendered his apology we should set aside the sentence and allow him to go unpunished. Otherwise, all that a person wanting to intimidate a Judge by making the grossest imputations against him has to do, is to go ahead and scandalize him, and later on tender a formal empty apology which costs him practically nothing. If such an apology were to be accepted, as a rule, and not as an

6. (1984) 3 SCC 405.

exception, we would in fact be virtually issuing a "licence" to scandalize courts and commit contempt of court with impunity. It will be rather difficult to persuade members of the Bar, who care for their self-respect, to join the judiciary if they are expected to pay such a price for it. And no sitting Judge will feel free to decide any matter as per the dictates of his conscience on account of the fear of being scandalized and persecuted by an advocate who does not mind making reckless allegations if the Judge goes against his wishes. If this situation were to be countenanced, advocates who can cow down the Judges, and make them fall in line with their wishes, by threats of character assassination and persecution, will be preferred by the litigants to the advocates who are mindful of professional ethics and believe in maintaining the decorum of courts."

12. In the case at hand, we are absolutely convinced that apology or for that matter the unconditional apology was neither prompt nor genuine. The concept of mercy and compassion is ordinarily attracted keeping in view the infirmities of man's nature and the fragile conduct but in a court of law a counsel cannot always take shelter under the canopy of mercy, for the law has to reign supreme. The sanctity of law which is sustained through dignity of courts cannot be marred by errant behaviour by any counsel or litigant. Even a Judge is required to maintain the decorum and dignity of the court.

13. In view of the above, we do not find any force in the appeal, which is accordingly dismissed. The appellant is directed to surrender and deposit the fine within a period of thirty days from today, failing which the Chief Judicial Magistrate, Fatehpur, shall ensure to give effect to the judgment and order passed by the High Court.

K.K.T. Appeal dismissed.

SAMBHAVANA
v.
UNIVERSITY OF DELHI
(Civil Appeal Nos.4722-4723 of 2013)

MAY 29, 2013

[DR. B.S. CHAUHAN AND DIPAK MISRA, JJ.]

Education – For visually impaired students – At the University level –Special needs of such students – Requirement of sensitivity – Held: Grievances raised by appellant-organisation relating to visually impaired students require more focus and sensitive approach – Legislative intendment relating to comprehensive education scheme is crystal clear – s.30(f) of the 1995 Act lays down suitable modification in the examination system and sub-section(g) requires restructuring of curriculum for benefit of children with disabilities – Said mandate of the statute to be given due weightage – A visually impaired student is entitled to receive special treatment – Respondent-University to live the role of Loco Parentis and show its concern and mitigate the grievances of visually impaired students as far as possible – Appellant-organisation permitted to submit representation indicating its grievances and views to Empowered Committee of the University within 3 days which shall then be dealt with by the Committee within a week – Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 – ss. 30 and 31 – United Nations Convention on the Rights of Persons with Disabilities – Art. 24 – Constitution of India, 1950 – Arts. 21 and 41.

The appellant-organisation invoked the jurisdiction of the High Court for issue of a writ in the nature of mandamus directing the respondent-University to make provisions to introduce a bridge course for students with vision impairment in the first year of four years under-

graduate programme so that they can easily pursue the foundation course and become part of mainstream education system; issue a direction to the respondent to introduce a foundation course in the second year of the four years under-graduate programme; command the respondent to provide accessible reading materials and to make provisions for training of the teachers who will teach the students in "Mathematics" and "Science and Life" in the four years under-graduate programme and further to issue a writ or direction to the respondent to provide representation to the persons with disabilities or organizations working for the cause of disability as the members of the Task Force, Academic Council, Executive Council or any other body of the Delhi University so that needs of the persons with disabilities can also be taken into consideration while introducing a new four year under-graduate programme with multiple degree and framing appropriate syllabus for the said programme.

Respondent-University produced a notification dated 14-5-2013 which indicated that an Empowered Committee had been constituted consisting of fourteen academicians to look into the special needs of the students with disabilities and suggestions for suitable modifications would be made in curricula, mode of instructions and assessment to the Vice Chancellor of the University.

The High Court directed the Empowered Committee to hear the suggestions made by the appellant-organisation and submit a report to the Vice Chancellor so that the Vice Chancellor could take a decision in respect of this report. The action taken on that basis was directed to be made available to the Court by way of a report by the University on the next adjourned date.

While the High Court was still in seisin of the matter, the appellant-organisation approach

Disposing of the appeals, the Court

HELD:1. Though the University had constituted an Empowered Committee and it has experts, yet the grievances raised by the appellant-organisation relating to visually impaired students require more focus and sensitive approach. [Para 9] [281-A-B]

2. On a careful reading of Section 30 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, the legislative intendment relating to comprehensive education scheme is crystal clear. Section 30(f) lays down suitable modification in the examination system and sub-section(g) requires restructuring of curriculum for the benefit of children with disabilities. The said mandate of the statute has to be given due weightage. Section 31 of the Act exposits the real concern of the legislature which is in tune with the international conventions. The Parliament has cast certain obligations under the State and Central Governments in this regard. It is requisite of them to develop special devices and aids so that a child with disability gets equal opportunity and comes to the main stream. A teacher imparting education to such visually impaired children should be absolutely competent and he must have the adequate training. Transport facilities, supply of books and uniforms and grant of scholarships are in a different sphere altogether. India has shown its concern by ratifying the United Nations Convention on the Rights of Persons with Disabilities, which has become operative from May, 2008. Article 24 of the said Convention deals with education of persons with disabilities. It gives emphasis on development of human potential, sense of dignity, self-worth and strengthening of respect for human rights and creativity. [Paras 10, 11] [282-C-G; 283-E]

3. When the University has thought of imparting

education in a different way, it has to bear in mind the need of sensitivity and expected societal responsiveness. A visually impaired student is entitled to receive special treatment. Under the constitutional frame the State has to have policies for such categories of people. Article 41 of the Constitution of India casts a duty on the State to make effective provisions for securing, inter alia, the rights of the disabled and those suffering from other infirmities within the limits of economic capacity and development. It is imperative that the authorities look into the real grievances of the visually impaired people as that is the constitutional and statutory policy. The University has to live the role of Loco Parentis and show its concern to redress the grievances in proper perspective. [Para 12] [283-E-G]

4. The necessity of the visually impaired students should have primacy in the mind of the Empowered Committee of the University. Education for visually impaired students is a great hope for them and such a hope is the brightest bliss in their lives. History has recorded with pride that some men with visual impairment have shown high intellectual prowess. The anguish and despondency in the life of Milton, the famous English poet, did not deter him to carry out the mission of his life. Lack of vision could not destroy his Will power. Needless to say that he had the support of the society. The ancient sage "Ashtavakra" while laying down the traffic rules had categorically stated that the blind man has the first right on the road. Thus, emphasis has always been laid on the visually impaired persons for many a reason. However, when this Court says so, it may not be understood to have said that otherwise impaired or disabled people are to be treated differently in the constitutional and statutory scheme. This Court has only laid emphasis on the visually impaired students for the purpose of present case. It is the need of the present tim y

shall look into the matter and mitigate the grievances of the visually impaired students as far as possible. The problem has remained unsolved. The same is required to be addressed to in an apposite manner. This is not to say that it has not at all been addressed but there has to be more focus, more empathy and more sensitivity. Therefore, the appellant-organisation is permitted to submit a representation indicating its grievances and the views to the said Committee within three days which shall be dealt with by the Committee within a week hence. [Para 12] [283-H; 284-A-F]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4722-4723 of 2013.

From the Judgment & Order dated 15.05.2013 of the High Court of Delhi at New Delhi in W.P.(C) No. 2982 of 2013 and CM No. 5636 of 2013.

Pankaj Sinha, Anuj Castelino, Jyoti Mendiratta for the Appellant.

Pinky Anand, Mohinder Jit Singh, Prabal Bagchi for the Respondent.

The Judgment of the Court was delivered by

DIPAK MISRA, J. 1. Leave granted.

2. The appellant-organisation invoked the jurisdiction of the High Court of Delhi in WP(C) No. 2982 of 2013 for issue of a writ in the nature of mandamus directing the respondent-University to make provisions to introduce a bridge course for students with vision impairment in the first year of four years under graduate programme so that they can easily pursue the foundation course and become part of mainstream education system; issue a direction to the respondent to introduce a foundation course in the second year of the four years for under graduate programme; command the respondent to provide

accessible reading materials and to make provisions for training of the teachers who will teach the students in "Mathematics" and "Science and Life" in the four years under graduate programme and further to issue a writ or direction to the respondent to provide representation to the persons with disabilities or organizations working for the cause of disability as the members of the Task Force, Academic Council, Executive Council or any other body of the Delhi University so that needs of the persons with disabilities can also be taken into consideration while introducing a new four year under graduate programme with multiple degree and framing appropriate syllabus for the said programme.

3. Before the High Court, the respondent-University entered appearance and produced a notification dated 14th May, 2013 which indicated that an Empowered Committee had been constituted consisting of fourteen academicians to look into the special needs of the students with disabilities and suggestions for suitable modifications would be made in curricula, mode of instructions and assessment to the Vice Chancellor of the University. It was submitted that the Empowered Committee has been asked to submit an interim report on (a) measures that need to be taken to modify the curricula keeping in mind the special needs of persons with disability; (b) steps to be taken to improve availability of reading materials; and (c) to examine the measures currently in place in the internal assessment scheme and examination pattern and further changes that could be made in that regard. It was suggested before the High Court that the appellant-organisation could also make suggestions to the said Empowered Committee so that the same would be taken note of before the report is submitted to the Vice Chancellor.

4. An apprehension was expressed by the appellant-organisation that in the event the admission process commenced, some students with disabilities may face difficulty in admission and, therefore, the per[illegible]e

Empowered Committee to submit the report by 15th June, 2013 should be pre-poned so that the recommendations could be implemented by the Vice Chancellor before the admission process is completed. The High Court, considering the submissions raised at the Bar, directed as follows: -

> "We direct the Empowered Committee constituted as per the notification dated 14th May 2013 to hear the suggestions made by the petitioner and submit a report to the Vice Chancellor by 7th June 2013 so that the Vice Chancellor could take a decision in respect of this report by 15th June 2013. The action taken on the basis of the order of this Court shall be made available to the Court by way of a report by the University on the next adjourned date. List on 03.07.2013."

5. Though the matter has been adjourned by the High Court and it is in seisin of the matter, yet the appellant-organisation has approached this Court. Regard being had to the sensitive nature of the issue and the attention it deserves, this Court required the learned counsel for the appellant-organisation to serve a copy of the petition on the counsel for the learned counsel for the Delhi University and, accordingly, the respondent has entered appearance and filed the response.

6. Though prayer has been made to restrain the respondent-University from introducing the four year under graduate programme with multiple degrees which is the final outcome of the case, we are not inclined to pass any order of stay. However, we will proceed to deal with the matter keeping in view the submissions advanced by Mr. Pankah Kumar Sinha, learned senior counsel for the appellant and Ms. Pinki Anand, learned senior counsel for the University.

7. Before we advert to the submissions raised at the Bar, it is necessary to advert to the affidavit filed by the University. It is averred in the affidavit that the Empowered Committee consists of experts and some visually impaired experts from

All India Confederation of the Blinds and Eye Way are special invitees to attend the meetings. The primary objective of including those individuals was to obtain their perspective on visual impairment with regard to the new under graduate programme on the basis of their expertise and experiences. The representation preferred by the appellant-organisation on 22nd May, 2013 has been referred to. The facilities that have been provided to the physically disabled students have been enumerated. The said aspects need not be stated in detail as that is not in the realm of controversy. However, as far as the students with vision impairment are concerned, it is contended that the University has provided a Braille Library and funds have been earmarked for each college to obtain the necessary technologies to facilitate screen reading for visually impaired students; that the representation submitted by the appellant-organisation has been considered by the Empowered Committee and taking note of the special needs of the students of the said category a report has been prepared by the Empowered Committee; and that the same shall be placed before the Academic Council. The report of the Empowered Committee has been brought on record. The suggestions of the appellant-organisation have been referred to in the report. It is stated in the report that each of the suggestions has been carefully and objectively examined and recommendations have been made. The relevant part of the recommendations are reproduced hereinbelow: -

> *"Recommendations:*
>
> On the basis of the deliberations of the committee the following recommendations are made:
>
> 1. ***Curriculum:***
>
> ***A.*** No modification in curricula prescribed for the Courses under reference is called-for except, if and wherever applicable, substituting visual content with alternative content. It is fu[illegible]h

'Building Mathematical Ability' and 'Science in Life' have equal importance for student with disabilities and non-disabled in day to day life.

B. Students studying these papers should be provided all requisite support and facilities to enable them to study these Courses efficiently and conveniently. The Faculties of mathematics and Science should be requested to provide a copy each of the essential diagrams, figures and charts and the same should be converted in accessible format by the EOC throughout sourcing.

C. However, in case there are some students with disabilities who do not find it at all possible to study these papers despite support from the University, will have the choice to study two alternative papers Viz. History of Science and Communication and Personality Development. The Hon'ble Vice Chancellor may kindly get the syllabi of these Courses prepared.

D. Tutorials/remedial teaching sessions should be conducted in these two Courses to address individual student-difficulties and fill in the gaps on a regular basis throughout the two semesters.

2. ***Mode of Instructions:***

It is recommended that in the case of the visually impaired, the Course entitled "Science And Life" should be taught in the 1st semester and the Course entitled "Building Mathematical Ability" in the 2nd semester such an arrangement is possible within the existing structure of the foundation course under FYUP programme. It is further recommended that an orientation programme should be organized preferably in the 1st half of July, 2013 or during the early part of the 1st semester for college teachers

teaching maths and science with a view to familiarizing them with the pedagogy of teaching these papers to students with visual impairments and other disabilities. The programme will be of a duration of 10 days and will be organized by the Faculty of maths and science in collaboration with EOC. The teaching in this orientation programme will be done by the eminent experts in the field of teaching students with disabilities. The teachers should be requested to describe verbally the black board work for the benefit of students with disabilities. Special devices should be made available to various colleges by the University. The list is given as (annexure E).

3. ***Accessible reading material and special devices:***

The concerned departments will identify and provide a reading package in English and Hindi to EOC who will get them converted in accessible formats by out sourcing."

8. Mr. Sinha, learned senior counsel has submitted that the recommendations do not really address the grievances in a seemly manner. In his written note he has, we must appreciably state, enumerated the difficulties that would be faced by the students who are visually impaired. He has categorized the problems and suggested that as far as Science and Life is concerned, it is the stand of the appellant-organisation that teaching of Science and Life does not require more orientation but needs special intensive training of manpower (teachers and non-teaching assistive staff) for at least one semester. He has dealt with the objectives and expected outcome and suggested the views. The views that have been given pertain to many a sphere. As far as Building Mathematical Ability is concerned, in the written note the learned senior counsel has given the views and there are also views relating to requirement and arrangements to be made to teach mathematics to visually impaired students. We are not enumerating the views and suggestions given in the note, for we are not experts and we do not intend to dwell upon the same in

9. At this juncture, we are obliged to state that Though the University had constituted an Empowered Committee and it has experts, yet the grievances raised by the appellant-organisation relating to visually impaired students require more focus and sensitive approach. In this context, we may refer with profit to Section 30 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (for brevity "the Act"). It reads as follows: -

"**30. Appropriate Governments to prepare a comprehensive education scheme providing for transport facilities, supply of books, etc.** – Without prejudice to the foregoing provisions, the appropriate Governments shall by notification prepare a comprehensive education scheme which shall make provision for –

(a) transport facilities to the children with disabilities or in the alternative financial incentives to parents or guardians to enable their children with disabilities to attend schools;

(b) the removal of architectural barriers from schools, colleges or other institutions imparting vocational and professional training;

(c) the supply of books, uniforms and other materials to children with disabilities attending school;

(d) the grant of scholarship to students with disabilities;

(e) setting up of appropriate fora for the redressal of grievances of parents regarding the placement of their children with disabilities;

(f) suitable modification in the examination system to eliminate purely mathematical questions for the benefit of blind students and students with low vision;

(g) restructuring of curriculum for the benefit of children with disabilities;

(h) restructuring the curriculum for the benefit of students with hearing impairment to facilitate them to take only one language as part of their curriculum."

10. On a careful reading of the aforesaid provision, the legislative intendment relating to comprehensive education scheme is crystal clear. Section 30(f) lays down suitable modification in the examination system and sub-section(g) requires restructuring of curriculum for the benefit of children with disabilities. The said mandate of the statute has to be given due weightage. In this context, Section 31 of the Act is referred with profit: -

"**31. Educational institutions to provide amanuensis to students with visual handicap**. – All educational institutions shall provide or cause to be provided amanuensis to blind students and students with or low vision."

11. The aforesaid provision exposits the real concern of the legislature which is in tune with the international conventions. The Parliament has cast certain obligations under the State and Central Governments in this regard. It is requisite of them to develop special devices and aids so that a child with disability gets equal opportunity and comes to the main stream. A teacher imparting education to such visually impaired children should be absolutely competent and he must have the adequate training. Transport facilities, supply of books and uniforms and grant of scholarships are in a different sphere altogether. The grievance that has been accentuated by Mr. Sinha with real concern is that there has been on redressal of the grievances pertaining to modification in the examination system and restructuring of curriculum. Be it noted, India has ratified the United Nations Convention o[illegible]s

with Disabilities. It has become operative from May, 2008. Article 24 of the said Convention deals with education of persons with disabilities. It gives emphasis on development of human potential, sense of dignity, self-worth and strengthening of respect for human rights and creativity. Article 24(4) of the Convention reads as follows: -

> "4. In order to help ensure the realization of this right, States Parties shall take appropriate measures to employ teachers, including teachers with disabilities, who are qualified in sign language and/or Braille, and to train professionals and staff who work at all levels of education. Such training shall incorporate disability awareness and the use of appropriate augmentative and alternative modes, means and formats of communication, educational techniques and materials to support persons with disabilities."

12. We are absolutely conscious that there is an enactment but India has shown its concern by ratifying the said Convention and, therefore, we have reproduced the same. When the University has thought of imparting education in a different way, it has to bear in mind the need of sensitivity and expected societal responsiveness. A visually impaired student is entitled to receive special treatment. Under the constitutional frame the State has to have policies for such categories of people. Article 41 of the Constitution of India casts a duty on the State to make effective provisions for securing, inter alia, the rights of the disabled and those suffering from other infirmities within the limits of economic capacity and development. It is imperative that the authorities look into the real grievances of the visually impaired people as that is the constitutional and statutory policy. The University has to live the role of Loco Parentis and show its concern to redress the grievances in proper perspective. Not for nothing Ralph Waldo Emerson had said "the secret of education is respecting pupil". Thus, the necessity of the visually impaired students should have primacy in the mind of the

Empowered Committee of the University. Education for visually impaired students is a great hope for them and such a hope is the brightest bliss in their lives. History has recorded with pride that some men with visual impairment have shown high intellectual prowess. The anguish and despondency in the life of Milton, the famous English poet, did not deter him to carry out the mission of his life. Lack of vision could not destroy his Will power. Needless to say that he had the support of the society. The ancient sage "Ashtavakra" while laying down the traffic rules had categorically stated that the blind man has the first right on the road. Thus, emphasis has always been laid on the visually impaired persons for many a reason. When we say so, we may not be understood to have said that otherwise impaired or disabled people are to be treated differently in the constitutional and statutory scheme. We have only laid emphasis on the visually impaired students for the purpose of present case. It is the need of the present time that the University shall look into the matter and mitigate the grievances of the visually impaired students as far as possible. We have already indicated that we are not experts. But we are disposed to think that the problem has remained unsolved. The same is required to be addressed to in an apposite manner. We do not intend to say that it has not at all been addressed but there has to be more focus, more empathy and more sensitivity. Therefore, we permit the appellant-organisation to submit a representation indicating its grievances and the views to the said Committee within three days which shall be dealt with by the Committee within a week hence.

13. The appeal is accordingly disposed of without any order as to costs.

B.B.B. Appeals disposed of.

ENGINEERING EXPORT PROMOTION COUNCIL
v.
USHA ANAND AND ANOTHER
(Criminal Appeal No. 387 of 2007)

MAY 29, 2013

[DR. B. S. CHAUHAN AND DIPAK MISRA, JJ.]

Code of Criminal Procedure, 1973 – s.482 – Jurisdiction – Scope of –Criminal proceedings u/ss.420, 468/471 IPC against respondent no.1's husband, and three other accused – All accused, without prejudice to their claim, deposited money with appellant, a channelising industry under the Ministry of Commerce – Case against husband of respondent no.1 stood abated on his death – Other three accused acquitted – After acquittal, they were granted relief of refund of the money deposited, by the High Court – Similar claim by respondent no.1 on behalf of her late husband – Allowed by High Court in exercise of jurisdiction u/s.482 CrPC – Propriety – Plea of appellant that husband of respondent no.1 deposited the amount not in pursuance of any order of court but on his own volition to avoid arrest, and hence same cannot be directed to be refunded u/s.482 CrPC – Held: Evidence on record make it clear that the money was deposited by the husband of respondent no.1 on his own volition with the appellant – Deposition of any sum as a condition of bail and a deposit with the Agency on one's own even if to avoid arrest would stand on a different footing – The later action has nothing to do with the proceedings in the court – s.482 CrPC could not have been exercised as the action taken by appellant, was absolutely an administrative action and, therefore, the same could only be challenged by way of a writ petition and not by seeking relief invoking the inherent power u/s.482 CrPC – Liberty granted to appellant to approach the High Court by way of writ petition – Penal Code, 1860 – ss.420, 468/471.

'Y', the husband of Ist respondent, was a merchant exporter of automotive components. The Central Bureau of Investigation (CBI) registered cases against him for offences punishable under Sections 420, 468/471 of IPC. Identical cases were registered against his three brothers, namely, 'A', 'S' and 'Su'.

'Y', without prejudice to his claim, deposited a sum of Rs.22 lakhs with the appellant-Engineering Export Promotion Council (EEPC), a channelising industry under the Ministry of Commerce and requested it to inform the Special Investigation Branch (CBI) not to take any measure against him. The other three brothers also similarly deposited sum with the said agency. The trial continued in different cases against all the four brothers and, eventually, 'A', 'S' and 'Su' were acquitted in all the cases by the trial court which extended them the benefit of doubt. 'Y' expired before conclusion of the trial and, therefore, the trial stood abated against him. Against the judgment of acquittal of the three brothers, CBI preferred appeals which were dismissed and no appeal was preferred assailing the judgment of affirmation of acquittal. Thereafter, they claimed refund of the amount by filing applications before the trial Judge who allowed the same.

As the amount was not refunded despite the order passed by the trial court, one of the brothers filed application before the High Court which passed order directing the appellant to refund the amount. Thereafter, the 1st respondent filed an identical application before the High Court with a prayer to command the appellant to refund the amount of Rs.22 lakhs deposited by her late husband, 'Y', which was allowed.

In the instant appeal, the appellant challenged the order of the High Court contending 1) that the husband of 1st respondent had deposite[illegible]e

appellant on his own and it was not in pursuance of the order or command of any court and it had nothing to do with the grant of bail; 2) that the High Court fell into grave error by applying the doctrine of parity which was remotely not applicable; and further 3) that when as a condition of bail a sum is deposited, the same is liable to be released after acquittal but when an amount is deposited on one's volition it cannot be directed to be refunded under Section 482 CrPC.

Allowing the appeal, the Court

HELD: 1. From the order passed by the High Court, it is clear that the High Court was exercising its inherent powers under Section 482 CrPC. The fulcrum of the order passed by the High Court is that late husband of the Ist respondent had deposited the money to avoid arrest and similarly placed accused persons had been acquitted and they had been granted relief of refund by the trial court and similar treatment should be meted out to her. [Para 11] [294-H; 295-A-B]

2. There is nothing like unlimited arbitrary jurisdiction conferred on the High Court under Section 482 of the Code. The power has to be exercised sparingly, carefully and with caution only where such exercise is justified by the tests laid down in the Section itself. Section 482 does not confer any new power on the High Court but only saves the inherent power which the court possessed before the enactment of the Code. There are three circumstances under which the inherent jurisdiction may be exercised, namely, (i) to give effect to an order under the Code, (ii) to prevent abuse of the process of Court, and (iii) to otherwise secure the ends of justice. There is a distinction between the exercise of power under Article 226 of the Constitution of India and the power under the Code. [Para 15 and 16] [297-A-F]

R.P. Kapur v. State of Punjab **AIR 1960 SC 866: 1960 SCR 388;** *State of Punjab v. Kasturi Lal and others* **AIR 2005 SC 4135;** *State of U.P. and others v. Surender Kumar* **(2005) 9 SCC 161;** *Divine Retreat Centre v. State of Kerala* **AIR 2008 SC 1614: 2008 (4) SCR 701 – relied on.**

3. In the case at hand, the High Court has given emphasis on judgment of acquittal and the deposit of money with the appellant to avoid arrest. As far as the judgment of acquittal because of abatement is concerned, it is not necessary to dwell upon what would be the effect of an acquittal in a case of this nature. The second issue being important requires to be delved into. Late 'Y' had written two letters to the appellant on 25.8.1994 and on 30.8.1994 respectively. From the aforesaid communications, it is clear that the money was deposited by the husband of the Ist respondent on his own volition with the appellant. The High Court observed that the other three brothers had deposited the amount under same circumstances and, therefore, after their acquittal the amount was directed to be refunded. The High Court has referred to its earlier order wherein it had been categorically stated that the money was deposited as a condition of bail. Deposition of any sum as a condition of bail and a deposit with the Agency on one's own even if to avoid arrest would stand on a different footing. The later action has nothing to do with the proceedings in the court. Thus understood, Section 482 of the Code could not have been exercised as the action taken by the appellant, a channelising industry under the Ministry of Commerce is absolutely an administrative action and, therefore, the same can only be challenged by way of a writ petition and not by seeking relief invoking the inherent power under Section 482 of the Code. [Paras 18 and 20] [297-G-H; 298-A-B]; 299-F-H; 300-A]

4. Consequently, the order pass rt

is set aside and liberty is granted to appellant to approach the High Court by way of writ petition. If a writ petition is filed, the same shall be dealt with on merits. [Para 21] [300-B-C]

Case Law Reference:

1960 SCR 388	**relied on**	**Para 12**
AIR 2005 SC 4135	**relied on**	**Para 13**
(2005) 9 SCC 161	**relied on**	**Para 15**
2008 (4) SCR 701	**relied on**	**Para 16**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 387 of 2007.

From the Judgment & Order dated 01.06.2006 of the High Court of Delhi at New Delhi in Crl. M.C. No. 540 of 2004 in Criminal Miscellaneous (M) No. 3009 of 2003 read with order dated 04.07.2006 in Crl.M.No. 6349 of 2006 in Crl. M.M. No. 3009 of 2003.

Amit Singh Chadha, Sangeeta Mandal, Kunal Sinha, Fox Mandal & Co. for the Appellant.

R. Nedumaran, Chandar Kumar, B.K. Prasad, Sonal Jain, Tanmay Agarwal (for Vinay Garg), P. Parmeswaran for the Respondents.

The Judgment of the Court was delivered by

DIPAK MISRA, J. 1. In this appeal challenge is to the orders dated 1.6.2006 and 4.7.2006 passed by the High Court of Delhi in Criminal M.C. No. 540 of 2004 in Crl. M. (M) No. 3009 of 2003 and Crl. M. No. 6349 of 2006 in Crl. M. (M) No. 3009 of 2003 respectively.

2. The facts which are essential to be exposited are that the husband of the Ist respondent, late Yash Pal Anand, was a

merchant exporter of automotive components and was carrying on business in the name and style of M/s. Anand Craft Centre. The Central Bureau of Investigation (CBI) registered six cases against him for offences punishable under Sections 420, 468/ 471 of the Indian Penal Code (for short "IPC") in the year 1994. Identical cases of equal numbers were registered against his brothers, namely, Ashok, Satish and Subhash. The allegations against the four accused persons are not required to be stated because the controversy pertains to a different realm altogether. As the factual matrix would demonstrate, late Yash Pal Anand had deposited a sum of Rs.22 lakhs with Engineering Export Promotion Council (EEPC), a channelising industry under the Ministry of Commerce. Other three brothers had also deposited the sum with the said agency. The trial continued in different cases against all the four brothers and, eventually, Ashok, Satish and Subhash were acquitted in all the cases by the trial court which extended them the benefit of doubt. As far as the husband of the Ist respondent is concerned, he expired before the conclusion of the trial and, therefore, the trial stood abated against him. Against the judgment of acquittal of the three brothers CBI preferred appeals which were dismissed on 27.5.2002 and no appeal was preferred assailing the judgment of affirmation of acquittal. Thereafter, they claimed refund of the amount by filing requisite applications before the learned trial Judge who, by order dated 13.8.2001, directed refund of the amount. The reason ascribed by the trial court for refund was that the said sum was deposited by the accused persons in compliance of the conditions of the bail order and it was clearly stated that the accused persons had deposited the money without prejudice to their rights and as they had been acquitted, they were entitled to refund of the money deposited with the EEPC.

3. As the amount was not refunded despite the order passed by the trial court, one of the brothers preferred Cri.M. (M) No. 3541 of 2001 before the High Court which passed an order directing the present appellant to r e

relevant part of the order dated 5.10.2001 passed in Crl. M. (M) No. 3541 of 2001 is as follows: -

> "The question that is being raised before me, is whether the amount deposited by the accused persons pursuant to orders dated 12.10.1994 requiring the petitioner to deposit a sum of Rs.15,24,079/- with the second respondent by way of terms and condition of the bail and the petitioner during trial having been acquitted of all charges on 22.6.2001 is entitled to receive back the money that is deposited pursuant to the orders of this Court with the second respondent as a condition of bail. Learned counsel for the CBI submits that the CBI does not have the money and that the same was deposited with the second respondent and, therefore it is only the second respondent that can be directed to return the money deposited.
>
> I have heard learned counsel present for the parties the second respondent choosing not to be present, I direct that the amount deposited by the petitioner with the second respondent pursuant to orders of this Court and which was directed to be returned vide order dated 13.8.2001 shall be returned within a period of two weeks from date of service of the order."

4. Thereafter, the 1st respondent filed Crl. M. (M) No. 3009 of 2003 with a prayer to command the respondent No. 2, the appellant herein, to refund the amount of Rs.22 lakhs on the ground that she was the sole legal heir; that the allegations in all the cases were identical without any exception; that the trial court had allowed the applications for refund vide order dated 13.8.2001 in respect of other brothers; that as the order passed by the trial court was not complied with, one of the brothers had filed Crl. M. (M) No. 3541 of 2001 before the High Court which was disposed of by order dated 5.10.2001 directing the respondent to refund the deposited amount within two weeks; that as the trial against the husband had abated, she had not been able to move the application earlier; that after the

termination of the trial she had approached the officers of the respondent but despite the earlier direction by this Court and they being under legal obligation to refund the amount, tremendous apathy was shown and money was not refunded; and that no response was given to the legal notice and, therefore, she was entitled to refund of the deposited sum.

5. The High Court entertained the application preferred by the 1st respondent and passed the following order on 3.12.2003: -

> "In identical petition namely Crl. M. (M) No. 3541/2001 an order dated 15.10.2001 was passed directing refund of the money deposited by the petitioner of that petition within a period of two weeks from the date of service of the respondent.
>
> Since in this case also respondent No. 2 has been served the same order needs to be passed. The amount deposited by the petitioner shall now be returned to the petitioner within a period of two weeks from today."

6. Being grieved by the aforesaid order special leave petition (Crl.) No. 41 of 2004 was filed before this Court, which was eventually converted to Criminal Appeal No.1085 of 2004. This Court, on 27.9.2004, passed the following order in the said criminal appeal: -

> "Let the present appellant, if they are advised, file their objections, if any, to the petition in Criminal Miscellaneous (Main) No. 3009 of 2003 in the High Court within three weeks from today. If any objection is filed, the same shall be considered on its own merits by the High Court about which we express no opinion. The Criminal Miscellaneous (Main) No. 3009 of 2003 shall be restored to its original position as stood before disposal on 3.12.2003. If no objection is filed, the order passed on 3.12.2003 shall

remain operative. The liberty given to the appellant to file a counter shall be also applicable to the CBI.

This order has been passed notwithstanding the stand of the respondents that full liberty was granted to the appellant to file any objection which they failed to avail. Since a specific stand has been taken that the appellant intended to file objections for which it was not granted any opportunity, we have passed the present order."

7. After the aforesaid order an objection was filed and the High Court, while dealing with the controversy referred to the order passed by the trial court on 13.8.2001 directing refund of amount in respect of other accused persons, and further referred to the order passed on 5.10.2001, which we have reproduced hereinabove, and thereafter, as is manifest from the order impugned, it reproduced a part of the letter dated 30.8.1994 by late Yash Pal Anand written to the respondent No. 2 therein and observed thus: -

"Admittedly, the other three brothers also deposited the amount under the same circumstances. After their acquittal when they applied to the trial court for refund of the amount deposited by them the trial court directed the refund of the amount. While passing the order of refund the learned trial court has categorically observed that money was deposited in compliance of the condition of bail order and without prejudice to the rights of the accused to be entitled to refund of the money. I fail to understand as to why same treatment be not meted out to the petitioner."

8. Being of this view, the High Court further opined that once the proceeding stood abated against him, it cannot be argued that the case would have resulted in conviction when cases against other brothers on identical allegations had resulted in acquittal and the appeals had been dismissed. Resultantly, the petition was allowed and the respondent No. 2

therein was directed to refund the amount within a period of four weeks.

9. Mr. Amit Singh Chadha, learned senior counsel appearing for the appellant, has seriously criticized the order on the ground that the respondent's husband had deposited the money with the appellant on his own and it is not in pursuance of the order or command of any court and it has nothing to do with the grant of bail. It is strenuously urged that the High Court has fallen into grave error by applying the doctrine of parity which is remotely not applicable. It is canvassed by him that when as a condition of bail a sum is deposited, the same is liable to be released after acquittal but when an amount is deposited on one's volition it cannot be directed to be refunded under Section 482 of the Code of Criminal Procedure (for short "the Code").

10. The learned counsel for the respondent No. 2, per contra, would contend that the order passed by the High Court is absolutely defensible inasmuch as when the trial stood abated against late Yash Pal Anand, husband of the Ist respondent, it had the effect of acquittal and, therefore, the fall out is refund of the amount which had been deposited with the appellant. It is his further submission that when the charges were identical against all and the three accused persons were acquitted, there was no justification to treat the legal heir of other accused in a different manner. It is put forth that the amount was deposited by late Yash Pal Anand to avoid arrest and without prejudice which is perceptible from letter dated 30.8.1994 written by him to the appellant which has been appositely referred to by the High Court and hence, interference with the order impugned would amount to non-refund of the amount to the respondent which would result in miscarriage of justice.

11. To appreciate the rivalised submissions raised at the Bar, we have with great anxiety scrutinized the order passed by the High Court. Indubitably, the High

its inherent powers under Section 482 of the Code. The fulcrum of the order passed by the High Court is that late husband of the Ist respondent had deposited the money to avoid arrest and similarly placed accused persons had been acquitted and they had been granted relief of refund by the trial court and again reiterated by the High Court under Section 482 of the Code, similar treatment should be meted out to her.

12. To appreciate the ratiocination of the order passed by the High Court it is necessary to understand the jurisdiction of the High Court while exercising the power under Section 482 of the Code. In *R.P. Kapur v. State of Punjab,*[1] a three-Judge Bench was dealing with the scope of inherent power the High Court under Section 561A of the old Code. In that context, it has been observed that the High Court has said inherent power as may be necessary is meant to give effect to any order under the Code or to prevent abuse of the process of any court or otherwise to secure the ends of justice.

13. In *State of Punjab v. Kasturi Lal and others,*[2] the Court, dealing with the scope of exercise of power under Section 482 of the Code. has observed that the Section does not confer any new power on the High Court. It only saves the inherent power which the Court possesses before the enactment of the Code.

14. After so stating it has been laid down that it envisages three circumstances under which the inherent jurisdiction may be exercised, namely, (i) to give effect to an order under the Code, (ii) to prevent abuse of the process of the Court, and (iii) to otherwise secure the ends of justice. It is neither possible nor desirable to lay down any inflexible rule which would govern the exercise of inherent jurisdiction. No legislative enactment dealing with procedure can provide for all cases that may possibly arise. Courts, therefore, have inherent powers apart from express provisions of law which are necessary for proper

1. AIR 1960 SC 866.
2. AIR 2005 SC 4135.

discharge of functions and duties imposed upon them by law. That is the doctrine which finds expression in the section which merely recognizes and preserves inherent powers of the High Courts.

15. In this context, we may fruitfully refer to *State of U.P. and others v. Surender Kumar*[3] wherein the appellant-State had assailed the order passed by the a learned Judge of the Allahabad High Court who, in exercise of power under Section 482 of the Code, had modified its earlier order directing the respondent-State and its functionaries not to carry out search and seizure of the goods lying at the railway station or in the custody of the City Booking Agency belonging to the applicant therein prior to their delivery to the consignee and also not to interfere in the functioning of the City Booking Agency. The two learned Judges opined that the High Court could not have modified the order as it amounted to review. Repelling the contention that the High Court had only acted in accordance with the judgment of the Division Bench of the said High Court, the two-Judge Bench proceeded to state as follows: -

> "In the garb of an application for modification of that order, the respondent could not file an application which was in effect a review application praying for other reliefs. Yet the High Court passed an order directing the appellants not to search and seize the goods lying at the railway station or in the custody of the City Booking Agency of the applicant prior to the delivery to the consignees. It has further directed that the appellants shall not interfere in the functioning of the City Booking Agency. These are matters which were entirely beyond the scope of the application under Section 482 CrPC and if, we may say so, beyond the jurisdiction of the High Court exercising jurisdiction under Section 482 CrPC. It does not arise out of any order passed by a court, nor was there any allegation of abuse of the process of the court, nor was it a case of manifest

3. (2005) 9 SCC 161.

injustice caused to a party. A direction like the one which the High Court has given in its impugned order could be given by the High Court in exercise of its writ jurisdiction in an appropriate case and not under Section 482 CrPC."

16. In *Divine Retreat Centre v. State of Kerala*[4] the central controversy that arose before this Court pertained to the scope, content and ambit of the inherent power conferred on the High Court under Section 482 of the Code. A submission was canvassed that the jurisdiction of the High Court under Section 482 of the Code was not available to order investigation into any case by the police. After referring to number of decisions it has been opined thus: -

"**22.** In our view, there is nothing like unlimited arbitrary jurisdiction conferred on the High Court under Section 482 of the Code. The power has to be exercised sparingly, carefully and with caution only where such exercise is justified by the tests laid down in the Section itself. It is well settled that Section 482 does not confer any new power on the High Court but only saves the inherent power which the court possessed before the enactment of the Code. There are three circumstances under which the inherent jurisdiction may be exercised, namely, (i) to give effect to an order under the Code, (ii) to prevent abuse of the process of Court, and (iii) to otherwise secure the ends of justice."

17. In the said case, the two-Judge Bench made a distinction between the exercise of power under Article 226 of the Constitution of India and the power under the Code.

18. In the case at hand, the High Court has given, as has been stated hereinbefore, emphasis on judgment of acquittal and the deposit of money with the appellant to avoid arrest. As far as the judgment of acquittal because of abatement is concerned, it is not necessary to dwell upon what would be the

4. AIR 2008 SC 1614.

effect of an acquittal in a case of this nature. The second issue being important requires to be delved into. Late Yash Pal Anand, had written two letters to the appellant on 25.8.1994 and on 30.8.1994 respectively. We may reproduce the relevant part of the letter dated 30.8.1994 : -

"Without prejudice to our claim and contention that benefit of I.P.R.S. has been legally claimed by us, we are happy tendering approximately a sum of Rs.7,40,000.00 which constitute about 27% of the total sum of Rs.27,50,000.00 as payable by us to E.E.P.C. as alleged to be payable. The detail of the tendering amount is as under.

1. Banker's Cheque No. 198929 dt. 27.8.94 of Rs. 2,80,000.00 issued by Canara Bank, New Delhi.

2. Banker's Cheque No. 198928 dt. 27.8.94 of Rs. 4,60,000.00 issued by Canara Bank, New Delhi.

Kindly accept this sum of Rs. 7,40,000.00 under protest and acknowledge.

We are already made 13% amount vide Banker's Cheque No. 198878 dt. 25.8.94 of Rs. 3,60,000.00 issued by Canara Bank, New Delhi and now total amount paid 40% (Rs. 11,00,000.00)

We are at present in serious financial constraint, therefore, the balance left over amount may not be deposited by us immediately. But however the remaining sum should be deposited in the course of the time as intimated to you from time to time.

In view of the above you are requested to also kindly inform immediately to the special investigation branch (CBI) not to take measure against us.

We assure you that we will fully co-operate with you from time to time and further assure you s

become payable by us shall be paid with."

[Emphasis added]

19. Again on 5.10.1994 late Yash Pal Anand wrote another letter the relevant part of which is as follows: -

"We are already made 13% amount vide Banker's Cheque No. 198878 dt. 25.8.94 of Rs. 3,60,000.00 issued by Canara Bank, New Delhi and 27% of Rs. 7,40,000.00 (Banker's Cheque No. 198929 dt. 27.8.94) and now total amount paid 80% (Rs. 22,00,000.00)

We are at present in serious financial constraint, therefore the balance left over amount may not be deposited by us immediately. But however the remaining sum should be deposited as early as possible.

In view of the above you are requested to also kindly inform immediately to the special investigation branch (CBI) not to take measure against us."

[Emphasis supplied]

20. From the aforesaid communications, it is clear that the money was deposited by the husband of the Ist respondent on his own volition with the appellant. The High Court has observed that the other three brothers had deposited the amount under same circumstances and, therefore, after their acquittal the amount was directed to be refunded. The High Court has referred to its earlier order wherein it had been categorically stated that the money was deposited as a condition of bail. Deposition of any sum as a condition of bail and a deposit with the Agency on one's own even if to avoid arrest would stand on a different footing. The later action has nothing to do with the proceedings in the court. Thus understood, Section 482 of the Code could not have been exercised as the action taken by the appellant, a channelising industry under the Ministry of Commerce is absolutely an administrative action and,

therefore, we are of the considered opinion that the same can only be challenged by way of a writ petition and not by seeking relief invoking the inherent power under Section 482 of the Code.

21. Consequently, the appeal is allowed, the order passed by the High Court is set aside and liberty is granted to appellant to approach the High Court by way of writ petition. If a writ petition is filed, the same shall be dealt with on merits. Needless to emphasise, all contentions relating to liability, entitlement for refund and all other aspects are kept open as we have not expressed any opinion on any count except the jurisdictional facet. There shall be no order as to costs.

B.B.B. Appeal allowed.