ORISSA MINING CORPORATION

v.

MINISTRY OF ENVIRONMENT & FOREST & OTHERS

(Writ Petition (Civil) No. 180 of 2011)

APRIL 18, 2013

[AFTAB ALAM, K.S. RADHAKRISHNAN AND RANJAN GOGOI, JJ.]

Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 – Primitive Tribal Groups – Specific protections extended to their "habitat and habitations" – Bauxite Mining Project (BMP) – Ministry of Environment and Forests (MOEF) rejecting Stage-II forest clearance for diversion of 660.749 hectares of forest land for mining of bauxite ore in Lanjigarh Bauxite Mines in Kalahandi and Rayagada Districts of Orissa – Alleged violation of the rights of the Scheduled Tribes (STs) and the "Traditional Forest Dwellers" (TFDs) – Held: STs and other TFDs have a vital role to play in the environmental management and development because of their knowledge and traditional practices – The State has a duty to recognize and duly support their identity, culture and interest so that they can effectively participate in achieving sustainable development – STs and other TFDs residing in the Scheduled Areas have a right to maintain their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands – Central role of Gram Sabha in determining the nature and extent of "individual"/"community rights" of the STs and other TFDs and in safeguarding their customary and religious rights under the Forest Rights Act – In the instant case, question whether STs and other TFDs, like Dongaria Kondh, Kutia Kandha and others, had any religious rights i.e. rights of worship over the Niyamgiri hills, known as Nimagiri, near Hundaljali, which is the hill top known as Niyam-Raja, to be

considered by the Gram Sabha – Gram Sabha to also examine whether the proposed mining area Niyama Danger, 10 km away from the peak, would in any way affect the abode of Niyam-Raja – Gram Sabha also free to consider all the community, individual as well as cultural and religious claims, over and above the claims already received from Rayagada and Kalahandi Districts – The State Government as well as the Ministry of Tribal Affairs, Government of India, to assist the Gram Sabha for settling of individual as well as community claims – Gram Sabha to take decision on them within 3 months and communicate the same to the MOEF, through the State Government – MoEF to then take a final decision on the grant of Stage II clearance for the Bauxite Mining Project in light of the decision of the Gram Sabha within 2 months thereafter – Environmental Law.

Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 – Enactment of – Object and purpose – Discussed – Held: The Act is a social welfare or remedial statute – It intends to protect custom, usage, forms, practices and ceremonies which are appropriate to the traditional practices of forest dwellers – The Act protects a wide range of rights of forest dwellers and STs including customary rights to use forest land as a community forest resource and not restricted merely to property rights or to areas of habitation.

Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 – s.6 – Nature and extent of "individual"/"community rights" of the Scheduled Tribes (STs) and other "Traditional Forest Dwellers" (TFDs) and their customary and religious rights – Determination of – Role of Gram Sabha – Discussed – Held: Gram Sabha is the authority to initiate the process for determining the nature and extent of individual or community forest rights or both that may be given to the forest dwelling STs and other TFDs within the local limits of their jurisdiction – Gr g

under the Forest Rights Act r/w s.4(d) of PESA Act has an obligation to safeguard and preserve the traditions and customs of the STs and other forest dwellers, their cultural identity, community resources etc., which they have to discharge following the guidelines issued by the Ministry of Tribal Affairs vide its letter dated 12.7.2012 – Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Amendment Rules, 2007 read with the 2012 Amendment Rules – Panchayat (Extension to Scheduled Areas) Act, 1996 – s.4(d).

Mines and Minerals (Regulation and Development) Act, 1957 – Right of the State over mines or minerals lying underneath the forest land – Held: The State holds the natural resources as a trustee for the people – s.3 of the Forest Rights Act does not vest such rights on the STs or other TFDs – PESA Act speaks only of minor minerals, which says that the recommendation of Gram Sabha shall be made mandatory prior to grant of prospecting licence or mining lease for minor minerals in the Scheduled Areas – State Government has the power to reserve any particular area for Bauxite mining for a Public Sector Corporation – Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 – s.3 – Panchayat (Extension to Scheduled Areas) Act, 1996.

The Orissa Mining Corporation (OMC), a State of Orissa Undertaking, approached this Court seeking a Writ of Certiorari to quash the order passed by the Ministry of Environment and Forests (MOEF) dated 24.8.2010 rejecting the Stage-II forest clearance for diversion of 660.749 hectares of forest land for mining of bauxite ore in Lanjigarh Bauxite Mines in Kalahandi and Rayagada Districts of Orissa and for other consequential reliefs.

The Stage II forest clearance for the OMC and Sterlite bauxite mining project on the Niyamgiri Hills in Lanjigarh,

Kalahandi and Rayagada districts of Orissa was rejected by the MOEF on grounds of:- 1) violation of the rights of the Tribal Groups including the Primitive Tribal Groups and the Dalit Population, more particularly with reference to the specific protections extended to their "habitat and habitations" under the Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 [the Forest Rights Act]; 2) violations of the Environmental Protection Act, 1986 and 3) violations under the Forest Conservation Act, 1980 coupled with the resultant impact on the ecology and biodiversity of the surrounding area.

The Petitioner assailed the order of MoEF dated 24.08.2010 as an attempt to reopen matters that had obtained finality and further submitted that the order wrongly cited the violation of certain conditions of environmental clearance by "Alumina Refinery Project" as grounds for denial of Stage II clearance to OMC for its "Bauxite Mining Project". The contention was based on the premise that the two Projects were totally separate and independent of each other and the violation of any statutory provision or a condition of environmental clearance by one cannot be a relevant consideration for grant of Stage II clearance to the other.

Disposing of the writ petition, the Court

HELD: 1. The Petitioner's assertion that the Alumina Refinery Project and the Bauxite Mining Project are two separate and independent projects, cannot be accepted as such, since there are sufficient materials on record to show that the two projects make an integrated unit. In two earlier orders of this Court (in the Vedanta case and the Sterlite case) also, the two Projects are seen as comprising a single unit. Quite contrary to the case of the petitioner, the Alumina Refinery Project and Bauxite Mining Project are interdependent a[illegible]d

together and, hence, any wrong doing by Alumina Refinery Project may cast a reflection on the Bauxite Mining Project and may be a relevant consideration for denial of Stage II clearance to the Bauxite Mining Project. However, in this Judgment, this Court, does not propose to make any final pronouncement on that issue but would keep the focus mainly on the rights of the Scheduled Tribes (STs) and the "Traditional Forest Dwellers" (TFDs) under the Forest Rights Act. [Para 30] [921-G-H; 922-A-C]

STs and TFDs:

2. Scheduled Tribe, as such, is not defined in the Forest Rights Act, but the word "Traditional Forest Dweller" has been defined under Section 2(o) as any member or community who has at least three generations prior to the 13th day of December, 2005 primarily resided in and who depend on the forest or forests land for *bona fide* livelihood needs. Article 366(25) of the Constitution states that STs means such tribes or tribal communities or parts of or groups within such tribes or tribal communities as are defined under Article 342 to be the Scheduled Tribes. [Para 31] [922-D-E]

Constitutional Rights and Conventions:

3.1. Article 244 (1) of the Constitution of India which appears in Part X provides that the administration of the Scheduled Areas and Scheduled Tribes in States (other than Assam, Meghalaya and Tripura) shall be according to the provisions of the Fifth Schedule and Clause (2) states that Sixth Schedule applies to the tribal areas in Assam, Meghalaya, Tripura and Mizoram. Evidently, the object of the Fifth Schedule and the Regulations made thereunder is to preserve tribal autonomy, their cultures and economic empowerment to ensure social, economic and political justice for the preservation of peace and

good Governance in the Scheduled Area. [Para 33] [922-H; 923-A-B]

3.2. Section 4 of the Panchayat (Extension to Scheduled Areas) Act, 1996 [PESA Act] stipulates that the State legislation on Panchayats shall be made in consonance with the customary law, social and religious practices and traditional management practices of community resources. Clause (d) of Section states that every Gram Sabha shall be competent to safeguard and preserve the traditions and customs of the people, their cultural identity, community resources and the customary mode of dispute resolution. [Para 36] [924-H; 925-A-B]

3.3. The customary and cultural rights of indigenous people have also been the subject matter of various international conventions. International Labour Organization (ILO) Convention on Indigenous and Tribal Populations Convention, 1957 (No.107) was the first comprehensive international instrument setting forth the rights of indigenous and tribal populations which emphasized the necessity for the protection of social, political and cultural rights of indigenous people. India is a signatory to the ILO Convention (No. 107). [Para 37] [925-E-G]

3.4. Apart from giving legitimacy to the cultural rights by 1957 Convention, the Convention on the Biological Diversity (CBA) adopted at the Earth Summit (1992) highlighted necessity to preserve and maintain knowledge , innovation and practices of the local communities relevant for conservation and sustainable use of bio-diversity, India is a signatory to CBA. Rio Declaration on Environment and Development Agenda 21 and Forestry principle also encourage the promotion of customary practices conducive to conservation. The necessity to respect and promote the inherent rights of indigenous peoples which derive l,

economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources have also been recognized by United Nations in the United Nations Declaration on Rights of Indigenous Peoples. STs and other TFDs residing in the Scheduled Areas have a right to maintain their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands. [Para 38] [925-G-H; 926-A-C]

3.5. STs and other TFDs have a vital role to play in the environmental management and development because of their knowledge and traditional practices. The State has got a duty to recognize and duly support their identity, culture and interest so that they can effectively participate in achieving sustainable development. [Para 39] [926-E-F]

Samatha v. Arunachal Pradesh **(1997) 8 SCC 191: 1997 (2) Suppl. SCR 305 and** *Union of India v. Rakesh Kumar* **(2010) 4 SCC 50: 2010 (1) SCR 483 – referred to.**

The Forest Rights Act

4.1. The Forest Rights Act has been enacted conferring powers on the Gram Sabha constituted under the Act to protect the community resources, individual rights, cultural and religious rights. The Forest Rights Act was enacted by the Parliament to recognize and vest the forest rights and occupation in forest land in forest dwelling STs and other TFDs who have been residing in such forests for generations but whose rights could not be recorded and to provide for a framework for recording the forest rights so vested and the nature of evidence required for such recognition and vesting in respect of forest land. [Paras 40, 41] [926-G-H; 927-A-B]

4.2. The Forest Rights Act is a social welfare or remedial statute. The Act protects a wide range of rights

of forest dwellers and STs including the customary rights to use forest land as a community forest resource and not restricted merely to property rights or to areas of habitation. [Para 43] [928-A-B]

4.3. Legislative intention is clear that the Act intends to protect custom, usage, forms, practices and ceremonies which are appropriate to the traditional practices of forest dwellers. [Para 47] [932-B]

Forest Rights Act and MMRD Act:

5. The Forest Rights Act, neither expressly nor impliedly, has taken away or interfered with the right of the State over mines or minerals lying underneath the forest land, which stand vested in the State. The State holds the natural resources as a trustee for the people. Section 3 of the Forest Rights Act does not vest such rights on the STs or other TFDs. PESA Act speaks only of minor minerals, which says that the recommendation of Gram Sabha shall be made mandatory prior to grant of prospecting licence or mining lease for minor minerals in the Scheduled Areas. Therefore, as held by this Court in *Amritlal* case while dealing with the scope of Mines and Minerals (Regulation and Development) Act, 1957, the State Government has the power to reserve any particular area for Bauxite mining for a Public Sector Corporation. [Para 50] [944-B-D]

Amritlal Athubhai Shah and Ors. v. Union Government of India and Another **(1976) 4 SCC 108: 1977 (1) SCR 372 – relied on.**

Gram Sabha and other Authorities:

6. Under Section 6 of the Forest Rights Act, Gram Sabha shall be the authority to initiate the process for determining the nature and extent of individual or community forest rights or both and

the forest dwelling STs and other TFDs within the local limits of the jurisdiction. For the said purpose it receive claims, and after consolidating and verifying them it has to prepare a plan delineating the area of each recommended claim in such manner as may be prescribed for exercise of such rights. [Para 51] [944-E-F]

6.2. Functions of the Gram Sabha, Sub-Divisional Level Committee, District Level Committee, State Level Monitoring Committee and procedure to be followed and the process of verification of claims etc. have been elaborately dealt with in the Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Amendment Rules, 2007 read with the 2012 Amendment Rules. [Para 52] [945-B-C]

Individual/Community Rights

7. The Forest Rights Act prescribed various rights to tribals/forest dwellers as per Section 3 of the Act. As per Section 6 of the Act, power is conferred on the Gram Sabha to process for determining the nature and the extent of individual or community forests read with or both that may be given to forest dwelling STs and other TFDs, by receiving claims, consolidate it, and verifying them and preparing a map, delineating area of each recommended claim in such a manner as may be prescribed. [Para 53] [945-E-F]

Customary and Religious Rights (Sacred Rights)

8.1. Religious freedom guaranteed to STs and the TFDs under Articles 25 and 26 of the Constitution is intended to be a guide to a community of life and social demands. The above mentioned Articles guarantee them the right to practice and propagate not only matters of faith or belief, but all those rituals and observations which are regarded as integral part of their religion. Their right

to worship the deity Niyam-Raja has, therefore, to be protected and preserved. [Para 55] [946-C-D]

8.2.Gram Sabha has a role to play in safeguarding the customary and religious rights of the STs and other TFDs under the Forest Rights Act. Section 6 of the Act confers powers on the Gram Sabha to determine the nature and extent of "individual" or "community rights". [Para 56] [946-E]

8.3. Gram Sabha functioning under the Forest Rights Act read with Section 4(d) of PESA Act has an obligation to safeguard and preserve the traditions and customs of the STs and other forest dwellers, their cultural identity, community resources etc., which they have to discharge following the guidelines issued by the Ministry of Tribal Affairs vide its letter dated 12.7.2012. [Para 57] [947-B]

9.1. In the instant case, therefore, the question whether STs and other TFDs, like Dongaria Kondh, Kutia Kandha and others, have got any religious rights i.e. rights of worship over the Niyamgiri hills, known as Nimagiri, near Hundaljali, which is the hill top known as Niyam-Raja, have to be considered by the Gram Sabha. Gram Sabha can also examine whether the proposed mining area Niyama Danger, 10 km away from the peak, would in any way affect the abode of Niyam-Raja. If the BMP, in any way, affects their religious rights, especially their right to worship their deity, known as Niyam Raja, in the hills top of the Niyamgiri range of hills, that right has to be preserved and protected. This aspect of the matter has not been placed before the Gram Sabha for their active consideration, but only the individual claims and community claims received from Rayagada and Kalahandi Districts, most of which the Gram Sabha has dealt with and settled. [Para 58] [947-C-F]

9.2. The Gram Sabha is also fre e

community, individual as well as cultural and religious claims, over and above the claims which have already been received from Rayagada and Kalahandi Districts. Any such fresh claims be filed before the Gram Sabha within six weeks from the date of this Judgment. The State Government as well as the Ministry of Tribal Affairs, Government of India, would assist the Gram Sabha for settling of individual as well as community claims. [Para 59] [947-G]

9.3. Direction is given to the State of Orissa to place these issues before the Gram Sabha with notice to the Ministry of Tribal Affairs, Government of India and the Gram Sabha would take a decision on them within three months and communicate the same to the MOEF, through the State Government. On conclusion of the proceeding before the Gram Sabha determining the claims submitted before it, the MoEF shall take a final decision on the grant of Stage II clearance for the Bauxite Mining Project in the light of the decisions of the Gram Sabha within two months thereafter. [Para 60] [947-H; 948-A-B]

9.4. The Alumina Refinery Project is well advised to take steps to correct and rectify the alleged violations by it of the terms of the environmental clearance granted by MoEF. While taking the final decision, the MoEF shall take into consideration any corrective measures that might have been taken by the Alumina Refinery Project for rectifying the alleged violations of the terms of the environmental clearance granted in its favour by the MoEF. [Para 61] [948-C-D]

9.5. The proceedings of the Gram Sabha shall be attended as an observer by a judicial officer of the rank of the District Judge, nominated by the Chief Justice of the High Court of Orissa who shall sign the minutes of the proceedings, certifying that the proceedings of the Gram Sabha took place independently and completely

uninfluenced either by the Project proponents or the Central Government or the State Government. [Para 62] [948-E-F]

Case Law Reference

1997 (2) Suppl. SCR 305	**referred to**	**Para 33**
2010 (1) SCR 483	**referred to**	**Para 35**
1977 (1) SCR 372	**relied on**	**Para 50**

CIVIL ORIGINAL JURISDICTION : Writ Petition (Civil) No. 180 of 2011.

Under Article 32 of the Constitution of India.

Mohan Parasaran, Solicitor General, Sidharth Luthra, ASG, K.K. Venugopal, C.U. Singh, C.A. Sundaram, Raj Panjwani, Prashanto Chandra Sen, P.S. Sudheer, Sara Sundram, Rishi Maheshwari, Anne Mathew, Abu John Mathew, Ekta Kapil, Anubha Singh, Atishree Sood, Vijayalakshmi Menon, R.S. Jena, Rohini Musa, A.D.N. Rao, Siddhartha Chouhdary, D.L. Chidananda, Haris Beeran, Asha G. Nair, Aditya Singla, Gurmohan Bedi, Amer Musthaq Salim, Zoheb Hossain, Alok Prasanna Kumar, Aarthi Rajan (for S.N. Terdal), Binu Tamta, Rahul Chaudhary, Ritwick Dutta, Anitha Shenoy, Sanjay Parikh, Mamta Saxena, Bushra Parveen, A.N. Singh for the appearing parties.

The Judgment of the Court was delivered by

K.S. RADHAKRISHNAN, J. 1. Orissa Mining Corporation (OMC), a State of Orissa Undertaking, has approached this Court seeking a *Writ of Certiorari* to quash the order passed by the Ministry of Environment and Forests (MOEF) dated 24.8.2010 rejecting the Stage-II forest clearance for diversion of 660.749 hectares of forest land for mining of bauxite ore in Lanjigarh Bauxite Mines in Kalahandi and Rayagada Districts of Orissa and also for other consequen

2. OMC urged that the above order passed by the MOEF has the effect of neutralizing two orders of this Court passed in I.A. Nos. 1324 and 1474 in Writ Petition (C) No. 202 of 1995 with I.A. Nos. 2081-2082 (arising out of Writ Petition No. 549 of 2007) dated 23.11.2007 reported in (2008) 2 SCC 222 [hereinafter referred to as 'Vedanta case'] and the order passed by this Court in I.A. No. 2134 of 2007 in Writ Petition No. 202 of 1995 on 08.08.2008 reported in (2008) 9 SCC 711 [hereinafter referred to as the 'Sterlite case']. In order to examine the issues raised in this writ petition, it is necessary to examine the facts at some length.

FACTS:

3. M/s. Sterlite (parent company of Vedanta) filed an application on 19.3.2003 before MOEF for environmental clearance for the purpose of starting an Alumina Refinery Project (ARP) in Lanjigarh Tehsil of District Kalahandi, stating that no forest land was involved within an area of 10 kms. The 4th respondent – Vedanta, in the meanwhile, had also filed an application on 6.3.2004 before this Court seeking clearance for the proposal for use of 723.343 ha of land (including 58.943 ha of reserve forest land) in Lanjigarh Tehsil of District Kalahandi for setting up an Alumina Refinery. Noticing that forest land was involved, the State of Orissa submitted a proposal dated 16.08.2004 to the MoEF for diversion of 58.90 hectare of forest land which included 26.1234 hectare of forest land for the said ARP and the rest for the conveyor belt and a road to the mining site. The State of Orissa, later, withdrew that proposal. The MoEF, as per the application submitted by M/s Sterlite, granted environmental clearance on 22.9.2004 to ARP on 1 million tonne per annum capacity of refinery along with 75 MW coal based CPP at Lanjigarh on 720 hectare land, by delinking it with the mining project. Later, on 24.11.2004, the State of Orissa informed MOEF about the involvement of 58.943 ha of forest land in the project as against "NIL" mentioned in the environmental clearance and that the Forest

Department of Orissa had, on 5.8.2004, issued a show-cause-notice to 4th respondent for encroachment of 10.41 acres of forest land (out of 58.943 ha for which FC clearance proposal was sent) by way of land breaking and leveling.

4. The State of Orissa, on 28.2.2005 forwarded the proposal to MOEF for diversion of 660.749 ha of forest land for mining bauxite ore in favour of OMC in Kalahandi and Rayagada Districts. The Central Empowered Committee (CEC), in the meanwhile, addressed a letter dated 2.3.2005 to MOEF stating that pending the examination of the project by CEC, the proposal for diversion of forest land and/or mining be not decided.

5. Vedanta, however, filed an application I.A. No. 1324 of 2005 before this Court seeking a direction to the MoEF to take a decision on the application for forest clearance for bauxite mining submitted by the state Government on 28.2.2005 for the Refinery project. The question that was posed by this Court while deciding the above-mentioned I.A. was whether Vedanta should be allowed to set up its refinery project, which involved the proposal for diversion of 58.943 ha. of forest land. CEC had, however, objected to the grant of clearance sought by Vedanta on the ground that the Refinery would be totally dependent on mining of bauxite from Niyamgiri Hills, Lanjigarh, which was the only vital wildlife habitat, part of which constituted elephant corridor and also on the ground that the said project would obstruct the proposed wildlife sanctuary and the residence of tribes like Dongaria Kondha.

6. The Court on 03.06.2006 directed the MoEF to consult the experts/organizations and submit a report. MoEF appointed Central Mining Planning and Design Institute (CMPDI), Ranchi to study the social impact of ground vibration on hydro-geological characteristics, including ground propensity, permeability, flow of natural resources etc. CMPDI submitted its report on 20.10.2006. MoEF appointed the Wildlife Institute of India (WII), Dehradun to study the [illegible]g

Project on the bio-diversity. WII submitted its report dated 14.06.2006 and the supplementary report dated 25.10.2006 before the MOEF. Reports of CMPDI, WII were all considered by the Forest Advisory Committee (FAC) on 27.10.2006 after perusing the above mentioned reports approved the proposal of OMC, for diversion of 660.749 ha. of forest land for the mining of bauxite in Kalahandi and Rayagada Districts subject to the conditions laid down by WII.

7. The State of Orissa had brought to the notice of this Court about the lack of basic infrastructure facilities in the Tribal areas of both the districts, so also the abject poverty in which the local people were living in Lanjigarh Tehsil, including the tribal people, and also the lack of proper housing, hospitals, schools etc. But this Court was not agreeable to clear the project, at the instance of Vedanta, however, liberty was granted to M/s. Sterlite to move the Court if they would agree to comply with the modalities suggested by the Court. Following were the modalities suggested by the Court, while disposing of the Vedanta case on 23.11.2007:

> *"(i)* State of Orissa shall float a Special Purpose Vehicle (SPV) for scheduled area development of Lanjigarh Project in which the stakeholders shall be State of Orissa, OMC Ltd. and M/s SIIL. Such SPV shall be incorporated under the Companies Act, 1956. The accounts of SPV will be prepared by the statutory auditors of OMC Ltd. and they shall be audited by the Auditor General for State of Orissa every year. M/s SIIL will deposit, every year commencing from 1-4-2007, 5% of its annual profits before tax and interest from Lanjigarh Project or Rs 10 crores *whichever is higher* for Scheduled Area Development with the said SPV and it shall be the duty of the said SPV to account for the expenses each year. The annual report of SPV shall be submitted to CEC every year. If CEC finds non-utilisation or misutilisation of funds the same shall be brought to the notice of this Court. While

calculating annual profits before tax and interest M/s SIIL shall do so on the basis of the market value of the material which is sold by OMC Ltd. to M/s SIIL or its nominee.

(*ii*) In addition to what is stated above, M/s SIIL shall pay NPV of Rs 55 crores and Rs 50.53 crores towards Wildlife Management Plan for Conservation and Management of Wildlife around Lanjigarh bauxite mine and Rs 12.20 crores towards tribal development. In addition, M/s SIIL shall also bear expenses towards compensatory afforestation.

(*iii*) A statement shall be filed by M/s SIIL with CEC within eight weeks from today stating number of persons who shall be absorbed on permanent basis in M/s SIIL including land-losers. They shall give categories in which they would be permanently absorbed. The list would also show particulars of persons who would be employed by the contractors of M/s SIIL and the period for which they would be employed.

(*iv*) The State Government has the following suggestions on this issue:

1. The user agency shall undertake demarcation of the lease area on the ground using four feet high cement concrete pillars with serial number, forward and back bearings and distance from pillar to pillar.

2. The user agency shall make arrangements for mutation and transfer of equivalent non-forest land identified for compensatory afforestation to the ownership of the State Forest Department.

3. The State Forest Department will take up compensatory afforestation at Project cost with suitable indigenous species and will declare the said area identified for compensatory afforestation as "protected

forest" under the Orissa Forest Act, 1972 for the purpose of management.

4. The user agency shall undertake *rehabilitation* of Project-affected families, if any, as per the Orissa Rehabilitation and Resettlement Policy, 2006.

5. The user agency shall undertake *phased reclamation* of mined-out area. All overburden should be used for back-filling and reclamation of the mined-out areas.

6. The user agency shall undertake *fencing of the safety zone* area and endeavour for protection as well as regeneration of the said area. It shall deposit funds with the State Forest Department for the protection and regeneration of the safety zone area.

7. Adequate *soil conservation measures* shall be undertaken by the lessee on the overburdened dumps to prevent contamination of stream flow.

8. The user agency should undertake comprehensive *study on hydrogeology* of the area and the impact of mining on the surrounding water quality and stream flow at regular interval and take effective measures so as to maintain the pre-mining water condition as far as possible.

9. The user agency should undertake a comprehensive study of the wildlife available in the area in association with institutes of repute like Wildlife Institute of India, Dehradun, Forest Research Institute, Dehradun, etc. and shall prepare a *site specific comprehensive wildlife management plan* for conservation and management of the wildlife in the Project impact area under the guidance of the Chief Wildlife Warden of the State.

10. The user agency shall *deposit the NPV* of the

forest land sought for diversion for undertaking mining operations.

11. The user agency shall prepare a comprehensive plan for the *development of tribals* in the Project impact area taking into consideration their requirements for health, education, communication, recreation, livelihood and cultural lifestyle.

12. As per the policy of the State Government, the user agency shall earmark *5% of the net profit* accrued in the Project to be spent for the development of health, education, communication, irrigation and agriculture of the said scheduled area within a radius of 50 km.

13. Controlled blasting may be used only in exigencies wherever needed to minimise the impact of noise on wildlife of the area.

14. The user agency shall undertake *development of greenery* by way of plantation of suitable indigenous species in all vacant areas within the Project.

15. Trees shall be felled from the diverted area *only when it is necessary* with the strict supervision of the State Forest Department at the cost of the Project.

16. The forest land diverted shall be *non-transferable*. Whenever the forest land is not required, the same shall be surrendered to the State Forest Department under intimation to Ministry of Environment and Forests, Government of India.

If M/s SIIL, State of Orissa and OMC Ltd. jointly agree to comply with the above rehabilitation package, this Court may consider granting of clearance to the Project.

Conclusion

12. If M/s SIIL is agreeable to the a n

package then they shall be at liberty to move this Court by initiating a proper application. This Court is not against the Project in principle. It only seeks safeguards by which we are able to protect nature and subserve development. IAs are disposed of accordingly.

However, we once again reiterate that the applications filed by M/s VAL stand dismissed."

The Court opined that if Sterlite, State of Orissa and OMC jointly agree to comply with the "Rehabilitation Package", the Court might consider granting clearance to the project. Stating so, all the applications were disposed of, the order of which is reported in (2008) 2 SCC 222.

8. M/s. Sterlite, 3rd respondent herein, then moved an application – being I.A. No. 2134 of 2007 – before this Court, followed by affidavits, wherein it was stated that M/s. Sterlite, State of Orissa and OMC had unconditionally accepted the terms and conditions and modalities suggested by this Court under the caption "Rehabilitation Package" in its earlier order dated 23.12.2007. Siddharth Nayak, who was the petitioner in WP No. 549/07, then filed a Review Petition No. 100/2008 and sought review of the order dated 23.11.2007 passed by this Court stating that this court had posed a wrong question while deciding I.A. No. 2134 of 2007 and pointed out that Alumina Refinery was already set up by Vedanta and production commenced and the principal question which came up before this Court was with regard to the ecological and cultural impact of mining in the Niyamgiri Hills. Further, it was also pointed out that if Sterlite was allowed to mine in the Niyamgiri Hills, it would affect the identity, culture and other customary rights of Dongaria Kondh. Review Petition was, however, dismissed by this Court on 07.05.2008.

9. This Court then passed the final order in Sterlite case on 8.8.2008, the operative portion of which reads as follows:

"13. For the above reasons and in the light of the affidavits filed by SIIL, OMCL and the State of Orissa, accepting the rehabilitation package, suggested in our order dated 23-11-2007, we hereby grant clearance to the forest diversion proposal for diversion of 660.749 ha of forest land to undertake bauxite mining on Niyamgiri Hills in Lanjigarh. The next step would be for MoEF to grant its approval in accordance with law."

10. MOEF, later, considered the request of the State of Orissa dated 28.2.2005 seeking prior approval of MOEF for diversion of 660.749 ha of forest land for mining of bauxite ore in Lanjigarh Bauxite Mines in favour of OMC, in accordance with Section 2 of the Forest (Conservation) Act, 1980. MOEF, after considering the proposal of the State Government and referring to the recommendations of FAC dated 27.10.2006, agreed in principle for diversion of the above mentioned forest land, subject to various conditions which are as follows:

(i) The Compensatory Afforestation shall be raised over non-forest land, equal in extent to the forest land proposed to be diverted, at the project cost. The User Agency shall transfer the cost of Compensatory Afforestation to the State Forest Department.

(ii) The non-forest land identified for Compensatory Afforestation shall be declared as Reserved Forests under Indian Forest Act, 1927.

(iii) The User Agency shall create fence and maintain a safety zone around the mining area. The User Agency will deposit fund with the Forest Department for creation, protection and regeneration of safety zone area and also will have to bear the cost of afforestation over one and a half time of the safety zone area in degraded forest elsewhere.

(iv) The reclamation of mines shall be carried out concurrently and should be regularly monitored by the State Forest Department.

(v) RCC pillars of 4 feet height shall be erected by the User Agency at the project cost to demarcate the area and the pillars will be marked with forward and back bearings.

(vi) The State Government shall charge Net Present Value (NPV) from the User Agency for the entire diverted forest land, as directed by Hon'ble Supreme Court and as per the guidelines issued vide Ministry of Environment and Forests letters No. 5-1/98-FC(Pt.II) dated 18th September 2003 and 22nd September 2003.

(vii) As per Hon'ble Supreme Court's order dated 23.11.2007 and 08.08.2008, M/s SIIL shall pay NPV of Rs.55 crores.

(viii) An undertaking from the User Agency shall also be obtained stating that in case the rates of NPV are revised upwards, the additional/differential amount shall be paid by the User Agency.

(ix) As per Hon'ble Supreme Court's order dated 23.11.2007 and 08.08.2-008, M/s SIIL shall pay Rs.50.53 crores towards Wildlife Management Plan for Conservation and Management of Wildlife around Lanjigarh bauxite mine.

(x) As per Hon'ble Supreme Court's order dated 23.11.2007 and 08.08.2-008, M/s SIIL is required to contribute Rs.12.20 crores towards tribal development apart from payment of NPV and apart from contribution to the Management of Wildlife around Lanjigarh Bauxite Mine. Moreover, while allocating CAMPA Funds the said amount of

Rs.12.20 crores shall be earmarked specifically for tribal development.

(xi) The State Government shall deposit all the funds with the Ad-hoc Body of Compensatory Afforestation Fund Management and Planning Authority (CAMPA) in Account No. CA 1585 of Corporation Bank (A Government of India Enterprise) Block-II, Ground Floor, CGO Complex, Phase-I, Lodhi Road, New Delhi-110 003, as per the instructions communicated vide letter N.5-2/ 2006-PC dated 20.05.2006.

(xii) As per Hon'ble Supreme Court's order dated 23.11.2007 and 08.08.2-008, M/s SIIL shall deposit 5% of its annual profits before tax and interest from Lanjigarh Project of Rs.10 crores whichever is higher as contribution for Scheduled Area Development. The contribution is to be made every year commencing from 01.04.2007. The State of Orissa shall float a Special Purpose Vehicle (SPV) for scheduled area development of Lanjigarh Project in which the stake-holders shall be State of Orissa, OMC Ltd. and M/s SIIL. Such SPV shall be incorporated under the Companies Act, 1956. The Accounts of SPC shall be prepared by the Statutory auditors of OMC Ltd and they shall be audited by the Auditor General for State of Orissa every year.

(xiii) The permission granted under FC Act shall be co-terminus with the mining lease granted under MMRD Act or any other relevant Act.

(xiv) Tree felling shall be done in a phased manner to coincide with the phasing of area to be put to mining with a view to minimizing clear felling. The felling will always be carried out under strict supervision of State Forest Department.

(xv) All efforts shall be made by the User Agency and the State Government to prevent soil erosion and pollution of rivers/nallas/streams etc.

(xvi) The Wildlife Management Plan (WMP) shall be modified accordingly as suggested by the Wildlife Institute of India (WII), Dehradun and shall be implemented by the State Government/User Agency at the project cost. The progress of implementation of the WMP shall be regularly monitored by the WILL and Regional Office, Bhubaneshwar.

(xvii) Any other condition that the CCF (Central), Regional Office, Bhubaneshwar / the State Forest Department may impose from time to time for protection and improvement of flora and fauna in the forest area, shall also be applicable.

(xviii) All other provisions under different Acts, rules, and regulations including environmental clearance shall be complied with before transfer of forest land.

(xix) The lease will remain in the name of Orissa Mining Corporation (OMCL) and if any change has to be done, it will require prior approval of the Central Government as per guidelines.

(xx) The present forest clearance will be subject to the final outcome of the Writ petition No. 202 of 1995 from the Hon'ble Supreme Court and Court's order dated 23.11.2007 and 08.08.2008.

(xxi) Other standard conditions as applicable to proposals related to mining shall apply in the instant case also."

MOEF, then, vide its letter dated 11.12.2008 informed the State of Orissa that it had, in principle, agreed for diversion of

660.749 ha. of forest land for mining bauxite in favour of OMC, subject to fulfillment of the above mentioned conditions, and after getting the compliance report from the State Government. Order dated 11.12.2008 was slightly modified on 31.12.2008. It was further ordered that the transfer of forest land to the user agency should not be effected by the State Government till formal orders approving diversion of forest land were issued.

11. MoEF then granted environmental clearance to OMC vide its proceedings dated 28.04.2009 subject to various conditions including the following conditions:

"(iii) Environmental clearance is subject to grant of forestry clearance. Necessary forestry clearance under the Forest (Conservation) Act, 1980 for diversion of 672.018 ha forest land involved in the project shall be obtained before starting mining operation in that area. No mining shall be undertaken in the forest area without obtaining requisite prior forestry clearance."

The State Government then forwarded the final proposal to the MoEF vide its letter dated 10.08.2009 stating that the user agency had complied with all the conditions stipulated in the letter of MoEF dated 11.12.2008. On the Forest Rights Act, the Government letter stated as follows:

"**Provisions of Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006**.

The Govt. of India, MOEF vide their letter dated 28.04.2009 have accorded environmental clearance to Lanjigarh Bauxite Mining Project. This letter of Govt. of India, MOEF puts on record that there is no habitation in the mining lease area on the plateau top and no resettlement and rehabilitation is involved. Public hearing for the project was held on 07.0

District and on 17.03.2003 for Rayagada District. In both the cases, the project has been recommended. Copies of the public hearing proceedings have already been submitted to Govt. of India, MOEF along with forest diversion proposal. This project was also challenged in the Hon'ble Supreme Court of India on the ground that it violates the provisions of the Scheduled Tribes & Other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 WP (C) No. 549 of 2007 was filed in the Hon'ble Supreme Court of India by one Sri Siddharth Nayak challenging the project on the above issue. After examining different aspects of the writ petition in IA No. 2081-2082 in WP (C) No. 549/2007, the Hon'ble Supreme Court of India had cleared the project by way of disposing the Writ Petition vide their order dated 23.11.2007. Subsequently, Hon'ble Supreme Court had finally cleared the project vide their order dated 08.08.2008. In view of the above position and orders of Hon'ble Supreme Court of India, no further action in this regard is proposed."

12. State of Orissa's final proposal was then placed before the FAC on 4.11.2009. FAC recommended that the final clearance would be considered only after ascertaining of the community rights on forest land and after the process for establishing such rights under Forest Rights Act was completed. FAC also decided to constitute an Expert Group to carry out a site inspection. Consequently, on 1.1.2010, a three-member Team composed of Dr. Usha Ramanathan and two others, was constituted to consider and make recommendations to MOEF on the proposal submitted by OMC. The Team carried out the site inspection during the months of January and February, 2010 and submitted three individual reports to MOEF on 25.2.2010 which were not against the project as such, but suggested an in-depth study on the application of the Forest Rights Act. FAC also, on 16.4.2010, considered all the three reports and recommended that a Special Committee, under the Ministry of Tribal Affairs,

be constituted to look into the issues relating to the violation of Tribal rights and the settlement of Forest rights under the Forest Rights Act.

13. MOEF then met on 29.6.2010 and decided to constitute a team composed of specialists to look into the settlement of rights on forest dwellers and the "Primitive Tribal Groups" under the Forest Rights Act and the impact of the Project on wildlife and biodiversity in the surrounding areas. Consequently, a 4-member Committee was constituted headed by Dr. Naresh Saxena to study and assess the impacts of various rights and to make a detailed investigation. The Committee, after conducting several site visits and making detailed enquiries submitted its report to MOEF on 16.8.2010.

14. The State Government then submitted their written objection on 17.08.2010 to the MoEF on the Saxena Committee Report and requested that an opportunity of hearing be given to it before taking any decision on the report. MoEF, however, called a meeting of FAC on 20.8.2010 and placed the Saxena Committee report before FAC, for consideration. Minutes of the Committee meeting was released on 23.8.2010, stating that the Primitive Tribal Groups were not consulted in the process of seeking project clearance and also noticed the violation of the provisions of Forest Rights Act, the Forest (Conservation) Act, 1980, Environmental Protection Act, 1986 and also the impact on ecological and biodiversity values of the Niyamgiri hills upon which the Dongaria Kondh and Kutia Kondh depend. FAC opined that it was a fit case for applying the precautionary principle to obviate the irreparable damage to the affected people and recommended for the temporary withdrawal of the in-principle/State I approval accorded. FAC recommended that the State Government be heard before a final decision is taken by the MoEF.

15. The recommendations of the FAC dated 23.8.2010 and Saxena Committee report were considered by MOEF and

the request for Stage-II Clearance was rejected on 24.8.2010, stating as follows:

"VIII. Factors Dictating Decision on Stage-II Clearance

I have considered three broad factors while arriving at my decision.

1. The Violation of the Rights of the Tribal Groups including the Primitive Tribal Groups and the Dalit Population.

The blatant disregard displayed by the project proponents with regard to rights of the tribals and primitive tribal groups dependant on the area for their livelihood, as they have proceeded to seek clearance is shocking. Primitive Tribal Groups have specifically been provided for in the Forest Rights Act, 2006 and this case should leave no one in doubt that they will enjoy full protection of their rights under the law. The narrow definition of the Project Affected People by the State Government runs contrary to the letter and spirit of the Forest Rights Act, 2006. Simply because they did not live on the hills does not mean that they have no rights there. The Forest Rights Act, 2006 specifically provides for such rights but these were not recognized and were sought to be denied.

Moreover, the fate of the Primitive Tribal Groups need some emphasis, as very few communities in India in general and Orissa in particular come under the ambit of such a category. Their dependence on the forest being almost complete, the violation of the specific protections extended to their "habitat and habitations" by the Forest Rights Act, 2006 are simply unacceptable.

This ground by itself has to be foremost in terms of consideration when it comes to the grant of forest or environmental clearance. The four-member committee has highlighted repeated instances of violations.

One also cannot ignore the Dalits living in the area. While they may technically be ineligible to receive benefits under the FRA 2006, they are such an inextricable part of the society that exists that it would be impossible to disentitle them as they have been present for over five decades. The Committee has also said on p.40 of their report that "*even if the Dalits have no claims under the FRA the truth of their de facto dependence on the Niyamgiri forests for the past several decades can be ignored by the central and state governments only at the cost of betrayal of the promise of inclusive growth and justice and dignity for all Indians*". This observation rings true with the MoE&F and underscores the MoE&F's attempt to ensure that any decision taken is not just true to the law in letter but also in spirit.

2. Violations of the Environmental Protection Act 1986:

(i) Observations of the Saxena Committee and MoE&F Records:

In additional to its findings regarding the settlement of rights under the FRA 2006, the four-member Committee has also observed, with reference to the environmental clearance granted for the aluminum refinery, on p.7 of its Report dated 16th August 2010 that:

> "The company/s Vedanta Alumina Limited has already proceeded with construction activity for its enormous expansion project that would increase its capacity six fold from 1 Mtpa to 6 Mtpa without obtaining environmental clearance as per the provisions of EIA Notification, 2006 under the EPA. This amounts to a serious violation of the provisions of the Environment (Protection) Act. This expansion, its extensive scale and advanced nature, is in complete violation of the EP n

of the contempt with which this company treats the laws of the land."

I have reviewed the records of the MoE&F and have found no documentation which establishes such activity to have been granted clearance. Nor is there any evidence to suggest that such requirement was waived by the Ministry. The TORs for the expansion of the project from 1 million tones to 6 million tones were approved in March 2008. No further right has been granted in any form by the Ministry to the project proponents to proceed with the expansion. While any expansion without prior EC is a violation of the EIA Notification/EPA 1986 this, itself, is not a minor expansion and is therefore a most serious transgression of the EPA 1986.

There also appear to have been other acts of violation that emerge from a careful perusal of the evidence at hand. This is not the first act of violation. On March 19th, 2003 M/s Sterlite filed an application for environmental clearance from the MoE&F for the refinery. In the application it was stated that no forest land is involved in the project and that there was no reserve forest within a radius of 10 kms of the project site.

Thereafter on September 22nd, 2004, environment clearance was granted by the MoE&F for the refinery project. While granting the environmental clearance, the MoE&F was unaware of the fact that the application for forest clearance was also pending since the environmental clearance letter clearly stated that no forest land was involved in the project.

In March 2005, in proceedings before itself, the Central Empowered Committee (CEC) too questioned the validity of the environmental clearance granted by the MoE&F and requested the Ministry to withhold the forest clearance on

the project till the issue is examined by the CEC and report is submitted to the Hon'ble Supreme Court.

(ii) Case before the MEAA by the Dongaria Kondhs:

After the grant of Environment Clearance, the local tribals and other concerned persons including the Dongaria Kondhs challenged the project before the National Environment Appellate Authority (NEAA). [*Kumati Majhi and Ors Vs Ministry of Environment. and Forest, Srabbu Sikka and Ors. Vs Ministry of Environment and Forests, R Sreedhar Vs. Ministry of Environment and Forest, Prafulla Samantara Vs. Ministry of Environment and Forests and Ors Appeal No. 18, 19, 20 and 21 of 2009]*.

It is brought to my attention that this is the first time that the Dongaria Kondha have directly challenged the project in any Court of law. The Appeals highlighted the several violations in the Environmental Clearance process. Some of the key charges raised were that the full Environmental Impact Assessment Report was not made available to the Public before the public hearing, different EIA reports made available to the public and submitted to the Ministry of Environment and Forests, the EIA conducted was a rapid EIA undertaken during the monsoon months. The matter is reserved for judgment before the NEAA.

(iii) Monitoring Report of the Eastern Regional Office dated 25th May, 2010:

On 25th May 2010, Dr. VP Upadhyay (Director 'S') of the Eastern Regional Office of the Ministry of Environment and Forests submitted his report to the MoE&F which listed various violations in para 2 of the monitoring report. They observed:

a. "M/s Vedanta Alumina Limited has already proceeded with construction in

project without obtaining environmental clearance as per provisions of EIA Notification 2006 that amounts to violation of the provisions of the Environment (Protection) Act."

b. "The project has not established piezometers for monitoring of ground water quality around red mud and ash disposal ponds; thus, the condition no. 5 of Specific Condition of the clearance letter is being violated."

c. "The condition no. Ii of General Condition of environmental clearance has been violated by starting expansion activities without prior approval from the Ministry."

Furthermore all bauxite for the refinery was to be sourced from mines which have already obtained environmental clearance. The Report listed 14 mines from which Bauxite was being sourced by the project proponents. However out of these 11 had not been granted a mining license while 2 had only received TORs and only 1 had received clearance.

3. Violations under the Forest Conservation Act:

The Saxena Committee has gone into great detail highlighting the various instances of violations under the Forest (Conservation) Act 1980. All these violations coupled with the resultant impact on the ecology and biodiversity of the surrounding area further condemn the actions of the project proponent. Not only are these violations of a repeating nature but they are instances of willful concealment of information by the project proponent.

IX. The Decision on Stage-II Clearance

The Saxena Committee's evidence as reviewed by the FAC and read by me as well is compelling. The violations

of the various legislations, especially the Forest (Conservation) Act, 1980, the Environment (Protection) Act, 1986, and the Scheduled Tribes and Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, appear to be too egregious to be glossed over. Furthermore, a mass of new and incriminating evidence has come to light since the Apex court delivered its judgment on August 8th, 2008. Therefore, after careful consideration of the facts at hand, due deliberation over all the reports submitted and while upholding the recommendation of the FAC, I have come to the following conclusions:

1. The Stage II forest clearance for the OMC and Sterlite bauxite mining project on the Niyamgiri Hills in Lanjigarh, Kalahandi and Rayagada districts of Orissa cannot be granted. Stage-II Forest Clearance therefore stands rejected.

2. Since forest clearance is being rejected, the environmental clearance for this mine is inoperable.

3. It appears that the project proponent is sourcing bauxite from a large number of mines in Jharkhand for the one million tonne alumina refinery and are not in possession of valid environmental clearance. This matter is being examined separately.

4. Further, a show-cause notice is being issued b y the MOE&F to the project proponent as to why the environmental clearance for the one million tonnes per annum alumina refinery should not be cancelled.

5. A show-cause notice is also being issued to the project proponent as to why the terms of reference (TOR) for the EIA report for the expansion from one million tones to six million tones should not be withdrawn. Meanwhile, the TOR and the appraisal process for the expansion s

Separately the MoE&F is in the process of examining what penal action should be initiated against the project proponents for the violations of various laws as documented exhaustively by the Saxena Committee.

On the issues raised by the Orissa State Government, I must point out that while customary rights of the Primitive Tribal Groups are not recognized in the National Forest Policy, 1988 they are an integral part of the Forest Rights Act, 2006. An Act passed by Parliament has greater sanctity than a Policy Statement. This is apart from the fact that the Forest Rights Act came into force eighteen years after the National Forest Policy. On the other points raised by the State Government officials, on the procedural aspects of the Forest Rights Act, 2006, I expect that the joint Committee set up by the MoE&F and the Ministry of Tribal Affairs would give them due consideration. The State Government officials were upset with the observations made by the Saxena Committee on their role in implementing the Forest Rights Act, 2006. Whether State Government officials have connived with the violations is a separate issue and is not relevant to my decision. I am prepared to believe that the State Government officials were attempting to discharge their obligations to the best of their abilities and with the best of intentions. The State Government could well contest many of the observations made by the Saxena Committee. But this will not fundamentally alter the fact that serious violations of various laws have indeed taken place.

The primary responsibility of any Ministry is to enforce the laws that have been passed by Parliament. For the MoE&F, this means enforcing the Forest (Conservation) Act, 1980, the Environmental (Protection) Act, 1986, the Scheduled Tribes and Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 and other laws. It is in this spirit that this decision has been taken."

The order dated 24.8.2010 was communicated by MOEF to the State of Orissa vide its letter dated 30.8.2010, the legality of those orders are the subject matter of this writ petition.

16. Shri K.K. Venugopal, learned senior counsel appearing for OMC, referred to the earlier judgments of this Court in *Vedanta* as well as *Sterlite* and submitted that those judgments are binding on the parties with regard to the various questions raised and decided and also to the questions which ought to have been raised and decided. Learned senior counsel also pointed out that MOEF itself, after the above mentioned two judgments, had accorded Stage-I clearance vide its proceeding dated 11.12.2008 and that the State of Orissa vide its letter dated 10.8.2009 had informed MOEF of the compliance of the various conditions stipulated in the Stage-I clearance dated 11.12.2008. Consequently, there is no impediment in the MOEF granting Stage-II clearance for the project. Learned senior counsel also submitted that the reasons stated by the FAC as well as the Saxena Committee are all untenable and have nothing to do with Bauxite Mining Project (BMP) undertaken by OMC. Learned senior counsel also submitted that the constitution of, initially, a 3-Member Committee and, later, a 4-Member Committee, was intended only to cancel the Stage-I clearance granted to the BMP in compliance with the judgment of this Court. Learned counsel also pointed out that the claim under the Forest Rights Act was also raised by Sidharth Nayak through a review petition, which was also rejected by this Court on 7.5.2008. Consequently, it would not be open to the parties to again raise the issues which fall under the Forest Rights Act.

17. Shri C.A. Sundaram, learned senior counsel appearing for the State of Orissa, submitted that various reasons stated by the MOEF for rejecting the Stage-II clearance are unsustainable in law as well as on facts. Learned senior counsel pointed out that reasons stated by the Saxena Committee as well as MOEF alleging violation of the Environmental Protection Act, 1986, are totally unrelated to the

counsel pointed out that Alumina Refinery is an independent project and the violation, if any, in respect of the same ought not to have been relevant criteria for the consideration of the grant of Stage-II clearance to the BMP, being granted to OMC. Referring to the Monitoring Report of Eastern Regional Office dated 25.5.2010, learned senior counsel pointed out that the findings recorded in that report are referable to 4th respondent and not to the mining project granted to OMC. Learned senior counsel also submitted that Saxena Committee as well as MOEF has committed a factual error in taking into account the alleged legal occupation of 26.123 ha of village forest lands enclosed within the factory premises which has no connection with regard to the mining project, a totally independent project. Learned senior counsel also submitted that in the proposed mining area, there is no human habitation and that the individual habitation rights as well as the Community Forest Resource Rights for all villages located on the hill slope of the proposed mining lease area, have already been settled. Learned senior counsel also pointed out that the Gram Sabha has received several individual and community claims from Rayagada and Kalahandi Districts and they have settled by giving alternate lands.

18. Shri Sundaram also submitted that the Forest Rights Act deals with individual and community rights of the Tribals which does not, in any manner, expressly or impliedly, make any reference to the religious or spiritual rights protected under Articles 25 and 26 of the Constitution of India and does not extend to the property rights. Learned senior counsel also submitted that the State Government continues to maintain and have ownership over the minerals and deposits beneath the forests and such rights have not been taken away by the Forest Rights Act and neither the Gram Sabha nor the Tribals can raise any ownership rights on minerals or deposits beneath the forest land.

19. Shri C.U. Singh, learned senior counsel appearing for the 3rd respondent – Sterlite, submitted that various grounds

stated in Saxena report as well as in the order of MOEF dated 24.8.2010, were urged before this Court when *Vedanda* and *Sterlite* cases were decided and, it was following those judgments, that MOEF granted Stage-I approval on 11.12.2008 on the basis of the recommendation of FAC. In compliance of the Stage-I clearance accorded by MOEF, SPV (OMC and Sterlite) undertook various works and completed, the details of the same have been furnished along with the written submissions filed on 21.1.2013. Learned senior counsel submitted that the attempt of the MOEF is to confuse the issue mixing up the Alumina Refinery Project with that of the Bauxite Mining Project undertaken by Sterlite and OMC through a SPV. The issues relating to expansion of refinery and alleged violation of the Environmental Protection Act, 1986, the Forest Conservation Act, 1980 etc. have nothing to do with the mining project undertaken by OMC and Sterlite. Learned senior counsel, therefore, submitted that the rejection of the Stage-II clearance by MOEF is arbitrary and illegal.

20. Shri Mohan Parasaran, Solicitor General of India, at the outset, referred to the judgment of this Court in Sterlite and placed considerable reliance on para 13 of the judgment and submitted that while granting clearance by this Court for the diversion of 660.749 ha of forest land to undertake bauxite mining in Niyamgiri hills, left it to the MOEF to grant its approval in accordance with law. Shri Parasaran submitted that it is in accordance with law that the MOEF had constituted two Committees and the reports of the Committees were placed before the FAC, which is a statutory body constituted under Section 3 of the Forest Conservation Act. It was submitted that it was on the recommendation of the statutory body that MOEF had passed the impugned order dated 24.8.2010. Further, it was pointed out that, though MOEF had granted the Stage-I clearance on 11.12.2008, it can still examine as to whether the conditions stipulated for the grant of Stage-I clearance had been complied with or not. For the said purpose, two Committees were constituted and the Saxena Com[illegible]s

noticed the violation of various conditions stipulated in the Stage-I clearance granted by MOEF on 11.12.2008. Shri Parasaran also submitted that the petitioner as well as 3rd respondent have also violated the provisions of the Forest Rights Act, the violation of which had been specifically noted by the Saxena Committee and accepted by MOEF. Referring to various provisions of the Forest Rights Act under Section 3.1(i), 3.1(e) and Section 5 of the Act, it was submitted that concerned forest dwellers be treated not merely as right holders as statutory empowered with the authority to protect the Niyamgiri hills. Shri Parasaran also pointed out that Section 3.1(e) recognizes the right to community tenures of habitat and habitation for "primitive tribal groups" and that Dongaria Kondh have the right to grazing and the collection of mineral forest of the hills and that they have the customary right to worship the mountains in exercise of their traditional rights, which would be robed of if mining is permitted in Niyamgiri hills.

21. Shri Raj Panjwani, learned senior counsel appearing for the applicants in I.A. Nos. 4 and 6 of 2012, challenged the environmental clearance granted to OMC on 28.4.2009 by MOEF before the National Environment Appellate Authority (NEAA) under Section 4(1) of the NEAA Act, 1997, by filing Appeal Nos. 20 of 2009 and 21 of 2009 before NEAA. NEAA vide its order dated 15.5.2010 allowed the appeals and remitted the matter to MOEF to revisit the grant of environmental clearance to OMC on 28.4.2009. Later, MOEF by its order dated 11.7.2011 has withdrawn the environmental clearance dated 28.4.2009 granted in favour of OMC and that OMC, without availing of the statutory remedy of the appeal, filed I.A. No. 2 of 2011 in the present writ petition.

22. Shri Sanjay Parekh, learned counsel appearing for the applicants in I.A. Nos. 5 and 6 of 2011, referred to the various provisions of the Forest Rights Act and the Rules and submitted that the determination of rights of scheduled tribes (STs)/other traditional forest dwellers (TFDs) have to be done by the Gram

Sabha in accordance with the machinery provided under Section 6 of the Act. Learned counsel also submitted that the forest wealth vests in the STs and other TFDs and can be diverted only for the purpose mentioned in Section 3(3). Learned counsel also referred to the Saxena Committee report and submitted that the report clearly reveals the community rights as well as the various rights and claims of the primitive traditional forest dwellers. Learned counsel also submitted that if the mining is undertaken in Niyamgiri hills, it would destroy more than 7 sq. Km. of undisturbed forest land on the top of the mountain which is the abode of the Dongaria Kondh and their identity depends on the existence of Niyamgiri hills.

Judicial Evaluation

23. We may, at the outset, point out that there cannot be any doubt that this Court in *Vedanta* case had given liberty to Sterlite to move this Court if they were agreeable to the "suggested rehabilitation package" in the order of this Court, in the event of which it was ordered that this Court might consider granting clearance to the project, but not to Vedanta. This Court in *Vedanta* case had opined that this Court was not against the project in principle, but only sought safeguards by which the Court would be able to protect the nature and subserve development.

24. The Sterlite, State of Orissa and OMC then unconditionally accepted the terms and conditions and modalities suggested by this Court in Vedanta under the caption "Rehabilitation Package" and they moved this Court by filing I.A. No. 2134 of 2007 and this Court accepted the affidavits filed by them and granted clearance to the diversion of 660.749 ha of forest land to undertake the bauxite mining in Niyamgiri Hills and ordered that MOEF would grant its approval in accordance with law.

25. MOEF, then considered the proposal of the State Government made under Section 2 of th

Act, 1980 and also the recommendations of the FAC and agreed in principle for the diversion of 660.749 ha of forest land for mining of bauxite ore in Lanjigarh Bauxite Mines in favour of OMC, subject to 21 conditions vide its order 11.12.2008. One of the conditions was with regard to implementation of the Wildlife Management Plan (WMP) suggested by WII and another was with regard to the implementation of all other provisions of different Acts, including environmental clearance, before the transfer of the forest land. Further, it was also ordered that after receipt of the compliance report on fulfilment of the 21 conditions from the State of Orissa, formal approval would be issued under Section 2 of the Forest (Conservation) Act, 1980.

26. MOEF examined the application of the OMC for environmental clearance under Section 12 of the EIA Notification, 2006 read with para 2.1.1(i) of Circular dated 13.10.2006 and accorded environmental clearance for the "Lanjigarh Bauxite Mining Project" to OMC for an annual production capacity of 3 million tonnes of -bauxite by opencast mechanized method involving total mining lease area of 721.323 ha, subject to the conditions and environmental safeguards, vide its letter dated 28.4.2009. 32 special conditions and 16 general conditions were incorporated in that letter. It was ordered that failure to comply with any of the conditions might result in withdrawal of the clearance and attract action under the provisions of the Environment Protection Act, 1986. It was specifically stated that the environmental clearance would be subject to grant of forestry clearance and that necessary clearance for diversion of 672.018 ha. Of forest land involved in the project be obtained before starting operation in that area and that no mining be undertaken in the forest area without obtaining prior forestry clearance. Condition No. XXX also stipulated that the project proponent shall take all precautionary measures during mining operation for conservation and protection of flora and fauna spotted in the study area and all safeguards measures brought out by the

WMP prepared specific to the project site and considered by WII shall be effectively implemented. Further, it was also ordered that all the recommendations made by WII for Wildlife Management be effectively implemented and that the project proponent would also comply with the standards prescribed by the State and Central Pollution Control Boards. Later, a corrigendum dated 14.7.2009 was also issued by MOEF adding two other conditions – one special condition and another general condition.

27. State of Orissa vide its letter dated 10.8.2009 informed MOEF that the user agency had complied with the stipulations of Stage-I approval. Specific reference was made point by point to all the conditions stipulated in the letters of MOEF dated 11.12.2008 and 30.12.2008 and, in conclusion, the State Government has stated in their letter as follows:

> "In view of the above position of compliance by the User Agency to the direction of Hon'ble Supreme Court of India dated 8.8.2008 and stipulations of the Government of India, MOEF vide their Stage-I approval order dated 30.12.2008, the compliance is forwarded to the Government of India, MOEF to kindly examine the same and take further necessary steps in matters of according final approval for diversion of 660.749 ha of forest land for the project under Section 2 of the Forest Conservation Act, 1980."

MOEF, it is seen, then placed the letter of the State Government dated 10.8.2008 before the FAC and FAC on 4.11.2009 recommended that the final clearance be considered only after ascertaining the community rights of forest land and after the process for establishing such rights under the Forest Rights Act is completed. Dr. Usha Ramanathan Committee report was placed before the FAC on 16.4.2010 and FAC recommended that a Special Committee under the Ministry of Tribal Affairs be constituted to look into the issue relating to violation of tribal rights and the settlement of various ri st

Rights Act, which led, as already indicated, to the constitution of the Saxena Committee report, based on which the MOEF passed the impugned order dated 24.8.2010.

28. FAC, in its meeting, opined that the final clearance under the Forest (Conservation) Act would be given, only after ascertaining the "Community Rights" on forest land and after the process of establishing such rights under the Forest Rights Act. After perusing the Usha Ramanathan report, FAC on 16.4.2010 recommended that a Special Committee be constituted to look into the issues relating to the alleged violation of rights under the Forest Rights Act. MOEF, then on 29.6.2010 constituted the Saxena Committee and the Committee after conducting an enquiry submitted its report which was placed before the FAC on 20.8.2010 and FAC noticed *prima facie* violation of the Forest Rights Act and the Forest (Conservation) Act.

29. Petitioner has assailed the order of MoEF dated 24.08.2010 as an attempt to reopen matters that had obtained finality. Further, it is also submitted that the order wrongly cites the violation of certain conditions of environmental clearance by "Alumina Refinery Project" as grounds for denial of Stage II clearance to OMC for its "Bauxite Mining Project". The contention is based on the premise that the two Projects are totally separate and independent of each other and the violation of any statutory provision or a condition of environmental clearance by one cannot be a relevant consideration for grant of Stage II clearance to the other.

30. Petitioner's assertion that the Alumina Refinery Project and the Bauxite Mining Project are two separate and independent projects, cannot be accepted as such, since there are sufficient materials on record to show that the two projects make an integrated unit. In the two earlier orders of this Court (in the Vedanta case and the Sterlite case) also the two Projects are seen as comprising a single unit. Quite contrary to the case of the petitioner, it can be strongly argued that the

Alumina Refinery Project and Bauxite Mining Project are interdependent and inseparably linked together and, hence, any wrong doing by Alumina Refinery Project may cast a reflection on the Bauxite Mining Project and may be a relevant consideration for denial of Stage II clearance to the Bauxite Mining Project.

In this Judgment, however, we do not propose to make any final pronouncement on that issue but we would keep the focus mainly on the rights of the Scheduled Tribes and the "Traditional Forest Dwellers" under the Forest Rights Act.

STs and TFDs:

31. Scheduled Tribe, as such, is not defined in the Forest Rights Act, but the word "Traditional Forest Dweller" has been defined under Section 2(o) as any member or community who has at least three generations prior to the 13th day of December, 2005 primarily resided in and who depend on the forest or forests land for *bona fide* livelihood needs. Article 366(25) of the Constitution states that STs means such tribes or tribal communities or parts of or groups within such tribes or tribal communities as are defined under Article 342 to be the Scheduled Tribes. The President of India, in exercise of the powers conferred by Clause (1) of Article 342 of the Constitution, has made the Constitution (Schedule Tribes) Order, 1950. Part XII of the Order refers to the State of Orissa. Serial No. 31 refers to Dongaria Kondh, Kutia Kandha etc.

32. Before we examine the scope of the Forest Rights Act, let us examine, how the rights of indigenous people are generally viewed under our Constitution and the various International Conventions.

Constitutional Rights and Conventions:

33. Article 244 (1) of the Constitution of India which appears in Part X provides that the administration of the Scheduled Areas and Scheduled Tribes in

Assam, Meghalaya and Tripura) shall be according to the provisions of the Fifth Schedule and Clause (2) states that Sixth Schedule applies to the tribal areas in Assam, Meghalaya, Tripura and Mizoram. Evidently, the object of the Fifth Schedule and the Regulations made thereunder is to preserve tribal autonomy, their cultures and economic empowerment to ensure social, economic and political justice for the preservation of peace and good Governance in the Scheduled Area. This Court in *Samatha v. Arunachal Pradesh* (1997) 8 SCC 191 ruled that all relevant clauses in the Schedule and the Regulations should be harmoniously and widely be read as to elongate the Constitutional objectives and dignity of person to the Scheduled Tribes and ensuring distributive justice as an integral scheme thereof. The Court noticed that agriculture is the only source of livelihood for the Scheduled Tribes apart from collection and sale of minor forest produce to supplement their income. Land is their most important natural and valuable asset and imperishable endowment from which the tribal derive their sustenance, social status, economic and social equality, permanent place of abode, work and living. Consequently, tribes have great emotional attachments to their lands.

34. Part B of the Fifth Schedule [Article 244(1)] speaks of the administration and control of Schedules Areas and Scheduled Tribes. Para 4 thereof speaks of Tribes Advisory Council. Tribes Advisory Council used to exercise the powers for those Scheduled Areas where Panchayat Raj system had not been extended. By way of the Constitution (73rd Amendment) Act, 1992, Part IX was inserted in the Constitution of India. Article 243-B of Part IX of the Constitution mandated that there shall be panchayats at village, intermediate and district levels in accordance with the provisions of that Part. Article 243-C of Chapter IX refers to the composition of Panchayats. Article 243-M (4)(b) states that Parliament may, by law, extend the provisions of Part IX to the Scheduled Areas and the Tribal areas and to work out the modalities for the same. The Central Government appointed Bhuria Committee

to undertake a detailed study and make recommendations as to whether the Panchayat Raj system could be extended to Scheduled Areas. The Committee submitted its report on 17.01.1995 and favoured democratic, decentralization in Scheduled Areas. Based on the recommendations, the Panchayat (Extension to Scheduled Areas) Act, 1996 (for short 'PESA Act') was enacted by the Parliament in the year 1996, extending the provisions of Part IX of the Constitution relating to Panchayats to the Scheduled Areas. The Statement of Objects and Reasons of the Act reads as follows:

> "There have been persistent demands from prominent leaders of the Scheduled Areas for extending the provisions of Part IX of the Constitution to these Areas so that Panchayati Raj Institutions may be established there. Accordingly, it is proposed to introduce a Bill to provide for the extension of the provisions of Part IX of the Constitution to the Scheduled Areas with certain modifications providing that, among other things, the State legislations that may be made shall be in consonance with the customary law, social and religious practices and traditional management practices of community resources;..... The offices of the Chairpersons in the panchayats at all levels shall be reserved for the Scheduled Tribes; the reservations of seats at every panchayat for the Scheduled Tribes shall not be less than one-third of the total number of seats."

35. This court had occasion to consider the scope of PESA Act when the constitutional validity of the proviso to section 4(g) of the PESA Act and few sections of the Jharkhand Panchayat Raj Act, 2001 were challenged in *Union of India v. Rakesh Kumar,* (2010) 4 SCC 50 and this Court upheld the Constitutional validity.

36. Section 4 of the PESA Act stipulates that the State legislation on Panchayats shall be made in consonance with the customary law, social and religious p[illegible]al

management practices of community resources. Clause (d) of Section states that every Gram Sabha shall be competent to safeguard and preserve the traditions and customs of the people, their cultural identity, community resources and the customary mode of dispute resolution. Further it also states in clause (i) of Section 4 that the Gram Sabha or the Panchayats at the appropriate level shall be consulted before making the acquisition of land in the Scheduled Areas for development projects and before re-settling or rehabilitating persons affected by such projects in the Scheduled Areas and that the actual planning and implementation of the projects in the Scheduled Areas, shall be coordinated at the State level. Sub-clause (k) of Section 4 states that the recommendations of the Gram Sabha or the Panchayats at the appropriate level shall be made mandatory prior to grant of prospective licence or mining lease for minor minerals in the Scheduled Areas. Panchayat has also endowed with the powers and authority necessary to function as institutions of Self-Government.

37. The customary and cultural rights of indigenous people have also been the subject matter of various international conventions. International Labour Organization (ILO) Convention on Indigenous and Tribal Populations Convention, 1957 (No.107) was the first comprehensive international instrument setting forth the rights of indigenous and tribal populations which emphasized the necessity for the protection of social, political and cultural rights of indigenous people. Following that there were two other conventions ILO Convention (No.169) and Indigenous and Tribal Peoples Convention, 1989 and United Nations Declaration on the rights of Indigenous Peoples (UNDRIP), 2007, India is a signatory only to the ILO Convention (No. 107).

38. Apart from giving legitimacy to the cultural rights by 1957 Convention, the Convention on the Biological Diversity (CBA) adopted at the Earth Summit (1992) highlighted necessity to preserve and maintain knowledge , innovation and

practices of the local communities relevant for conservation and sustainable use of bio-diversity, India is a signatory to CBA. Rio Declaration on Environment and Development Agenda 21 and Forestry principle also encourage the promotion of customary practices conducive to conservation. The necessity to respect and promote the inherent rights of indigenous peoples which derive from their political, economic and social structures and from their cultures, spiritual traditions, histories and philosophies, especially their rights to their lands, territories and resources have also been recognized by United Nations in the United Nations Declaration on Rights of Indigenous Peoples. STs and other TFDs residing in the Scheduled Areas have a right to maintain their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands.

39. Many of the STs and other TFDs are totally unaware of their rights. They also experience lot of difficulties in obtaining effective access to justice because of their distinct culture and limited contact with mainstream society. Many a times, they do not have the financial resources to engage in any legal actions against development projects undertaken in their abode or the forest in which they stay. They have a vital role to play in the environmental management and development because of their knowledge and traditional practices. State has got a duty to recognize and duly support their identity, culture and interest so that they can effectively participate in achieving sustainable development.

40. We notice, bearing in mind the above objects, the Forest Rights Act has been enacted conferring powers on the Gram Sabha constituted under the Act to protect the community resources, individual rights, cultural and religious rights.

The Forest Rights Act

41. The Forest Rights Act was enacted by the Parliament to recognize and vest the forest rights a st

land in forest dwelling STs and other TFDs who have been residing in such forests for generations but whose rights could not be recorded and to provide for a framework for recording the forest rights so vested and the nature of evidence required for such recognition and vesting in respect of forest land. The Act also states that the recognized rights of the forest dwelling STs and other TFDs include the responsibilities and authority for sustainable use, conservation of bio-diversity and maintenance of ecological balance and thereby strengthening the conservation regime of the forests while ensuring livelihood and food security of the forest dwelling STs and other TFDs. The Act also noticed that the forest rights on ancestral lands and their habitat were not adequately recognized in the consolidation of State forests during the colonial period as well as in independent India resulting in historical injustice to them, who are integral to the very survival and sustainability of the forest ecosystem.

42. The Statement of Objects and Reasons of the Act states that forest dwelling tribal people and forests are inseparable and that the simplicity of tribals and their general ignorance of modern regulatory framework precluded them from asserting their genuine claims to resources in areas where they belong and depended upon and that only recently that forest management regimes have initiated action to recognize the occupation and other right of the forest dwellers. Of late, we have realized that forests have the best chance to survive if communities participate in their conservation and regeneration measures. The Legislature also has addressed the long standing and genuine felt need of granting a secure and inalienable right to those communities whose right to life depends on right to forests and thereby strengthening the entire conservation regime by giving a permanent stake to the STs dwelling in the forests for generations in symbiotic relationship with the entire ecosystem.

43. We, have to bear in mind the above objects and

reasons, while interpreting various provisions of the Forest Rights Act, which is a social welfare or remedial statute. The Act protects a wide range of rights of forest dwellers and STs including the customary rights to use forest land as a community forest resource and not restricted merely to property rights or to areas of habitation.

44. Forest rights of forest dwelling STs and other TFDs are dealt with in Chapter II of the Act. Section 3 of that chapter lists out what are the forest rights for the purpose of the Act. Following are some of the rights which have been recognized under the Act:

(a) Right to hold and live in the forest land under the individual or common occupation for habitation or for self-cultivation for livelihood by a member or members of a forest dwelling Scheduled Tribe or other traditional forest dwellers;

(b) Community rights such as nistar, by whatever name called, including those used in erstwhile Princely States, Zamindari or such intermediary regimes;

(c) Right of ownership access to collect, use, and dispose of minor forest produce which has been traditionally collected within or outside village boundaries;

(d) Other community rights of uses or entitlement such as fish and other products of water bodies, grazing (both settled or transhumant) and traditional seasonal resource access of nomadic or pastoralist communities;

(e) Rights, including community tenures of habitat and habitation for primitive tribal groups and pre-agricultural communities

(f) ————————

(g) ————————-

(h) Rights of settlement and conversion of all forest villages, old habitation, unsurveyed villages and other villages in forests, whether recorded, notified or not into revenue villages;

(i) Right to protect, regenerate or conserve or manage any community forest resource which they have been traditionally protecting and conserving for sustainable use;

(j) Rights which are recognized under any State law or laws of any Autonomous District Council or Autonomous Regional Council or which are accepted as rights of tribals under any traditional or customary law of the concerned tribes of any State;

(k) Right of access to bio-diversity and community right to intellectual property and traditional knowledge related to bio-diversity and cultural diversity;

(l) Any other traditional right customarily enjoyed by the forest dwelling Scheduled Tribes or other traditional forest dwellers, as the case may be, which are not mentioned in clauses (a) to (k) but excluding the traditional right of hunting or trapping or extracting a part of the body of any species of wild animal.

45. The above section has to be read along with a definition clause. Section 2(a) defines "community forest resource":

"(a) "Community Forest Resource" means customary common forest land within the traditional or customary boundaries of the village or seasonal use of landscape in the case of pastoral communities, including reserved forests, protected forests and protected areas such

Sanctuaries and National Parks to which the community had traditional access."

"Critical wildlife habitat" is defined under Section 2(b) of the Act, which reads as follows:

"(b) "critical wildlife habitat" means such areas of National Parks and Sanctuaries where it has been specifically and clearly established, case by case, on the basis of scientific and objective criteria, that such areas are required to be kept as inviolate for the purposes of wildlife conservation as may be determined and notified by the Central Government in the Ministry of Environment and Forests after open process of consultation by an Expert Committee, which includes experts from the locality appointed by that Government wherein a representative of the Ministry of Tribal Affairs shall also be included, in determining such areas according to the procedural requirement arising from sub-sections (1) and (2) of Section 4."

"Forest dwelling Scheduled Tribes" is defined under Section 2(c) of the Act, which reads as follows:

"(c) "Forest dwelling Scheduled Tribes" means the members or community of the Scheduled Tribes who primarily reside in and who depend on the forests or forest lands for bona fide livelihood needs and includes the Scheduled Tribe Pastoralist communities."

"Forest land" is described under Section 2(d), which reads as follows:

"(d) "forest land" means land of any description falling within any forest area and includes unclassified forests, undemarcated forests, existing or deemed forests, protected forests, reserved forests, sanctuaries and National Parks."

"Gram Sabha" is defined under Section 2(g), which reads as follows:

> "(g) "Gram Sabha" means a village assembly which shall consist of all adult members of a village and in case of States having no Panchayats, Padas, Tolas and other traditional village institutions and elected village committees, with full and unrestricted participation of women."

"Habitat" is defined under Section 2(h), which reads as follows:

> "(h) "habitat" includes the area comprising the customary habitat and such other habitats in reserved forests and protected forests of primitive tribal groups and pre-agricultural communities and other forest dwelling Scheduled Tribes."

"Scheduled Areas" is described under Section 2(m), which reads as follows:

> "(m) "Scheduled Areas" means the Scheduled Areas referred to in clause (1) of Article 244 of the Constitution."

"Sustainable use" is described under Section 2(n), which reads as follows:

> "(n) "sustainable use" shall have the same meaning as assigned to it in clause (o) of Section 2 of Biological Diversity Act, 2002 (18 of 2003)."

46. Chapter III of the Act deals with recognition, restoration and vesting of forest rights and related matters. Section 4 of that chapter deals with recognition of, and vesting of, forest rights in forest dwelling STs and other TFDs. Section 5 lists out duties in whom the forest rights vests and also the holders of forest rights empowers them to carry out duties. Those duties include preservation of habitat from any form of destructive practices affecting their cultural and natural heritage.

47. The definition clauses read with the above mentioned provisions give emphasis to customary rights, rights to collect, use and dispose of minor forest produce, community rights like grazing cattle, community tenure of habitat and habitation for primitive tribal groups, traditional rights customarily enjoyed etc. Legislative intention is, therefore, clear that the Act intends to protect custom, usage, forms, practices and ceremonies which are appropriate to the traditional practices of forest dwellers.

48. Chapter IV of the Act deals with the authorities and procedure for vesting of forest rights. That chapter has only one section i.e. Section 6, which has to be read along with The Scheduled Tribes and Other Traditional Forest Dwellers (Recognition of Forest Rights) Amendment Rules, 2007 and the Amendment Rules 2012.

49. Ministry of Tribal Affairs has noticed several problems which are impeding the implementation of the Act in its letter and spirit. For proper and effective implementation of the Act, the Ministry has issued certain guidelines and communicated to all the States and UTs vide their letter dated 12.7.2012. The operative portion of the same reads as follows:

"GUIDELINES:

(i) Process of Recognition of Rights:

(a) The State Governments should ensure that on receipt of intimation from the Forest Rights Committee, the officials of the Forest and Revenue Departments remain present during the verification of the claims and the evidence on the site.

(b) In the event of modification or rejection of a claim by the Gram Sabha or by the Sub-Divisional Level Committee or the District Level Committee, the decision on the claim should be communicated to the claimant to enable the aggrieved person to prefer a petition to the S[illegible]el

Committee or the District Level Committee, as the case may be, within the sixty days period prescribed under the Act and no such petition should be disposed of against the aggrieved person, unless he has been given a reasonable opportunity to present his case.

(c) The Sub-Divisional Level Committee or the District Level Committee should, if deemed necessary, remand the claim to the Gram Sabha for reconsideration instead of rejecting or modifying the same, in case the resolution or the recommendation of the Gram Sabha is found to be incomplete or prima-facie requires additional examination.

(d) In cases where the resolution passed by the Gram Sabha, recommending a claim, is upheld by Sub-Divisional Level committee, but the same is not approved by the District Level Committee, the District Level Committee should record the reasons for not accepting the recommendations of the Gram Sabha and the Sub-Divisional Level Committee, in writing, and a copy of the order should be supplied to the claimant.

(e) On completion of the process of settlement of rights and issue of titles as specified in Annexures II, III & IV of the Rules, the Revenue / Forest Departments shall prepare a final map of the forest land so vested and the concerned authorities shall incorporate the forest rights so vested in the revenue and forest records, as the case may be, within the prescribed cycle of record updation.

(f) All decisions of the Sub-Divisional Level Committee and District Level Committee that involve modification or rejection of a Gram Sabha resolution/ recommendation should be in the form

of speaking orders.

(g) The Sub-Divisional Level Committee or the District Level committee should not reject any claim accompanied by any two forms of evidences, specified in Rule 13, and recommended by the Gram Sabha, without giving reasons in writing and should not insist upon any particular form of evidence for consideration of a claim. Fine receipts, encroacher lists, primary offence reports, forest settlement reports, and similar documentation rooted in prior official exercises, or the lack -thereof, would not be the sole basis for rejection of any claim.

(h) Use of any technology, such as, satellite imagery, should be used to supplement evidences tendered by a claimant for consideration of the claim and not to replace other evidences submitted by him in support of his claim as the only form of evidence.

(i) The status of all the claims, namely, the total number of claims filed, the number of claims approved by the District Level Committee for title, the number of titles actually distributed, the number of claims rejected, etc. should be made available at the village and panchayat levels through appropriate forms of communications, including conventional methods, such as, display of notices, beat of drum etc.

(j) A question has been raised whether the four hectare limit specified in Section 4(6) of the Act, which provides for recognition of forest rights in respect of the land mentioned in clause (a) of sub-section (1) of section 3 of the Act, applies to other forest rights mentioned in Section 3(1) of the Act. It is clarified that the four he n

Section 4(6) applies to rights under section 3(1)(a) of the Act only and not to any other right under section 3(1), such as conversion of pattas or leases, conversion of forest villages into revenue villages etc.

(ii) <u>Minor Forest Produce</u>:

(a) The State Government should ensure that the forest rights relating to MFPs under Section 3(1)(c) of the Act are recognized in respect of all MFPs, as defined under Section 2(i) of the Act, in all forest areas, and state policies are brought in alignment with the provisions of the Act. Section 2(i) of the Act defines the term "minor forest produce" to include "all non-timber produce of plant origin, including bamboo, brush wood, stumps, cane, tussar, cocoons, honey, wax, lac, tendu or kendu leaves, medicinal plants and herbs, roots, tubers, and the like".

(b) The monopoly of the Forest Corporations in the trade of MFP in many States, especially in case of high value MFP, such as, tendu patta, is against the spirit of the Act and should henceforth be done away with.

(c) The forest right holders or their cooperatives/ federations should be allowed full freedom to sell such MFPs to anyone or to undertake individual or collective processing, value addition, marketing, for livelihood within and outside forest area by using locally appropriate means of transport.

(d) The State Governments should exempt movement of all MFPs from the purview of the transit rules of the State Government and, for this purpose, the transit rules be amended suitably. Even a transit

permit from Gram Sabha should not be required. Imposition of any fee/charges/royalties on the processing, value addition, marketing of MFP collected individually or collectively by the cooperatives/ federations of the rights holders would also be ultra vires of the Act.

(e) the State Governments need to play the facilitating role in not only transferring unhindered absolute rights over MFP to forest dwelling Scheduled Tribes and other traditional forest dwellers but also in getting them remunerative prices for the MFP, collected and processed by them.

(iii) <u>Community Rights</u>:

(a) The District Level Committee should ensure that the records of prior recorded nistari or other traditional community rights (such as Khatian part II in Jharkhand, and traditional forest produce rights in Himachal and Uttarakhand) are provided to Gram Sabhas, and if claims are filed for recognition of such age-old usufructory rights, such claims are not rejected except for valid reasons, to be recorded in writing, for denial of such recorded rights;

(b) The District Level Committee should also facilitate the filing of claims by pastoralists before the concerned Gram Sabha (s) since they would be a floating population for the Gram Sabha(s) of the area used traditionally.

(c) In view of the differential vulnerability of Particularly Vulnerable Tribal Groups (PTGs) amongst the forest dwellers, District Level Committee should play a pro-active role in ensuring that all PTGs receive habitat rights in consultation with the concerned PTGs' traditiona ir

claims for habitat rights are filed before the concerned Gram Sabhas.

(d) The forest villages are very old entities, at times of pre-independent era, duly existing in the forest records. The establishment of these villages was in fact encouraged by the forest authorities in the pre-independent era for availability of labour within the forest areas. The well defined record of each forest village, including the area, number of inhabitants, etc. exists with the State Forest Departments. There are also unrecorded settlements and old habitations that are not in any Government record. Section 3(1)(h) of the Act recognizes the right of forest dwelling Scheduled Tribes and other traditional forest dwellers relating to settlement and conversion on forest villages, old habitation, un-surveyed villages and other villages and forests, whether recorded, notified or not into revenue villages. The conversion of all forest villages into revenue villages and recognition of the forest rights of the inhabitants thereof should actually have been completed immediately on enactment of the Act. The State Governments may, therefore, convert all such erstwhile forest villages, unrecorded settlements and old habitations into revenue villages with a sense of urgency in a time bound manner. The conversion would include the actual land-use of the village in its entirety, including lands required for current or future community uses, like, schools, health facilities, public spaces etc. Records of the forest villages maintained by the Forest Department may thereafter be suitably updated on recognition of this right.

(iv) <u>Community Forest Resource Rights:</u>

(a) The State Government should ensure that the forest

rights under Section 3(1)(i) of the Act relating to protection, regeneration or conservation or management of any community forest resource, which forest dwellers might have traditionally been protecting and conserving for sustainable use, are recognized in all villages and the titles are issued as soon as the prescribed Forms for claiming Rights to Community Forest Resource and the Form of Title for Community Forest Resources are incorporated in the Rules. Any restriction, such as, time limit, on use of community forest resources other than what is traditionally imposed would be against the spirit of the Act.

(b) In case no community forest resource rights are recognized in a village, the reasons for the same should be recorded. Reference can be made to existing records of community and joint forest management, van panchayats, etc. for this purpose.

(c) The Gram Sabha would initially demarcate the boundaries of the community forest resource as defined in Section 2(a) of the Act for the purposes of filing claims for recognition of forest right under Section 3(1)(i) of the Act.

(d) The Committees constituted under Rule 4(e) of the Forest Rights Rules, 2008 would work under the control of Gram Sabha. The State Agencies should facilitate this process.

(e) Consequent upon the recognition of forest right in Section 3(i) of the Act to protect, regenerate or conserve or manage any community forest resource, the powers of the Gram Sabha would be in consonance with the duties as defined in Section 5(d), wherein the Gram Sabha is empowered to regulate access to communi d

stop any activity which adversely affects the wild animals, forest and the bio-diversity. Any activity that prejudicially affects the wild-life, forest and bio-diversity in forest area would be dealt with under the provisions of the relevant Acts.

(v) <u>Protection Against Eviction, Diversion of Forest Lands and Forced Relocation :</u>

(a) Section 4(5) of the Act is very specific and provides that no member of a forest dwelling Scheduled Tribe or other traditional forest dwellers shall be evicted or removed from the forest land under his occupation till the recognition and verification procedure is complete. This clause is of an absolute nature and excludes all possibilities of eviction of forest dwelling Scheduled Tribes or other traditional forest dwellers without settlement of their forest rights as this Section opens with the words "Save as otherwise provided". The rationale behind this protective clause against eviction is to ensure that in no case a forest dweller should be evicted without recognition of his rights as the same entitles him to a due compensation in case of eventuality of displacement in cases, where even after recognition of rights, a forest area is to be declared as inviolate for wildlife conservation or diverted for any other purpose. In any case, Section 4(1) has the effect of recognizing and vesting forest rights in eligible forest dwellers. Therefore, no eviction should take place till the process of recognition and vesting of forest rights under the Act is complete.

(b) The Ministry of Environment & Forests, vide their letter No.11-9/1998-FC(pt.) dated 30.07.2009, as modified by their subsequent letter of the same number dated 03.08.2009, has issued directions,

requiring the State/ UT Governments to enclose certain evidences relating to completion of the process of settlement of rights under the Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006, while formulating unconditional proposals for diversion of forest land for non-forest purposes under the Forest (Conservation) Act, 1980. The State Government should ensure that all diversions of forest land for non-forest purposes under the Forest (Conservation) Act, 1980 take place in compliance with the instructions contained in the Ministry of Environment & Forest's letter dated 30.07.2009, as modified on 03.08.2009.

(c) There may be some cases of major diversions of forest land for non-forest purposes under the Forest (Conservation) Act, 1980 after the enactment of the Scheduled Tribes and other Traditional Forest Dwellers (Recognition of Forest Rights) Act, 2006 but before the issue of Ministry of Environment & Forests' letter dated 30.07.2009, referred to above. In case, any evictions of forest dwelling Scheduled Tribes and other traditional forest dwellers have taken place without settlement of their rights due to such major diversions of forest land under the Forest (Conservation) Act, 1980, the District Level Committees may be advised to bring such cases of evictions, if any, to the notice of the State Level Monitoring Committee for appropriate action against violation of the provisions contained in Section 4(5) of the Act.

(d) The Act envisages the recognition and vesting of forest rights in forest dwelling Scheduled Tribes and other traditional forest dwellers over all forest lands, including National Parks ar

Section 2(b) of the Act, the Ministry of Environment & Forests is responsible for determination and notification of critical wildlife habitats in the National Parks and Sanctuaries for the purpose of creating inviolate areas for wildlife conservation, as per the procedure laid down. In fact, the rights of the forest dwellers residing in the National Parks and Sanctuaries are required to be recognized without waiting of notification of critical wildlife habitats in these areas. Further, Section 4(2) of the Act provides for certain safeguards for protection of the forest rights of the forest rights holders recognized under the Act in the critical wildlife habitats of National Parks and Sanctuaries, when their rights are either to be modified or resettled for the purposes of creating inviolate areas for wildlife conservation. No exercise for modification of the rights of the forest dwellers or their resettlement from the National Parks and Sanctuaries can be undertaken, unless their rights have been recognized and vested under the Act. In view of the provisions of Section 4(5) of the Act, no eviction and resettlement is permissible from the National Parks and sanctuaries till all the formalities relating to recognition and verification of their claims are completed. The State/ UT Governments may, therefore, ensure that the rights of the forest dwelling Scheduled Tribes and other traditional forest dwellers, residing in National Parks and Sanctuaries are recognized first before any exercise for modification of their rights or their resettlement, if necessary, is undertaken and no member of the forest dwelling Scheduled Tribe or other traditional forest dweller is evicted from such areas without the settlement of their rights and completion of all other actions required under section 4 (2) of the Act.

(e) The State Level Monitoring Committee should monitor compliance of the provisions of Section 3(1)(m) of the Act, which recognizes the right to in situ rehabilitation including alternative land in cases where the forest dwelling Scheduled Tribes and other traditional forest dwellers have been illegally evicted or displaced from forest land without receiving their legal entitlement to rehabilitation, and also of the provisions of Section 4(8) of the Act, which recognizes their right to land when they are displaced from their dwelling and cultivation without land compensation due to State development interventions.

(vi) <u>Awareness-Raising, Monitoring and Grievance Redressal:</u>

(a) Each State should prepare suitable communication and training material in local language for effective implementation of the Act.

(b) The State Nodal Agency should ensure that the Sub Divisional Level Committee and the District Level Committee make district-wise plans for trainings of revenue, forest and tribal welfare departments' field staff, officials, Forest Rights Committees and Panchayat representatives. Public meetings for awareness generation in those villages where process of recognition is not complete need to be held.

(c) In order to generate awareness about the various provisions of the Act and the Rules, especially the process of filing petitions, the State Government should organize public hearings on local bazaar days or at other appropriate locations on a quarterly basis till the process of recognition is complete. It will be helpful if some mem

Level Committee are present in the public hearings. The Gram Sabhas also need to be actively involved in the task of awareness raising.

(d) If any forest dwelling Scheduled Tribe in case of a dispute relating to a resolution of a Gram Sabha or Gram Sabha through a resolution against any higher authority or Committee or officer or member of such authority or Committee gives a notice as per Section 8 of the Act regarding contravention of any provision of the Act or any rule made thereunder concerning recognition of forest rights to the State Level Monitoring Committees, the State Level Monitoring Committee should hold an inquiry on the basis of the said notice within sixty days from the receipt of the notice and take action, if any, that is required. The complainant and the Gram Sabha should be informed about the outcome of the inquiry."

Forest Rights Act and MMRD Act:

50. State of Orissa has maintained the stand that the State has the ownership over the mines and minerals deposits beneath the forest land and that the STs and other TFDs cannot raise any claim or rights over them, nor the Gram Sabha has any right to adjudicate such claims. This Court in *Amritlal Athubhai Shah and Ors. v. Union Government of India and Another* (1976) 4 SCC 108, while dealing with the scope of Mines and Minerals (Regulation and Development) Act, 1957 held as follows:

"3. ……the State Government is the "owner of minerals" within its territory, and the minerals "vest" in it. There is nothing in the Act or the Rules to detract from this basic fact. That was why the Central Government stated further in its revisional orders that the State Government had the "inherent right to reserve any particular area for

exploitation in the public sector". It is therefore quite clear that, in the absence of any law or contract etc to the contrary, bauxite, as a mineral, and the mines thereof, vest in the State of Gujarat and no person has any right to exploit it otherwise then in accordance with the provisions of the Act and the Rules……."

The Forest Rights Act, neither expressly nor impliedly, has taken away or interfered with the right of the State over mines or minerals lying underneath the forest land, which stand vested in the State. State holds the natural resources as a trustee for the people. Section 3 of the Forest Rights Act does not vest such rights on the STs or other TFDs. PESA Act speaks only of minor minerals, which says that the recommendation of Gram Sabha shall be made mandatory prior to grant of prospecting licence or mining lease for minor minerals in the Scheduled Areas. Therefore, as held by this Court in *Amritlal* (supra), the State Government has the power to reserve any particular area for Bauxite mining for a Public Sector Corporation.

Gram Sabha and other Authorities:

51. Under Section 6 of the Act, Gram Sabha shall be the authority to initiate the process for determining the nature and extent of individual or community forest rights or both and that may be given to the forest dwelling STs and other TFDs within the local limits of the jurisdiction. For the said purpose it receive claims, and after consolidating and verifying them it has to prepare a plan delineating the area of each recommended claim in such manner as may be prescribed for exercise of such rights. The Gram Sabha shall, then, pass a resolution to that effect and thereafter forward a copy of the same to the Sub-Divisional Level Committee. Any aggrieved person may move a petition before the Sub-Divisional Level Committee against the resolution of the Gram Sabha. Sub-section (4) of Section 6 confers a right on the aggrieved person to prefer a petition to the District Level Committee against the decision of the Sub-Divisional Level Committee. Sub-sec 6

enables the State Government to constitute a State Level Monitoring Committee to monitor the process of recognition and vesting of forest rights and to submit to the nodal agency. Such returns and reports shall be called for by that agency.

52. Functions of the Gram Sabha, Sub-Divisional Level Committee, District Level Committee, State Level Monitoring Committee and procedure to be followed and the process of verification of claims etc. have been elaborately dealt with in 2007 Rules read with 2012 Amendment Rules. Elaborate procedures have therefore been laid down by Forest Rights Act read with 2007 and 2012 Amendment Rules with regard to the manner in which the nature and extent of individual or customary forest rights or both have to be decided. Reference has already been made to the details of forest rights which have been conferred on the forest dwelling STs as well as TFDs in the earlier part of the Judgment.

Individual/Community Rights

53. Forest Rights Act prescribed various rights to tribals/ forest dwellers as per Section 3 of the Act. As per Section 6 of the Act, power is conferred on the Gram Sabha to process for determining the nature and the extent of individual or community forests read with or both that may be given to forest dwelling STs and other TFDs, by receiving claims, consolidate it, and verifying them and preparing a map, delineating area of each recommended claim in such a manner as may be prescribed. The Gram Sabha has received a large number of individual claims and community claims from the Rayagada District as well as the Kalahandi District. From Rayagada District Gram Sabha received 185 individual claims, of which 145 claims have been considered and settled by granting alternate rights over 263.5 acres of land. 40 Individual claims pending before the Gram Sabha pertain to areas which falls outside the mining lease area. In respect of Kalahandi District 31 individual claims have been considered and settled by granting alternate rights over an area of 61 acres.

54. Gram Sabha has not received any community claim from the District of Rayagada. However, in respect of Kalahandi District 6 community claims had been received by the Gram Sabha of which 3 had been considered and settled by granting an alternate area of 160.55 acres. The balance 3 claims are pending consideration.

Customary and Religious Rights (Sacred Rights)

55. Religious freedom guaranteed to STs and the TFDs under Articles 25 and 26 of the Constitution is intended to be a guide to a community of life and social demands. The above mentioned Articles guarantee them the right to practice and propagate not only matters of faith or belief, but all those rituals and observations which are regarded as integral part of their religion. Their right to worship the deity Niyam-Raja has, therefore, to be protected and preserved.

56. Gram Sabha has a role to play in safeguarding the customary and religious rights of the STs and other TFDs under the Forest Rights Act. Section 6 of the Act confers powers on the Gram Sabha to determine the nature and extent of "individual" or "community rights". In this connection, reference may also be made to Section 13 of the Act coupled with the provisions of PESA Act, which deal with the powers of Gram Sabha. Section 13 of the Forest Rights Act reads as under:

> "**13**. **Act not in derogation of any other law**. – Save as otherwise provided in this Act and the provisions of the Panchayats (Extension of the Scheduled Areas) Act, 1996 (40 of 1996), the provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force."

57. PESA Act has been enacted, as already stated, to provide for the extension of the provisions of Part IX of the Constitution relating to Panchayats to the Scheduled Areas. Section 4(d) of the Act says that every

competent to safeguard and preserve the traditions, customs of the people, their cultural identity, community resources and community mode of dispute resolution. Therefore, Grama Sabha functioning under the Forest Rights Act read with Section 4(d) of PESA Act has an obligation to safeguard and preserve the traditions and customs of the STs and other forest dwellers, their cultural identity, community resources etc., which they have to discharge following the guidelines issued by the Ministry of Tribal Affairs vide its letter dated 12.7.2012.

58. We are, therefore, of the view that the question whether STs and other TFDs, like Dongaria Kondh, Kutia Kandha and others, have got any religious rights i.e. rights of worship over the Niyamgiri hills, known as Nimagiri, near Hundaljali, which is the hill top known as Niyam-Raja, have to be considered by the Gram Sabha. Gram Sabha can also examine whether the proposed mining area Niyama Danger, 10 km away from the peak, would in any way affect the abode of Niyam-Raja. Needless to say, if the BMP, in any way, affects their religious rights, especially their right to worship their deity, known as Niyam Raja, in the hills top of the Niyamgiri range of hills, that right has to be preserved and protected. We find that this aspect of the matter has not been placed before the Gram Sabha for their active consideration, but only the individual claims and community claims received from Rayagada and Kalahandi Districts, most of which the Gram Sabha has dealt with and settled.

59. The Gram Sabha is also free to consider all the community, individual as well as cultural and religious claims, over and above the claims which have already been received from Rayagada and Kalahandi Districts. Any such fresh claims be filed before the Gram Sabha within six weeks from the date of this Judgment. State Government as well as the Ministry of Tribal Affairs, Government of India, would assist the Gram Sabha for settling of individual as well as community claims.

60. We are, therefore, inclined to give a direction to the

State of Orissa to place these issues before the Gram Sabha with notice to the Ministry of Tribal Affairs, Government of India and the Gram Sabha would take a decision on them within three months and communicate the same to the MOEF, through the State Government. On the conclusion of the proceeding before the Gram Sabha determining the claims submitted before it, the MoEF shall take a final decision on the grant of Stage II clearance for the Bauxite Mining Project in the light of the decisions of the Gram Sabha within two months thereafter.

61. The Alumina Refinery Project is well advised to take steps to correct and rectify the alleged violations by it of the terms of the environmental clearance granted by MoEF. Needless to say that while taking the final decision, the MoEF shall take into consideration any corrective measures that might have been taken by the Alumina Refinery Project for rectifying the alleged violations of the terms of the environmental clearance granted in its favour by the MoEF.

62. The proceedings of the Gram Sabha shall be attended as an observer by a judicial officer of the rank of the District Judge, nominated by the Chief Justice of the High Court of Orissa who shall sign the minutes of the proceedings, certifying that the proceedings of the Gram Sabha took place independently and completely uninfluenced either by the Project proponents or the Central Government or the State Government.

63. The Writ Petition is disposed of with the above directions. Communicate this order to the Ministry of Tribal Affairs, Gram Sabhas of Kalahandi and Rayagada Districts of Orissa and the Chief Justice of High Court of Orissa, for further follow up action.

B.B.B. Writ Petition disposed of.

SHANKAR KISANRAO KHADE
v.
STATE OF MAHARASHTRA
(Criminal Appeal No. 362-363 of 2010)

APRIL 25, 2013

[K.S. RADHAKRISHNAN AND MADAN B. LOKUR, JJ.]

Penal Code, 1860 – ss. 302, 376, 366-A, 363 r/w. s. 34 – Rape and murder of minor and intellectually challenged girl – By the accused aged about 52 years – Conviction and death sentence by courts below – Held: In view of the evidence of the case, guilt of the accused proved beyond reasonable doubt – Conviction upheld – However, sentence of death reduced to life imprisonment – All other sentences awarded, directed to run consecutively.

Evidence – Circumstantial evidence – Standard of proof – Held: Circumstances relied upon, must be fully established and chain of the circumstances must be complete, so as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused.

Crime Against Children – Sexual assault – On minor children – Held: It is the duty of the State to protect the children from all forms of sexual exploitation and abuse – It is also duty of every citizen to report the act of assault or abuse on a minor child to the police or Juvenile Justice Board – While dealing with an issue of child abuse, approach of the court should be child centric – Proper and sufficient safeguards also need to be provided to persons who come forward to report such incidents – Supreme Court as a parens patriae, gave certain directions to the State authorities, to educational institutions, medical institutions and homes wherever children are housed, to media, hotels, lodge, clubs, studios for protection of children from sexual abuse – Further directed

that non-reporting of such crime would be a serious crime – Constitution of India, 1950 – Articles 15(3) and 39 – United Nations Convention on the Rights of Children – Articles 3(2) and 34 – Protection of Children from Sexual Offences Act, 2012.

Sentence/Sentencing:

Death sentence – Award of – Held: While awarding death sentence, the courts should apply 'crime test', 'criminal test' and 'rarest if rare test' – 'Crime test' has to be fully satisfied i.e. 100%, 'criminal test' i.e. no mitigating circumstance favouring the accused should be 0% - 'Rarest of rare test' should be 'society centric' and not 'judge centric'.

Death sentence – Award of – By treating pendency of criminal case against the accused as aggravating circumstance – Propriety of – Held: Pendency of criminal cases as such is not aggravating circumstance unless the accused is found guilty and convicted in those cases.

Death sentence – Rarest of Rare case principle – Applicability of – Held: ***Per Madan Lokur, J. –*** *The principle of rarest of rare cases is based on comparative evaluation of the case with other cases – Due to lack of empirical data for making two fold comparison, the application of the rarest of rare principle becomes extremely delicate, thereby making the awarding of death sentence subjective or judge-centric – While converting the death sentence to life imprisonment, the judiciary applies the rarest of rare principle and the executive applies the factors not known to the courts – Since the two important organs of the State treat the life convicts with different standards, it is imperative that courts lay down jurisprudential basis for awarding the death penalty – Death penalty and its execution should not become matter of uncertainty – Law Commission of India should examine whether death penalty is a deterrent punishment or is retributive justice or serves an*

incapacitative goal – Code of Criminal Procedure, 1973 – s. 432 – Constitution of India, 1950 – Arts. 72 and 161.

Death sentence – Commutation of – Need to record reasons for commuting the sentence – Held: ***Per Madan Lokur, J.*** *– Normal rule is awarding life sentence and reasons are required to be recorded while awarding death sentence – Therefore, courts not required to record reasons for commuting death sentence to life imprisonment.*

Appellant-accused No.1 and his wife accused No.2 were charged for the offences punishable u/ss. 363, 366-A, 376, 302, 201 r/w s. 34 IPC, for having, in furtherance of their common intention, kidnapped a minor girl with intellectual disability and then accused No.1 committed rape on her several times and committed her murder by strangulation. Trial court, relying on the witnesses and documentary evidence, convicted appellant-accused No.1 u/ss. 302, 376, 366-A, 363 r/w. s.34 IPC and sentenced him to death u/s. 302 IPC alongwith punishment for other offences. Accused No.2 was convicted for the offences punishable u/s.363A r/w. s. 34 IPC and was sentenced to 5 years RI. Accused No.1 preferred appeal before High Court, which was dismissed and his death sentence was confirmed. Hence the present appeal.

Dismissing the appeal, and converting the death sentence to life imprisonment, the Court

HELD:

Per K.S. Radhakrishnan, J.

1.1. The standard of proof required to convict a person on circumstantial evidence is that the circumstances relied upon in support of the conviction must be fully established and the chain of evidence

furnished by those circumstances must be complete so as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused. In view of the evidence, it was the accused who had committed the crime. The trial court as well as the High Court have correctly appreciated the evidence and documents adduced and found that the guilt of the accused is proved beyond reasonable doubt. [Para 18] [981-C-D]

1.2. Facts in the present case indicate that the deceased was aged about 11 years on the date of the incident. PW 10, PW 11, PW 12 and PW 13 stated how the girl was taken from the house of PW 13 and travelled to difference places. Another clinching evidence which conclusively proved that the girl was in the company of the accused and his wife, was the evidence of PW 8. He deposed that the accused along with his wife and a minor girl came to his house. The accused and his wife requested that they be permitted to stay during night which PW 8 agreed. During night PW 8 heard the girl weeping and became curious and when it was found that the accused was having sexual intercourse with the minor girl. PW 8 asked the accused and his wife to leave the place. Accused then took away the girl on his bicycle leaving his wife in the house of PW8. The above facts clearly establish that the girl was last seen with the accused. Evidence of PW8 discloses that the girl and the accused were seen together at a point of time in proximity with the time and date of the commission of the offence. Last seen theory was successfully established by the prosecution beyond any reasonable doubt. Evidence of PW 8 is very crucial and there is nothing to show that he had any enmity or grudge against the accused so as to implicate him. PW8 had no difficulty in identifying the accused since he knew them earlier. [Paras 12, 13, 14 and 15] [978-B, D, G-H; 979-B-E, H; 980-A-B]

1.3. Medical evidence clearly indicates that the cause of the death was asphyxia due to strangulation and though there was clear evidence of carnal intercourse, the accused was not charged for that offence. On a close scrutiny of the evidence, it can safely be concluded that the deceased girl was subjected to the acts of rape for more than one occasion. [Para 17] [980-H; 981-A-B]

2.1. The tests that the courts have to apply, while awarding death sentence, are "*crime test*", "*criminal test*" and the '*Rarest of Rare Test'*(R-R Test) and not "*balancing test*". To award death sentence, the "crime test" has to be fully satisfied, that is 100% and "criminal test" 0%, that is no Mitigating Circumstance favouring the accused. If there is any circumstance favouring the accused, like lack of intention to commit the crime, possibility of reformation, young age of the accused, not a menace to the society, no previous track record etc., the "criminal test" may favour the accused to avoid the capital punishment. Even, if both the tests are satisfied that is the aggravating circumstances to the fullest extent and no mitigating circumstances favouring the accused, still the courts have to apply finally the R-R Test. R-R Test depends upon the perception of the society that is "society centric" and not "Judge centric" that is, whether the society will approve the awarding of death sentence to certain types of crimes or not. While applying that test, the Court has to look into variety of factors like society's abhorrence, extreme indignation and antipathy to certain types of crimes like sexual assault and murder of minor girls intellectually challenged, suffering from physical disability, old and infirm women with those disabilities etc.. Courts award death sentence since situation demands so, due to constitutional compulsion, reflected by the will of the people and not the will of the judges. [Para 28] [997-C-H]

Sangeet and Ors. vs. State of Haryana **(2013) 2 SCC 452: 2012 (13) SCR 85 – relied on.**

2.2. in the present case, so far as enormity of the crime and execution thereof i.e. 'Crime Test' is concerned, the victim was aged 11 years, totally innocent, defenceless and having moderate intellectual disability. She was physically handicapped and was having moderate mental retardation. Evidence of PW 10, PW 12 and PW13 also corroborates the fact that she was a minor girl with moderate intellectual disability, an aggravating circumstance which goes against the accused. In view of the ghastly manner in which the crime was executed, the action of accused, not only was inhuman but barbaric. Ruthless crime of repeated actions of rape followed by murder of a young minor girl who was having moderate intellectual disability, shocks not only the judicial conscience, but the conscience of the society. Thus the crime test has been satisfied fully against the accused. [Paras 29 to 32] [998-A-D, E, F-G]

2.3. In the facts and circumstances of the case, criminal test has been fully satisfied against the accused. The accused was aged 52 years at the time of incident, a fatherly figure for the minor child. The accused was an able bodied person and was the father of two children. The accused repeatedly raped the girl for few days, ultimately strangulated her to death. Intellectually challenged minor girls will not be safe in our society if the accused is not given adequate punishment. Considering the age of the accused, a middle ager of 52 years, reformation or rehabilitation is practically ruled out. The only mitigating circumstance stated was that the accused is having two sons aged 26 and 27 years and are dependent on him, which is not a mitigating circumstance and the "criminal test" is fully satisfied

against the accused. Both the crime test and criminal test are, therefore, independently satisfied against the accused. [Para 33] [998-H; 999-A-D]

2.5. Even though all the tests namely, 'crime test', 'criminal test' and the 'R-R Test' have been satisfied in the present case, the extreme sentence of Death penalty is not warranted. One of the factors which influenced the High Court to award death sentence was the previous track record of the accused. The High Court was of the view that the pendency of criminal cases against the accused was a circumstance against the accused. The mere pendency of few criminal cases as such is not an aggravating circumstance to be taken note of while awarding death sentence unless the accused is found guilty and convicted in those cases. High Court was, therefore, in error in holding that those were relevant factors to be considered in awarding appropriate sentence. [Paras 35, 36 and 38] [999-G; 1000-C, D; 1001-B]

Mohd. Farooq Abdul Gafur vs. State of Maharashtra **(2010) 14 SCC 641: (2009) 12 SCR 1093 – relied on.**

Gurmugh Singh vs. State of Haryana **(2009) 15 SCC 635: 2009 (13) SCR 548 – referred to**

2.6. President of India on 3rd February, 2013 promulgated an ordinance titled "The Criminal Law (Amendment) Ordinance, 2013, further to amend the CPC, 1973, Indian Evidence Act, 1872 and the Indian Penal Code, 1860. By the ordinance, ss. 375, 376, 376-A, 376-B, 376-C and 376-D IPC have been substituted by new Sections. The word "rape" has been replaced by the word "sexual assault". Section 375 has also clarified that lack of physical resistance is immaterial for constituting an offence. A new s.376-A has been added a person, who commits an offence punishable under sub-section (1) and sub-section (2) of s. 376 and causes death shall be

punishable with rigorous imprisonment for a term which shall not be less than twenty years but which my extend to imprisonment for life, which shall mean the remainder of that person's natural life or with death. [Para 53] [1006-D-G]

2.7. Thus, considering the entire facts and circumstances of the case, the death sentence awarded to the accused is converted to rigorous imprisonment for life and all the sentences awarded, are directed run consecutively. [Para 54] [1007-B]

Bachan Singh vs. State of Punjab **(1980) 2 SCC 684;** *Machhi Singh and Ors. vs. State of Punjab* **(1983) 3 SCC 470: 1983 (3) SCR 413;** *Nathu Garam vs. State of Uttar Pradesh* **(1979) 3 SCC 366;** *Jumman Khan vs. State of Uttar Pradesh* **(1991) 1 SCC 752: 1990 (3) Suppl. SCR 398;** *Dhananjoy Chatterjee vs. State of West Bengal* **(1994) 2 SCC 220: 1994 (1) SCR 37;** *Laxman Naik vs. State of Orissa* **(1994) 3 SCC 381: 1994 (2) SCR 94;** *Kamta Tiwari vs. State of Madhya Pradesh* **(1996) 6 SCC 250: 1996 (5) Suppl. SCR 507;** *Molai and Anr. vs. State of M.P.* **(1999) 9 SCC 581: 1999 (4) Suppl. SCR 104;** *Bantu vs. State of Madhya Pradesh* **(2001) 9 SCC 615: 2001 (4) Suppl. SCR 298;** *Devender Pal Singh vs. Government of NCT of Delhi* **(2002) 5 SCC 234: 2002 (2) SCR 767;** *Shivaji @ Dadya Shankar Alhat vs. The State of Maharashtra* **(2008) 15 SCC 269: 2008 (13) SCR 81;** *Mohd. Mannan @ Abdul Mannan vs. State of Bihar* **(2011) 5 SCC 317: 2011 (5) SCR 518;** *Rajendra Pralhadrao Wasnik vs. State of Maharashtra* **(2012) 4 SCC 37: 2012 (2) SCR 225;** *Kumudi Lal vs. State of U.P.* **(1994) 4 SCC 108;** *Raju vs. State of Haryana* **(2001) 9 SCC 50: 2001 (3) SCR 409;** *Bantu alias Naresh Giri vs. State of M.P.* **(2001) 9 SCC 615: 2001 (4) Suppl. SCR 298;** *State of Maharashtra vs. Suresh* **(2000) 1 SCC 471: 1999 (5) Suppl. SCR 215;** *Amrit Singh vs. State of Punjab* **AIR 2007 SC 132: 2006 (8) Suppl. SCR 889;** *Rameshbhai Chandubhai Rathod vs.* *at*

(2011) 2 SCC 764: 2011 (1) SCR 829; *Surendra Pal Shivbalak vs. State of Gujarat* **(2005) 3 SCC 127: 2004 (4) Suppl. SCR 464;** *Amit vs. State of Maharashtra* **(2003) 8 SCC 93: 2003 (2) Suppl. SCR 285;** *Santosh Kumar Satishbhushan Bariyar vs. State of Maharashtra* **(2009) 6 SCC 498: 2009 (9) SCR 90 – referred to.**

3. The police after booking the accused for offence u/s. 377 IPC failed to charge sheet him, in spite of the fact the medical evidence had clearly established the commission of carnal intercourse on a minor girl with moderate intellectual disability. PW3, the doctor who conducted the post mortem, had clearly spelt out the facts of sodomy in his report as well as in his deposition. Prosecuting agency also failed in his duty to point out the same to the court that a case had been made out u/s. 377 IPC. [Para 39] [1001-C-D]

State of Uttar Pradesh vs. Satish **(2005) 3 SCC 114: 2005 (2) SCR 1132;** *Ramreddy Rajesh Khanna Reddy and Anr. v. State of Andhara Pradesh* **(2006) 10 SCC 172: 2006 (3) SCR 348;** *Kusuma Ankama Rao v. State of Andhra Pradesh* **(2008) 13 SCC 257: 2008 (10) SCR 89 – relied on.**

4.1. Non-reporting of sexual assault on minor children is a disturbing trend in our society, which has happened in the present case as well. PW-8 though was witness to the crime he did not report the said fact to the police, possibly due to the reason that there was no clear cut legislative provision casting an obligation on him to report to the J.J. Board or to the S.J.P.U. dealing with sexual offences towards children after having witnessed the incident. A duty cast on every citizen of country, if they witness or come to know any act of sexual assault or abuse on a minor child to report the same to the police or to the J.J. Board. They cannot keep mum so as to screen the culprit from legal punishment. [Paras 40 and 41] [1001-F, H; 1002-A-B]

4.2. Article 15(3) of the Constitution confers upon the State, powers to make special provision for children. Article 39 *inter alia* provides that the State shall, in particular, direct its policy towards securing that the tender age of children are not abused and their childhood and youth are protected against exploitation and they are given facilities to develop in a healthy man ner and in conditions of freedom and dignity. [Para 42] [1002-C-D]

4.3. The United Nations Convention on the Rights of Children, rectified by India, requires the State Parties to undertake all appropriate national, bilateral and multilateral measures to prevent the inducement or coercion of child to engage in any unlawful sexual activity, the exploitative use of children in prostitution or other unlawful sexual practices etc. Articles 3(2) and 34 of the Convention have placed a specific duty on the State to protect the child from all forms of sexual exploitation and abuse. [Para 43] [1002-D-F]

4.4. Parliament passed the Act titled The Protection of Children from Sexual Offences Act, 2012, which provides for reporting of sexual offences and the punishment for failure to report or record punishment for filing false complaint and/or false information. The Act also provides for a Justice Delivery System for child victims and few other provisions to safeguard the interest of children. [Para 48] [1003-G-H]

4.5. In large numbers of cases, children are abused by persons known to them or who have influence over them. Criminal Courts in this country are galore with cases where children are abused by adults addicted to alcohol, drugs, depression, marital discord etc. Preventive aspects have seldom been given importance or taken care of. Penal laws focus more on situations after commission of offences like violence

of the children. Witnesses of many such heinous crimes often keep mum taking shelter on factors like social stigma, community pressure, and difficulties of navigating the criminal justice system, total dependency on perpetrator emotionally and economically and so on. Sexual abuse can be in any form like sexually molesting or assaulting a child or allowing a child to be sexually molested or assaulted or encouraging, inducing or forcing the child to be used for the sexual gratification of another person, using a child or deliberately exposing a child to sexual activities or pornography or procuring or allowing a child to be procured for commercial exploitation and so on. [Para 50] [1004-H; 1005-A-C, D-E]

4.6. Whenever the Court deals with an issue of child abuse, it must apply the best interest child standard, since best interest of the child is paramount and not the interest of perpetrator of the crime. The approach must be child centric. Complaints received from any quarter, of course, have to be kept confidential without casting any stigma on the child and the family members. But, if the tormentor is the family member himself, he shall not go scot free. Proper and sufficient safeguards also have to be given to the persons who come forward to report such incidents to the police or to the Juvenile Justice Board. [Para 51] [1005-F-H]

4.7. The conduct of the police for not registering a case u/s. 377 IPC against the accused, the agony undergone by a child of 11 years with moderate intellectual disability, non-reporting of offence of rape committed on her, after having witnessed the incident either to the local police or to the J.J. Board, compels the Court to give certain directions for compliance in future which are necessary to protect the children from such sexual abuses. This Court as *parens patriae* has a duty to do so because Court has guardianship over minor

children, especially with regard to the children having intellectual disability, since they are suffering from legal disability. Prompt reporting of the crime in this case could have perhaps, saved the life of a minor child of moderate intellectual disability. [Para 52] [1006-A-C]

Mohd. Chaman vs. State (NCT of Delhi) **(2001) 2 SCC 28;** *Surendra Pal Shivbalakpal vs. State of Gujarat* **(2005) 3 SCC 127: 2004 (4) Suppl. SCR 464;** *State of Maharashtra vs. Mansingh* **(2005) 3 SCC 131;** *State of Rajasthan vs. Kashi Ram* **(2006) 12 SCC 254: 2006 (8) Suppl. SCR 501;** *Sushil Murmu vs. State of Jharkhand* **(2004) 2 SC 338: 2003 (6) Suppl. SCR 702;** *Shivu and Anr. vs. Registrar General, High Court of Karnataka and Anr.* **(2007) 4 SCC 713: 2007 (2) SCR 555;** *B.A. Umesh vs. Registrar General, High Court of Karnataka* **(2011) 3 SCC 85: 2011 (2) SCR 367;** *Mohd. Mannan Alias Abdul Mannan vs. State of Bihar* **(2011) 5 SCC 317: 2011 (5) SCR 518;** *Sebastian vs. State of Kerala* **(2010) 1 SCC 58;** *Aloke Nath Dutta and Ors. vs. State of West Bengal* **(2007) 12 SCC 230: 2006 (10) Suppl. SCR 662;** *Swamy Shraddananda Alias Murali Manohar Mishra vs. State of Karnataka* **(2007) 12 SCC 288: 2007 (7) SCR 616 – referred to.**

Per Madan B. Lokur, J. (Concurring)

1. In *Swamy *Shraddananda* ***(2)*** **case this Court noted that the expression "the rarest of rare cases" in ****Bachan Singh* **case indicated a relative category based on a comparison with other cases. The Court also expressed the view that there is hardly any field available for comparison. In other words, the Court highlighted the difficulty in the practical application of the "rarest of rare" principle since there is a lack of empirical data for making the two-fold comparison. It is this inability to make a comparative evaluation and clarity on the issue due to a lack of information and any detailed study that the application of the rarest of rare s**

extremely delicate thereby making the awarding of a death sentence subjective or judge-centric. [Paras 2 and 3] [1009-G; 1010-A-D]

****Bachan Singh vs. State of Punjab* (1980) 2 SCC 684 – followed.**

***Shraddananda (2) vs. State of Karnataka* (2008) 13 SCC 767: 2008 (11) SCR 93; *Sangeet and Ors. vs. State of Haryana* (2013) 2 SCC 452: 2012 (13) SCR 85 – referred to.**

2. The Constitution Bench in *Bachan Singh* case concluded that normally the punishment for murder is life imprisonment and a death penalty may be imposed only if there are special reasons for doing so. In other words, special reasons are required to be recorded not for awarding life imprisonment but for awarding death sentence. It was further held that the normal rule is of awarding life sentence but death sentence may be awarded only if the alternative of life sentence is unquestionably foreclosed. Therefore, this Court is not required to record reasons for commuting the death sentence to one of life imprisonment – it is only required to record reasons for either confirming the death sentence or awarding it. [Paras 5 to 7] [1011-B-C, E, H; 1012-A]

Bachan Singh vs. State of Punjab **(1980) 2 SCC 684 – followed.**

3.1. There are several reasons, cumulatively taken, for converting the death penalty to that of imprisonment for life. However, some of the factors that have had an influence in commutation include (1) the young age of the accused; (2) the possibility of reforming and rehabilitating the accused; (3) the accused had no prior criminal record; (4) the accused was not likely to be a menace or threat or danger to society or the community. A few other

reasons such as the accused having been acquitted by one of the Courts; the crime was not premeditated; the case was one of circumstantial evidence. Commutation has also been ordered since there was apparently no 'exceptional' feature warranting a death penalty and because the Trial Court had awarded life sentence but the High Court enhanced it to death. [Para 29] [1024-H; 1025-A-F]

Nirmal Singh vs. State of Haryana **(1999) 3 SCC 670: 1999 (2) SCR 1;** *Kumudi Lal vs. State of Uttar Pradesh* **(1999) 4 SCC 108;** *Akhtar vs. State of Uttar Pradesh* **(1999) 6 SCC 60;** *State of Maharashtra vs. Suresh* **(2000) 1 SCC 471;** *Mohd. Chaman vs. State (NCT of Delhi)* (2001) 2 SCC 28; *Raju vs. State of Haryana* **(2001) 9 SCC 50: 2001 (3) SCR 409;** *State of Maharashtra vs. Bharat Fakira Dhiwar* **(2002) 1 SCC 622: 2001 (5) Suppl. SCR 12;** *Amit vs. State of Maharashtra* **(2003) 8 SCC 93: 2003 (2) Suppl. SCR 285;** *Surendra Pal Shivbalakpal vs. State of Gujarat* **(2005) 3 SCC 127: 2004 (4) Suppl. SCR 464;** *State of Maharashtra vs. Mansingh* **(2005) 3 SCC 131;** *Rahul vs. State of Maharashtra* **(2005) 10 SCC 322;** *Amrit Singh vs. State of Punjab* **(2006) 12 SCC 79: 2006 (8) Suppl. SCR 889;** *Bishnu Prasad Sinha vs. State of Assam* **(2007) 11 SCC 467: 2007 (1) SCR 916;** *Santosh Kumar Singh vs. State* **(2010) 9 SCC 747: 2010 (13) SCR 901;** *Rameshbhai Chandubhai Rathod (2) vs. State of Gujarat* **(2011) 2 SCC 764: 2011 (1) SCR 829;** *Haresh Mohandas Rajput vs. State of Maharashtra* **(2011) 12 SCC 56: 2011 (14) SCR 921;** *Amit vs. State of Uttar Pradesh* **(2012) 4 SCC 107: 2012 (1) SCR 1009 – referred to.**

3.2. The principal reasons for confirming the death penalty include (1) the cruel, diabolic, brutal, depraved and gruesome nature of the crime; (2) the crime results in public abhorrence, shocks the judicial conscience or the conscience of society or the community; (3) the reform or rehabilitation of the convi

he would be a menace to society; (4) the victims were defenceless; (5) the crime was either unprovoked or that it was premeditated. The antecedents or the prior history of the convict was taken into consideration. [Para 45] [1037-D-H; 1038-A]

Jumman Khan vs. State of Uttar Pradesh **(1991) 1 SCC 752: 1990 (3) Suppl. SCR 398;** *Dhananjoy Chatterjee vs. State of West Bengal* **(1994) 2 SCC 220:1994 (1) SCR 37;** *Laxman Naik vs. State of Orissa* **(1994) 3 SCC 381: 1994 (2) SCR 94;** *Kamta Tiwari vs. State of Madhya Pradesh* **(1996) 6 SCC 250: 1996 (5) Suppl. SCR 507;** *Nirmal Singh vs. State of Haryana* **(1999) 3 SCC 670: 1999 (2) SCR 1;** *Jai Kumar vs. State of Madhya Pradesh* **(1999) 5 SCC 1: 1999 (3) SCR 426;** *Molai & Anr. vs. State of M.P.* **(1999) 9 SCC 581: 1999 (4) Suppl. SCR 104;** *State of Uttar Pradesh v. Satish* **(2005) 3 SCC 114: 2005 (2) SCR 1132;** *Shivu and Anr. vs. Registrar General, High Court of Karnataka* **(2007) 4 SCC 713: 2007 (2) SCR 555;** *Bantu vs. State of Uttar Pradesh* **(2008) 11 SCC 113: 2008 (11) SCR 184;** *Shivaji vs. State of Maharashtra* **(2008) 15 SCC 269: 2008 (13) SCR 81;** *Ankush Maruti Shinde vs. State of Maharashtra* **(2009) 6 SCC 667: 2009 (7) SCR 182;** *B.A. Umesh vs. Registrar General, High Court of Karnataka* **(2011) 3 SCC 85: 2011 (2) SCR 367;** *Mohd. Mannan vs. State of Bihar* **(2011) 5 SCC 317: 2011 (5) SCR 518;** *Rajendra Pralhadrao Wasnik vs. State of Maharashtra* **(2012) 4 SCC 37: 2012 (2) SCR 225;** *State of Maharashtra v. Bharat Fakira Dhiwar* **(2002) 1 SCC 622: 2001 (5) Suppl. SCR 12 – referred to.**

3.3. However, there are cases where the factors taken into consideration for commuting the death penalty were given a go-bye in cases where the death penalty was confirmed. The young age of the accused was not taken into consideration or held irrelevant. The possibility of reformation or rehabilitation was ruled out, without any expert evidence. Even though the crime was not

premeditated, the death penalty was confirmed. Circumstantial evidence was held not to be a 'mitigating' factor. [Para 46] [1038-B-F]

Dhananjoy Chatterjee vs. State of West Bengal **(1994) 2 SCC 220: 1994 (1) SCR 37;** *Rameshbhai Chandubhai Rathod (2) vs. State of Gujarat* **(2011) 2 SCC 764: 2011 (1) SCR 829;** *Amit vs. State of Maharashtra* **(2003) 8 SCC 93: 2003 (2) Suppl. SCR 285;** *Rahul vs. State of Maharashtra* **(2005) 10 SCC 322;** *Amrit Singh vs. State of Punjab* **(2006) 12 SCC 79: 2006 (8) Suppl. SCR 889;** *Santosh Kumar Satishbhushan Bariyar vs. State of Maharashtra* **(2009) 6 SCC 498: 2009 (9) SCR 90;** *Amit vs. State of Uttar Pradesh* **(2012) 4 SCC 107: 2012 (1) SCR 1009;** *Jai Kumar vs. State of Madhya Pradesh* **(1999) 5 SCC 1: 1999 (3) SCR 426;** *B.A. Umesh vs. Registrar General, High Court of Karnataka* **(2011) 3 SCC 85: 2011 (2) SCR 367;** *Mohd. Mannan Alias Abdul Mannan vs. State of Bihar* **(2011) 5 SCC 317: 2011 (5) SCR 518;***Nirmal Singh vs. State of Haryana* **(1999) 3 SCC 670: 1999 (2) SCR 1;** *Mohd.Chaman vs. State (NCT of Delhi)* **(2001) 2 SCC 28;** *Raju vs. State of Haryana* **(2001) 9 SCC 50: 2001 (3) SCR 409;** *Bantu alias Naresh Giri vs. State of M.P.* **(2001) 9 SCC 615: 2001 (4) Suppl. SCR 298;** *Surendra Pal Shivbalak vs. State of Gujarat* **(2005) 3 SCC 127: 2004 (4) Suppl. SCR 464;** *State of Uttar Pradesh vs. Satish* **(2005) 3 SCC 114: 2005 (2) SCR 1132;** *State of Tamil Nadu vs. Suresh* **(1998) 2 SCC 372: 1997 (6) Suppl. SCR 203;** *Ankush Maruti Shinde vs. State of Maharashtra* **(2009) 6 SCC 667: 2009 (7) SCR 182 – referred to.**

4. *Bachan Singh* case is more than clear that the crime is important (cruel, diabolic, brutal, depraved and gruesome) but the criminal is also important and this, has been overlooked in several cases in the past. It is this individualized sentencing that has made this Court wary, in the recent past, of imposing death penalty and instead substituting it for fixed term sentences exceeding 14 years (the term of 14 years or 20 yea

equated with life imprisonment) or awarding consecutive sentences. [Para 47] [1038-G-H; 1039-A-B]

5. There have been several cases where life sentence has been awarded by this Court with a minimum fixed term of incarceration. This Court has been seriously reconsidering, though not in a systemic manner, awarding life sentence as an alternative to death penalty by applying (though not necessarily mentioning) the "unquestionably foreclosed" formula laid down in *Bachan Singh* case. The issue as regards the interpretation of "life sentence" – whether it means imprisonment for only 14 years or 20 years or it mean for the life of the convict has been laid to rest. It has been unequivocally laid down that a sentence of imprisonment for life means imprisonment for the rest of the normal life of the convict. The convict is not entitled to any remission in a case of sentence of life imprisonment, as is commonly believed. However, if the convict is sought to be released before the expiry of his life, it can only be by following the procedure laid down in Section 432 of the Code of Criminal Procedure or by the Governor exercising power under Article 161 of the Constitution or by the President exercising power under Article 72 of the Constitution. There is no other method or procedure. [Paras 48, 65 and 66] [1039-C; 1048-C-G]

Aloke Nath Dutta vs. State of West Bengal **(2007) 12 SCC 230: 2006 (10) Suppl. SCR 662;** *Subhash Chander vs. Krishan Lal* **(2001) 4 SCC 458: 2001 (2) SCR 864;** *Shri Bhagwan vs. State of Rajasthan* **(2001) 6 SCC 296: 2001 (3) SCR 656;** *Prakash Dhawal Khairnar (Patil)* vs. *State of Maharashtra* **(2002) 2 SCC 35: 2001 (5) Suppl. SCR 612;** *Ram Anup Singh* vs. *State of Bihar* **(2002) 6 SCC 686: 2002 (1) SCR 586;** *Mohd. Munna* vs. *Union of India* **(2005) 7 SCC 417: 2005 (3) Suppl. SCR 233;** *Jayawant Dattatraya Suryarao vs. State of Maharashtra* **(2001) 10 SCC 109: 2001 (5) Suppl. SCR 54;** *Nazir Khan vs. State of Delhi* **(2003) 8**

SCC 461: 2003 (2) Suppl. SCR 884; *Sebastian vs. State of Kerala* **(2010) 1 SCC 58;** *Ramnaresh vs. State of Chhattisgarh* **(2012) 4 SCC 257: 2012 (3) SCR 630;** *Neel Kumar vs. State of Haryana* **(2012) 5 SCC 766: 2012 (5) SCR 696;** *Sandeep vs. State of U.P.* **(2012) 6 SCC 107: 2012 (5) SCR 952;** *Brajendrasingh vs. State of Madhya Pradesh* **(2012) 4 SCC 289: 2012 (3) SCR 599;** *State of Uttar Pradesh vs. Sanjay Kumar* **(2012) 8 SCC 537: 2012 (7) SCR 359;** *Gurvail Singh vs. State of Punjab* **(2013) 2 SCC 713;** *Ravindra Trimbak Chouthmal vs. State of Maharashtra* **(1996) 4 SCC 148: 1996 (2) SCR 1009;** *Ronny vs. State of Maharashtra* **(1998) 3 SCC 625: 1998 (2) SCR 162;** *Sandesh vs. State of Maharashtra* **(2013) 2 SCC 479;** *Sanaullah Khan vs. State of Bihar* **MANU/SC/0165/2013 – referred to.**

6. The two important organs of the State that is the Judiciary and the Executive are treating the life of convicts convicted of an offence punishable with death with different standards. While the standard applied by the Judiciary is that of the rarest of rare principle (however subjective or judge-centric it may be in its application) the standard applied by the Executive in granting commutation is not known. Therefore, it is imperative, in this regard, that the Courts lay down a jurisprudential basis for awarding the death penalty and when the alternative is unquestionably foreclosed so that the prevailing uncertainty is avoided. Death penalty and its execution should not become a matter of uncertainty nor should converting a death sentence into imprisonment for life become a matter of chance. The Law Commission of India can resolve the issue by examining whether death penalty is a deterrent punishment or is retributive justice or serves an incapacitative goal. It could happen (and might well have happened) that in a given case the Sessions Judge, the High Court and the Supreme Court are unanimous in their view in award y

to a convict, any other option being unquestionably foreclosed, but the Executive has taken a diametrically opposite opinion and has commuted the death penalty. This may also need to be considered by the Law Commission of India. [Paras 71 and 72] [1052-E-H; 1053-A-C]

Case Law Reference:

In the Judgment of K.S. Radhakrishnan, J.:

(2001) 2 SCC 28	referred to	Para 9
2004 (4) Suppl. SCR 464	referred to	Para 9
(2005) 3 SCC 131	referred to	Para 9
2006 (8) Suppl. SCR 501	referred to	Para 9
2009 (12) SCR 1093	referred to	Para 10
2003 (6) Suppl. SCR 702	referred to	Para 10
2007 (2) SCR 555	referred to	Para 10
2011 (2) SCR 367	referred to	Para 10
2011 (5) SCR 518	referred to	Para 10
(2010) 1 SCC 58	referred to	Para 10
2006 (10) Suppl. SCR 662	referred to	Para 10
2007 (7) SCR 616	referred to	Para 10
2005 (2) SCR 1132	relied on	Para 14
2006 (3) SCR 348	relied on	Para 14
2008 (10) SCR 89	relied on	Para 14
(1980) 2 SCC 684	referred to	Para 20
1983 (3) SCR 413	referred to	Para 21

(1979) 3 SCC 366	referred to	Para 22(1)
1990 (3) Suppl. SCR 398	referred to	Para 22(2)
1994 (1) SCR 37	referred to	Para 22(3)
1994 (2) SCR 94	referred to	Para 22(4)
1996 (5) Suppl. SCR 507	referred to	Para 22(5)
1999 (4) Suppl. SCR 104	referred to	Para 22(6)
2008 (11) SCR 184	referred to	Para 22(7)
2008 (13) SCR 81	referred to	Para 22(8)
2012 (2) SCR 225	referred to	Para 22(9)
2011 (5) SCR 518	referred to	Para 22(10)
1994) 4 SCC 108	referred to	Para 23(1)
2001 (3) SCR 409	referred to	Para 23(2)
2001 (4) Suppl. SCR 298	referred to	Para 23(3)
1999 (5) Suppl. SCR 215	referred to	Para 23(4)
2006 (8) Suppl. SCR 889	referred to	Para 23(5)
2011 (1) SCR 829	referred to	Para 23(6)
2004 (4) Suppl. SCR 464	referred to	Para 23(7)
2003 (2) Suppl. SCR 285	referred to	Para 23(8)
2009 (9) SCR 90	referred to	Para 26
2012 (13) SCR 85	relied on	Para 27
2009 (13) SCR 548	referred to	Para 37
2009 (12) SCR 1093	relied on	Para 37

In the Judgment of Madan B. Lokur, J.:

2008 (11) SCR 93	refer	

(1980) 2 SCC 684	followed	Para 2, 5
2012 (13) SCR 85	referred to	Para 2
1999 (2) SCR 1	referred to	Para 10, 29
(1999) 4 SCC 108	referred to	Para 11
(1999) 6 SCC 60	referred to	Para 12
1999 (5) Suppl. SCR 215	referred to	Para 13
(2001) 2 SCC 28	referred to	Para 14
2001 (3) SCR 409	referred to	Para 15
2001 (4) Suppl. SCR 298	referred to	Para 16, 29
2001 (5) Suppl. SCR 12	referred to	Para 17
2003 (2) Suppl. SCR 285	referred to	Para 18, 29
2004 (4) Suppl. SCR 464	referred to	Para 19
2005 (3) SCC 131	referred to	Para 20
(2005) 10 SCC 322	referred to	Para 21, 29
2006 (8) Suppl. SCR 889	referred to	Para 22, 29
2007 (1) SCR 916	referred to	Para 23
2010 (13) SCR 901	referred to	Para 24
2011 (1) SCR 829	referred to	Para 25, 29
2011 (14) SCR 921	referred to	Para 27, 29
2012 (1) SCR 1009	referred to	Para 28
1997 (6) Suppl. SCR 203	referred to	Para 29
1994 (1) SCR 37	referred to	Para 29
2009 (9) SCR 90	referred to	Para 29
1999 (3) SCR 426	referred to	Para 29

2011 (2) SCR 367	referred to	Para 29
2011 (5) SCR 518	referred to	Para 29
(2001) 2 SCC 28	referred to	Para 29
2001 (3) SCR 409	referred to	Para 29
2004 (4) Suppl. SCR 464	referred to	Para 29
2005 (2) SCR 1132	referred to	Para 29
1997 (6) Suppl. SCR 203	referred to	Para 29
2009 (7) SCR 182	referred to	Para 29
2001 (5) Suppl. SCR 12	referred to	Para 29
1990 (3) Suppl. SCR 398	referred to	Para 30
1994 (1) SCR 37	referred to	Para 31
1994 (2) SCR 94	referred to	Para 32
1996 (5) Suppl. SCR 507	referred to	Para 33
1999 (2) SCR 1	referred to	Para 34
1999 (3) SCR 426	referred to	Para 35
1999 (4) Suppl. SCR 104	referred to	Para 36
2005 (2) SCR 1132	referred to	Para 37
2007 (2) SCR 555	referred to	Para 38
2008 (11) SCR 184	referred to	Para 39
2008 (13) SCR 81	referred to	Para 40
2009 (7) SCR 182	referred to	Para 41
2011 (2) SCR 367	referred to	Para 42
2011 (5) SCR 518	referred to	Para 43
2012 (2) SCR 225	refer	

2009 (9) SCR 90	**referred to**	**Para 47**
2006 (10) Suppl. SCR 662	**referred to**	**Para 48**
2001 (2) SCR 864	**referred to**	**Para 49**
2001 (3) SCR 656	**referred to**	**Para 49**
2001 (5) Suppl. SCR 612	**referred to**	**Para 49**
2002 (1) SCR 586	**referred to**	**Para 49**
2005 (3) Suppl. SCR 233	**referred to**	**Para 51**
2001 (5) Suppl. SCR 54	**referred to**	**Para 52**
2003 (2) Suppl. SCR 884	**referred to**	**Para 52**
(2010) 1 SCC 58	**referred to**	**Para 54**
2012 (3) SCR 630	**referred to**	**Para 55**
2012 (5) SCR 696	**referred to**	**Para 56**
2012 (5) SCR 952	**referred to**	**Para 57**
2012 (3) SCR 599	**referred to**	**Para 58**
2012 (7) SCR 359	**referred to**	**Para 59**
(2013) 2 SCC 713	**referred to**	**Para 60**
1996 (2) SCR 1009	**referred to**	**Para 61**
1998 (2) SCR 162	**referred to**	**Para 62**
(2013) 2 SCC 479	**referred to**	**Para 63**
MANU/SC/0165/2013	**referred to**	**Para 64**

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No. 362-363 of 2010.

From the Judgment & Order dated 27.06.2008 of the High Court of Judicature at Bombay Bench at Nagpur in Criminal Appeal No. 512 of 2007.

Ajay Kumar Talesara for the Appellant.

Aprajita Singh (for Asha Gopalan Nair) for the Respondent.

The Judgments of the Court was delivered by

K.S. RADHAKRISHNAN, J. 1. We are in these appeals concerned with a gruesome murder of a minor girl with intellectual disability (moderate) after subjecting her to series of acts of rape by a middle ager, who has now been sentenced to death by the High Court of Bombay.

2. Appellant, Shankar Kisanrao Khade (Accused No.1) and his present wife Mala Shankar Khade (Accused No.2) were charge sheeted, for the offences punishable under Sections 363, 366-A, 376, 302, 201 read with Section 34 IPC, for having, in furtherance of their common intention, kidnapped a minor girl and accused No.1 had committed rape on her several times and committed the murder by strangulation. The Additional Sessions Court in Sessions Case No. 165/2006 convicted the first accused and sentenced him to death under Section 302 IPC, subject to confirmation by the High Court and was also awarded imprisonment for life and to pay a fine of Rs.1,000/- in default to suffer rigorous imprisonment (for short RI) for six months for offences under Section 376 IPC, further seven years RI and to pay a fine of Rs.500/- in default to suffer RI for three months under Section 366-A IPC and five years RI and to pay a fine of Rs.500/- in default to suffer RI for one month for offences punishable under Section 363 IPC, read with Section 34 IPC. The second accused - his wife, was convicted for the offences punishable under Section 363A read with Section 34 IPC and sentenced to suffer RI for five years and to pay a fine of Rs.500/- in default and to suffer RI for one month. The Accused No.2 had already suffered the punishment, hence did not file any appeal against the order of the sessions judge. The accused preferred Criminal Appeal No.512 of 2007 before the High Court and the Court heard the appeal along with Confirmation Case No.1 of 2007. The

the appeal and the reference made by the Sessions Court was accepted and the death sentence was confirmed. Appellant has preferred these two appeals against those orders.

3. The facts giving rise to these appeals are as follows:

The deceased, a minor girl, aged about 11 years was living with her grandmother (PW-13) at Gunwant Khandare in Gunwant Maharaj Sansthan at Lakhnwadi. On 20.7.2006, in the evening, both the accused came to Sansthan and stayed there. On seeing the minor girl the accused and his wife offered mango sweets. On the morning of 21.07.2006 also the accused offered her sweets and attracted her attention. At about 12.00 O'clock on the same day, both the accused and his wife induced her to come with them and the girl accompanied them. PW-13, the grandmother of the girl child was informed by some of the ladies residing in the neighbourhood that they saw the girl being taken away by the first accused towards the place called Puja – Dhuni. PW-13 met village Madhan and informed him that fact and also to her son, Ramesh (PW-12), but the girl could not be traced. Facts revealed that the girl was taken by the accused persons to a weekly market at Paratwada and stayed there during night and the first accused had committed the act of rape on her and which was repeated at Gayatri *Mandir* at Paratwada where they had stayed on 22.7.2006.

4. The accused persons then on 23.07.2006 took the girl to the house of one Ravindra Lavate (PW-8) whom they know earlier. PW8 and the son of the accused were friends. On the date of incident, they stayed there. The accused and the girl were sleeping in the verandah when PW-8 heard the cries of the minor girl and found the accused committing rape on her which was objected to by him and his wife. The accused then took the girl on a bicycle in the field bearing No.62 of Shantaram Jawarkar at about 9.00 pm. and after committing rape strangulated and murdered her. Vinod Jaswarkar (PW 14) and Sanjay (PW 9) found the dead body of the minor girl from the field. PW 9 approached the police station Asegaon and

submitted Ext.48 report about the incident. The Investigating Officer A.P.I. Baviskar (PW18) went to the place of occurrence with the panchas and staff and noticed that the minor girl was raped and murdered. The spot panchnama was prepared in the presence of the staff. Articles found at the spot were seized and Ext.16 inquest panchnama was also prepared and dead body was sent for the post mortem. Dr. Mohan Kewade (PW 3) conducted the post-mortem and submitted the report Ext. 27 dated 25.07.2006.

5. Ramesh (PW12) informed Asegaon police station that his sister's daughter was missing since 21.7.2006 and her dead body was identified by him. PW3, who conducted the post mortem, came to the conclusion that the deceased was raped and murdered and he had also opined that the deceased was subjected to carnal intercourse and the death was due to asphyxia due to strangulation. Devsingh Baviskar, API (PW18) recorded the statement of several witnesses and arrested the accused and his wife on 2.8.2006 and the charge sheet was filed before the Judge, First Class, Chandur Bazar who later committed the case to the Court of Sessions.

6. The prosecution examined 18 witnesses and relied upon several documents including the experts evidence. No witness was examined on the side of the defence. The Sessions Court found both the accused guilty and convicted the 1st accused and sentenced him with death penalty which was confirmed. We are in these appeals primarily concerned with the question whether the death sentence awarded to Shankar Kisanrao Khade is sustainable or not and whether the case falls under the category of rarest of rare cases warranting capital punishment.

7. We heard Shri. A.K. Talesera, learned counsel appearing for the accused and Ms.Aprajita Singh, learned counsel appearing for the State at length. Shri Talesera submitted that the prosecution had failed to prove beyond reasonable doubt that it was the accus[illegible]d

the offence of rape and murder of the deceased girl. He submitted that PW 8 is not a natural witness and his evidence inspires no confidence. Further, it was pointed out that there was delay in recording the statement of PW8 by the Police and he was a planted witness. Learned counsel also pointed out that if PW 8 had witnessed the accused committing the crime, he would have informed the police at the earliest point of time. Learned counsel also pointed out that even though the wife of PW 8 was also present in the house, she was not examined as a witness. Further it was pointed out that, the test identification parade conducted also suffered from serious infirmities. Further it is also pointed out that there were material inconsistencies, contradictions and omissions which had seriously affected the prosecution version and that the important links in the chain of circumstances that it was the accused who had committed the crime were missing. Learned counsel submitted that in any view of the matter, the case would not fall under the rarest of rare category warranting capital punishment.

8. Ms. Aparjita Singh, learned counsel appearing for the respondent-State submitted that the prosecution has succeeded in proving the guilt of the accused beyond reasonable doubt. Learned counsel submitted that PW 8 is a natural witness and he had no motive or any enmity with the accused so as to rope him in the crime. On the other hand his son and accused's son were friends. Learned counsel submitted that the evidence adduced in this case proved beyond doubt that it was the accused who had kidnapped the minor girl and committed rape on her and later strangulated her to death. Learned counsel also submitted that the medical evidence clearly establishes that over and above the commission of the offence of rape, the accused had committed the offence of sodomy as well. Further it was pointed out that the accused was aged about 52 years and had committed the ghastly crime of rape on the girl aged between 11 to 12 years having moderate intellectual disability. Facts, according to the counsel, clearly indicate that the deceased was subjected to

rape for more than one occasion and later strangulated her to death. Learned counsel placed reliance on an affidavit and submitted that the accused had previous history of committing various crimes. Reference was made to Crime No.18 of 2006, charged against the accused for committing the offence under Sections 457 and 380 of IPC, which was registered at Asegaon police station. Reference was also made to Criminal Case No.264 of 2006 pending before the Judicial Magistrate, First Class, Chandurbazar. Further it was also pointed that the accused was arrayed as accused in Sessions Trial No.52 of 2007 for offences punishable under Section 302 IPC for committing the murder of one lady.

9. Counsel appearing on either side placed reliance on a number of judgments of this Court to bring home their respective contentions. Learned counsel appearing for the accused placed reliance on the judgments of this Court in *Bachan Singh v. State of Punjab* (1980) 2 SCC 684, *Mohd. Chaman vs. State (NCT of Delhi)* (2001) 2 SCC 28, *Surendra Pal Shivbalakpal vs. State of Gujarat* (2005) 3 SCC 127, *State of Maharashtra* v. *Mansingh* (2005) 3 SCC 131 and *State of Rajasthan v. Kashi Ram* (2006) 12 SCC 254.

10. Learned counsel appearing for the prosecution placed reliance on the judgments of this Court in *Gurmukh Singh v. State of Haryana* (2009) 15 SCC 635, *Mohd. Farooq Abdul Gafur and others. v. State of Maharashtra* (2010) 14 SCC 641, *Sushil Murmu v. State of Jharkhand* (2004) 2 SC 338, *Shivu and another v. Registrar General, High Court of Karnataka and another* (2007) 4 SCC 713, *B.A. Umesh v. Registrar General, High Court of Karnataka* (2011) 3 SCC 85, *Mohd. Mannan Alias Abdul Mannan v. State of Bihar* (2011) 5 SCC 317, *Sebastian v. State of Kerala* (2010) 1 SCC 58, *Aloke Nath Dutta and others v. State of West Bengal (*2007) 12 SCC 230 and *Swamy Shraddananda Alias Murali Manohar Mishra v. State of Karnataka (*2007) 12 SCC 288.

11. I have critically and minutely gon e

adduced by the prosecution as well as by the defence and examined whether the prosecution had succeeded in establishing the following circumstances to prove the charges levelled against the accused.

(i) The accused went to Gunwant Maharaj Sansthan at Lakhanwadi on 20.07.2006 and stayed there for one day along with accused No.2 and on 21.7.2006 took the deceased to Dhuni.

(ii) On 22.7.2006 accused took deceased to Gayatri *Mandir*.

(iii) On 23.7.2006 the accused along with his wife and deceased went to the house of Ravindra Lavate (P.W.8) and stayed there.

(iv) On 23.7.2006 at night the accused committed rape on deceased.

(v) On 23.7.2006 during the night time the accused left on the bicycle with the deceased and on 24.7.2006 he came back to the house of PW8 to take his wife accused No.2.

(vi) False explanation given by accused to PW8 that he had dropped the deceased at Lakhanwadi.

(vii) On 24.7.2006 dead body of the deceased was found in the field of the father of Sanjay Jawarkar (P.W.9).

(viii) Death of deceased was homicidal and that deceased was subjected to sexual intercourse on more than one occasion.

(ix) Deceased was suffering from moderate intellectual disability.

(x) Identification of the accused by the witnesses.

(xi) Spot Punchanama and discovery of articles at the instance of the accused."

12. Facts in this case indicate that the deceased was aged about 11 years on the date of the incident and was studying in the 4th standard. On the age of the girl, there was some dispute. Certificate Ext.94 issued by the Handicap Board stated the age of girl was 9 years on 6.12.2005. Post-mortem report Ext.27 mentions her age as 14 years and the opinion of the Medical Officer Ext. 29 shows that the approximate age of the deceased was about 14 years. Ramesh PW 12, the maternal uncle stated that her age was between 10-12 years. PW 13 - grandmother of the deceased stated her age was about 10 years. Taking into consideration all the versions of the witnesses and the documents produced, it is safe to conclude that her age was around 11 years.

13. PW 10, PW 11, PW 12 and PW 13 stated how the girl was taken from the house of PW 13 and travelled to difference places, including the *mandir*. PW 10 who was present at Gunwant Maharaj Sansthan had deposed that on 20.7.2006 at about 7.00 pm accused and his wife came to *mandir* and stayed in the hall of the *mandir* and one girl aged about 11 years was also with them. PW 11, who was conducting the hotel business opposite to the *mandir*, stated that on 20.7.2006 at about 7.00pm one man and woman had come to his hotel and on the next day at about 1.00 pm they came with a girl aged about 10-11 years and went to the *mandir* and he identified both the accused persons in the court. P.W. 12, the uncle of the deceased stated that on 23.7.2006 his mother had come to his house and informed that the deceased was missing. Further, a watchman of the *mandir* PW 16 had also deposed that he saw a lady and a man with the girl aged about 12 years coming come to the *mandir*. Another clinching evidence which conclusively proved that the girl was in the company of the accused and his wife was the evidence of PW 8. PW 8 deposed that his son and

accused, were friends and he used to go to the house of the accused. PW 8 deposed that, on 19.6.2006, the accused and his wife had stayed in his house stating that they had come to meet one of the relatives who had been admitted in a nearby hospital. On 23.7.2006, again the accused along with his wife came to the house of PW 8 on a bicycle along with a minor girl who was wearing a white shirt and green skirt. The accused and his wife requested that they be permitted to stay during night which PW 8 agreed. The accused was sleeping in the verandah during night along with the girl. PW 8 heard the girl weeping and became curious and when it was found that the accused was having sexual intercourse with the minor girl PW 8 asked the accused and his wife to leave the place. Accused then took away the girl on his bicycle leaving his wife in the house of PW8.

14. The above facts would clearly establish that the girl was last seen with the accused. PW8 evidence discloses that the girl and the accused were seen together at a point of time in proximity with the time and date of the commission of the offence. Last seen theory was successfully established by the prosecution beyond any reasonable doubt. This Court in *State of U.P. v. Satish* (2005) 3 SCC 114 has held that the last seen theory comes into play where the time gap between the point of time when the accused and the deceased were seen last alive and when the deceased is found is so small that possibility of any person other than the accused being the author of the crime is impossible. This test, in my view, is fully satisfied in the instant case. Reference may also be made to the judgment of this Court in *Ramreddy Rajesh Khanna Reddy and Another v. State of Andhara Pradesh* (2006) 10 SCC 172, *Kusuma Ankama Rao v. State of Andhra Pradesh* (2008) 13 SCC 257 and *Manivel and Others v. State of Tamil Nadu.*

15. PW8 stated on the next day of the incident that the accused came alone to his house without the girl and left the house along with his wife. Evidence of PW 8 is very crucial and

there is nothing to show that he had any enmity or grudge against the accused so as to implicate him. PW8 had no difficulty in identifying the accused since he knew them earlier.

16. Further, apart from the evidence of witnesses discussed above, another crucial evidence is the medical evidence. PW 3, Dr. Mohan Kewade, who had conducted the post-mortem on the dead body of the deceased, noticed the following external injuries:

(i) Labia Majora and Minora swelled, tear of size two inch x ½ inch over interior part of labia Majora, extending to vagina present with clots of blood.

(ii) Anal tear of size 1 inch x ½ inch posteriorly present swelling of anal opening and dilation of anal opening about 2 inch ween.

(iii) Bruises of size 3 cm x 2 cm over both side of neck present about three in number on each side.

(iv) Bruise of size 2 cm x 2 cm over medial surface thigh and thigh folds present.

(v) Perianal bruises of size 1 cm x 1cm about three in number present, probable age of injuries are about 2 to 3 days.

On internal examination he found following injuries:

(i) Injuries over larynx Trachea and bronchi; Evidence of fracture of upper two tracheal rings and larynx present.

(ii) Organs of generation.

(iii) Tear of cervix about 3 cm interiorly present with echoymetic."

17. Medical evidence clearly indic of

the death was asphyxia due to strangulation and though there was clear evidence of carnal intercourse, the accused was not charged for that offence. On a close scrutiny of the evidence, it can safely be concluded that the deceased girl was subjected to the acts of rape for more than one occasion.

18. I have extensively, critically and minutely gone through the evidence adduced in this case and I have no doubt in mind that it was the accused who had committed the crime. The standard of proof required to convict a person on circumstantial evidence is well established by a series of judgments of this Court. The circumstances relied upon in support of the conviction must be fully established and the chain of evidence furnished by those circumstances must be complete so as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused. The Sessions Court as well as the High Court has correctly appreciated the evidence and documents adduced in this case and found that the guilt of the accused is proved beyond reasonable doubt with which we fully concur.

19. The only question that now remains to be decided is whether this case falls in the category of rarest of rare cases, justifying capital punishment. This Court in several Judgments has awarded capital punishment, where rape and murder have been committed on a minor girl, after striking a balance between the aggravating and mitigating circumstances. Several other factors like the young age of the accused, the possibility of reformation, lack of intention to murder consequent to rape etc. have also gone into the judicial mind.

20. In *Bachan Singh* (supra), while determining the constitutional validity of the death penalty, this Court also examined the sentencing procedure embodied in sub-section (3) of Section 354 Cr.P.C. and held as follows:

> "While considering the question of sentence to be imposed for the offence of murder under Section 302 of the Penal Code, the court must have regard to every relevant circumstance relating to the crime as well as the criminal. If the court finds, but not otherwise, that the offence is of an exceptionally depraved and heinous character and constitutes, on account of its design and the manner of its execution, a source of grave danger to the society at large, the court may impose the death sentence."

21. In *Machhi Singh and others v. State of Punjab* (1983) 3 SCC 470 this Court held that case fell in the category of rarest of rare cases calling for capital punishment since the victim of murder was an innocent child who could not have or had not provided even an excuse, much less a provocation for murder or the murder was committed in an extremely brutal, grotesque, diabolical, revolting or dastardly manner which arose intense and extreme indignation of the community. The motivation of the perpetrator, the vulnerability of the victim, the enormity of the crime, the execution thereof are factors which normally weigh with the court in awarding the death sentence terming it as the rarest of the rare cases. Reference to few judgments of this Court where death penalty has been awarded for rape and murder of minor girls and judgments, where it has been commuted may be apposite.

22. <u>DEATH</u> <u>PENALTY AWARDED</u>

1. *Nathu Garam v. State of Uttar Pradesh* [(1979) 3 SCC 366]

This Court in that case upheld the death sentence awarded by the trial Court, confirmed by the High Court, for causing death of a 14 year old girl by a person aged 28 years after luring her into the house for committing criminal assault. Judgment was delivered prior to *Bachan Singh* (supra), therefore, the mitigating circumstances concerning the criminal were not seen addressed. Stress was more on "crime test".

2. *Jumman Khan v. State of*)
1 SCC 752]

This Court, in this case, was hearing a writ petition moved by a convict, not to extend the death sentence. Writ Petition was dismissed after referring to the order passed by this Court in S.L.P. (Criminal) No. 558 of 1986, confirming the death sentence, noticing the degree of criminality and the reprehensive and gruesome manner the crime was committed on a six year old child. "Criminal test" is not *prima facie* seen satisfied, but only the "crime test".

3. *Dhananjoy Chatterjee v. State of West Bengal* [(1994) 2 SCC 220]

This Court dealt with a case of rape and murder of a young girl of about 18 years. The Court opined that a real and abiding concern for the dignity of human life is required to be kept in mind by courts while considering the confirmation of the sentence of death but a cold-blooded and pre-planned murder without any provocation, after committing rape on an innocent and defenceless young girl of 18 years exists in a rarest of rare cases which calls for no punishment other than capital punishment.

Paras 14 and 15 of the judgment would indicate that this Court was more on crime test, not on criminal test, which are extracted below:

> "14. In recent years, the rising crime rate-particularly violent crime against women has made the criminal sentencing by the courts a subject of concern. Today there are admitted disparities. Some criminals get very harsh sentences while many receive grossly different sentence for an essentially equivalent crime and a shockingly large number even go unpunished, thereby encouraging the criminal and in the ultimate making justice suffer by weakening the system's credibility. Of course, it is not possible to lay down any cut and dry formula relating to imposition of sentence but the object of sentencing should be to see that the crime does not go unpunished and the

> victim of crime as also the society has the satisfaction that justice has been done to it. In imposing sentences, in the absence of specific legislation, Judges must consider variety of factors and after considering all those factors and taking an over-all view of the situation, impose sentence which they consider to be an appropriate one. Aggravating factors cannot be ignored and similarly mitigating circumstances have also to be taken into consideration.
>
> 15. In our opinion, the measure of punishment in a given case must depend upon the atrocity of the crime; the conduct of the criminal and the defenceless and unprotected state of the victim. Imposition of appropriate punishment is the manner in which the courts respond to the society's cry for justice against the criminals. Justice demands that courts should impose punishment fitting to the crime so that the courts reflect public abhorrence of the crime. The courts must not only keep in view the rights of the criminal but also the rights of the victim of crime and the society at large while considering imposition of appropriate punishment."

Prima facie, it is seen that criminal test has not been satisfied, since there was not much discussion on the mitigating circumstances to satisfy the 'criminal test'.

4. *Laxman Naik v. State of Orissa* [(1994) 3 SCC 381]

This Court again confirmed the death sentence on an accused for the offence of rape followed by murder of 7 year old girl by her own uncle. The Court opined that the accused seems to have acted in a beastly manner. After satisfying his lust, he thought that the victim might expose him for the commission of offence on her to her family members and others, the accused with a view to screen the evidence of the crime, put an end to the life of that innocent girl. The Court noticed how diabolically the accused h n

and brutally executed it in such a calculated cold blooded and brutal murder of a very tender age girl after committing rape on her which, according to the Court, undoubtedly falls in the rarest of rare case attracting no punishment other than capital punishment.

In this case aggravating circumstances, that is, "crime test" is seen fully satisfied, but on mitigating circumstances (criminal test), this Court held as follows:

> "26. This brings us to the question of sentence to be imposed upon the appellant for the offences for which he has been found guilty by the two Courts below as well as by us discussed above. In this connection it may be pointed out that this Court in the case of *Bachan Singh v. State of Punjab* (1980) 2 SCC 684: 1980 SCC (Cri) 580 while discussing the sentencing policy, also laid down norms indicating the area of imposition of death penalty taking into consideration the aggravating and mitigating circumstances of the case and affirmed the view that the sentencing discretion is to be exercised judicially on well recognized principles, after balancing all the aggravating and mitigating circumstances of the crime guided by the Legislative Policy discernible from the provision contained in Sections 253(2) and 354(3) of the CrPC. In other words, the extreme penalty can be inflicted only in gravest cases of the extreme culpability and in making choice of the sentence, in addition to the circumstances of the offender also. Having regard to these principles with regard to the imposition of the extreme penalty it may be noticed that there are absolutely no mitigating circumstances in the present case. On the contrary the facts of the case disclose only aggravating circumstances against the appellant which we have to some extent discussed above and at the risk of repetition shall deal with that again briefly.
>
> 27. The hard facts of the present case are that the appellant Laxman is the uncle of the deceased and almost

> occupied the status and position that of guardian. Consequently the victim who was aged about 7 years must have reposed complete confidence in the appellant must have believed in his bona fide also and it was on account of such a faith and belief that she acted upon the command of the appellant in accompanying him under the impression that she was being taken to her village unmindful of the pre-planned unholy designs of the appellant. The victim was totally a helpless child there being no one to protect her in the desert where she was taken by the appellant misusing his confidence to fulfill his just. It appears that the appellant had pre-planned to commit the crime by resorting to diabolical methods and it was with that object that he took the girl to a lonely place to execute his dastardly act."

Both the tests "crime test" and "criminal test", it is seen, have been satisfied against the accused for awarding capital punishment.

5. *Kamta Tiwari v. State of M.P.* [(1996) 6 SCC 250]

This Court dealt with a case of rape followed by murder of a 7 year old girl. Evidence disclosed that the accused was close to the family of the father of the deceased and the deceased used to call him "uncle". This Court noticed the closeness to the accused and the accused encouraged her to go to the grocery shop where the girl was kidnapped by him and was subjected to rape and later strangulated to death throwing the dead body in a well. This Court described the murder as gruesome and barbaric and pointed out that a person, who was in a position of a trust, had committed the crime and the motivation of the perpetrator, the vulnerability of the victim, the enormity of the crime, the execution thereof persuaded this Court to hold that case as a rarest of rare cases where death sentence was warranted. The Court was following the guidelines laid down in *Machhi Singh* (supra) held as follows:

"8. Taking an overall view of all the facts and circumstances of the instant case in the light of the above propositions we are of the firm opinion that the sentence of death should be maintained. In vain we have searched for mitigating circumstances - but found aggravating circumstances aplenty. The evidence on record clearly establishes that the appellant was close to the family of Parmeshwar and the deceased and her siblings used to call him 'Tiwari uncle'. Obviously her closeness with the appellant encouraged her to go to his shop, which was near the saloon where she had gone for a haircut with her father and brother, and ask for some biscuits. The appellant readily responded to the request by taking her to the nearby grocery shop of Budhsen and handing over a packet of biscuits apparently as a prelude to his sinister design which unfolded in her kidnapping, brutal rape and gruesome murder - as the numerous injuries on her person testify; and the finale was the dumping of her dead body in a well. When an innocent hapless girl of 7 years was subjected to such barbaric treatment by a person who was in a position of her trust his culpability assumes the proportion of extreme depravity and arouses a sense of revulsion in the mind of the common man. In fine, the motivation of the perpetrator, the vulnerability of the victim, the enormity of the crime, the execution thereof persuade us to hold that this is a 'rarest of rare' cases where the sentence of death is eminently desirable not only to deter others from committing such atrocious crimes but also to give emphatic expression to society's a abhorrence of such crimes."

Court was giving thrust on crime test rather than criminal test against the accused.

6. *Molai and another v. State of M.P.* [(1999) 9 SCC 581]

A three-Judge Bench of this Court justified death sentence

in a case where a 16 year old girl, preparing for her Tenth Standard Examination was raped and strangulated to death. The Court noticed the gruesome manner in which rape was committed and the way in which she was strangulated to death and the dead body was immersed in the septic tank. On sentence, the Court held as follows:

> 36. We have very carefully considered the contentions raised on behalf of the parties. We have also gone through various decisions of this Court relied upon by the parties in the courts below as well as before us and in our opinion the present case squarely falls in the category of one of the rarest of rare cases, and if this be so, the courts below have committed no error in awarding capital punishment to each of the accused. It cannot be overlooked that Naveen, a 16 year old girl, was preparing for her 10th examination at her house and suddenly both the accused took advantage of she being alone in the house and committed a most shameful act of rape. The accused did not stop there but they strangulated her by using her under-garment and thereafter took her to the septic tank along with the cycle and caused injuries with a sharp edged weapon. The accused did not even stop there but they exhibited the criminality in their conduct by throwing the dead body into the septic tank totally disregarding the respect for a human dead body. Learned Counsel for the accused (appellants) could not point any mitigating circumstances from the record of the case to justify the reduction of sentence of either of the accused. In a case of this nature, in our considered view, the capital punishment to both the accused is the only proper punishment and we see no reason to take a different view than the one taken by the courts below."

The three-Judge Bench, it is seen, has applied both the tests Crime test as well as the Criminal test and found that the case falls in the category of rarest of rare ca

7. *Bantu v. State of Uttar Pradesh* [(2008) 11 SCC 113]

This Court confirmed death sentence in a case where a minor girl of 5 years was raped and murdered. This Court, following the principles laid down in *Bachan Singh*, pointed out that when the victim of the murder is an innocent child or a helpless woman or old or infirm person or a person vis-à-vis whom the murderer is in a dominating position, or a public figure generally loved and respected by the community, it is a vital factor justifying award of capital punishment. In this judgment also, this Court stressed on drawing of a balance sheet of mitigating and aggravating circumstances, following the judgment in *Devender Pal Singh v. Government of NCT of Delhi* (2002) 5 SCC 234. Court was applying the "balancing test", to award capital sentence.

8. *Shivaji @ Dadya Shankar Alhat v. The State of Maharashtra* [(2008) 15 SCC 269]

This was a case where the accused, a married man having three children, was known to the family of the deceased. The Court noticed the horrendous manner in which the girl aged 9 years was done to death after ravishing her. The Court awarded capital punishment. The Court, in this case, took the view that mitigating and aggravating circumstances have to be balanced. Here also the test applied was the "balancing test" to award capital punishment.

9. *Mohd. Mannan @ Abdul Mannan v. State of Bihar* [(2011) 5 SCC 317]

This was a case where a minor girl aged 7 years was kidnapped, raped and murdered. Court noticed how the accused had won the trust of that innocent girl and the gruesome manner in which she was subjected to rape and then strangulated her to death. The accused was aged 42-43 years. The Court held that he would be a menace to society and would

continue to be so and could not be reformed. The Court awarded death sentence. The Court, in this case, held that a balance sheet is to be prepared while considering the imposition of death sentence. Here also the test applied was "balancing test" to award capital punishment.

10. *Rajendra Pralhadrao Wasnik v. State of Maharashtra*, (2012) 4 SCC 37

This was a case of rape and murder of a 3 years old child by a married man of 31 years. Court noticed the brutal manner in which the crime was committed and the pain and agony undergone by the minor girl. The Court confirmed the death sentence awarded. The Court elaborately discussed when the aggravating and mitigating circumstances to be taken note of before awarding sentence and what are the principles to be followed, while awarding death sentence. The Court then held as follows:

> "37. When the Court draws a balance-sheet of the aggravating and mitigating circumstances, for the purposes of determining whether the extreme sentence of death should be imposed upon the accused or not, the scale of justice only tilts against the accused as there is nothing but aggravating circumstances evident from the record of the Court. In fact, one has to really struggle to find out if there were any mitigating circumstances favouring the accused. Another aspect of the matter is that the minor child was helpless in the cruel hands of the accused. The accused was holding the child in a relationship of 'trust-belief' and 'confidence', in which capacity he took the child from the house of PW2. In other words, the accused, by his conduct, has belied the human relationship of trust and worthiness."

Court in this case also applied the "balancing test" to award capital punishment.

23. CASES IN WHICH DEATH PENALTY COMMUTED

1. *Kumudi Lal v. State of U.P.* [(1994) 4 SCC 108]

It was a case where a 14 year girl was raped and killed by strangulation. The Court accepted the brutality of the crime, however commuted death penalty to life imprisonment. The Court noticed that the evidence did not indicate the girl was absolutely unwilling but rather showed that she initially permitted the accused to take some liberties with her but later expressed her unwillingness. Treating the same as a mitigating factor, death sentence was commuted to that of life imprisonment. 'Criminal test' was applied and was found not fully satisfied since some mitigating circumstances were found to be in favour of the accused so as to avoid death sentence.

2. *Raju v. State of Haryana* [(2001) 9 SCC 50]

This Court commuted death sentence to life imprisonment in a case where a girl of 11 years was raped and murdered. Court noticed that the accused had no intention to murder her, but on the spur of the moment, without any premeditation, he gave two brick blows which caused the death. Further, it was also found that the accused had no previous criminal record or would be a threat to the society. 'Criminal test' was applied and found not fully satisfied some mitigating circumstances were found to be in favour of the accused so as to avoid death sentence.

3. *Bantu alias Naresh Giri v. State of M.P.* [(2001) 9 SCC 615]

This Court commuted death sentence to that of life imprisonment in a case where a girl of 6 years was raped and murdered by a boy of less than 22 years. Though, this Court found that the act was heinous and required to be condemned, but it could not be said to be one of the rarest of rare category. The accused did not require to be eliminated from the society.

'Criminal test' was applied and found some circumstances favouring the accused so as to avoid death sentence.

4. *State of Maharashtra v. Suresh* [(2000) 1 SCC 471]

This Court in that case commuted the death sentence to life imprisonment where a girl of 4 years old was raped and murdered. Though this Court felt that the case was perilously near the region of rarest of the rare cases, but refrained from imposing extreme penalty. "Criminal test" was applied and narrowly escaped death sentence.

5. *Amrit Singh v. State of Punjab* [AIR 2007 SC 132]

This Court commuted death sentence to that of life imprisonment in a case, where a 7-8 years old girl was raped and murdered by the accused aged 31 years. The Court noticed the manner in which the deceased was raped, it was brutal, but held it could have been a momentary lapse on the part of the accused, seeing a lonely girl at a secluded place and there was no pre-meditation for commission of the crime. "Criminal test" it is seen, has been applied in favour of the accused to avoid death sentence.

6. *Rameshbhai Chandubhai Rathod v. The State of Gujarat* [(2011) 2 SCC 764]

This Court commuted death sentence to life imprisonment of the accused committing rape and murder of a girl of 8 years. It was noticed that the accused at the time of the commission of crime was 27 years and possibility of reformation could not be ruled out. "Criminal test" was applied considering the age of the accused and possibility of reformation saved the accused from death penalty.

7. *Surendra Pal Shivbalak v. State of Gujarat* [(2005) 3 SCC 127]

This Court commuted death sentence to that of life imprisonment in a case where the accused aged 36 years had committed rape and murder of a minor girl. This Court noticed at the time of occurrence, the accused had no previous criminal record and held would not be a menace to the society in future. "Criminal test" was applied and absence of previous record was considered as a circumstance to avoid death sentence.

8. *Amit v. State of Maharashtra* [(2003) 8 SCC 93]

This Court commuted death sentence to life imprisonment in a case where the accused aged 28 years had raped and murdered a girl of 11-12 years. This Court noticed that the accused had no previous criminal track record and also there was no evidence that he would be a danger to the society in future. "Criminal test" was applied, absence of previous track record and danger to the society were considered to avoid death sentence.

24. The list of cases mentioned above, wherein this Court had awarded death sentence and cases where this Court had commuted death sentence, is not exhaustive but only illustrative. This bench in *Sangeet & Ors v. State of Haryana* (2013) 2 SCC 452 noticed that the circumstances of the criminal referred to in *Bachan Singh* appeared to have taken a bit of back seat in the sentencing process and held despite *Bachan Singh,* the 'particular crime' continues to play a more important role than the 'crime and criminal'. In conclusion, we have said, *inter alia*, as follows:

"1. The application of aggravating and mitigating circumstances needs a fresh look. This Court has not endorsed that approach in *Bachan Singh*. In any event, there is little or no uniformity in the application of this approach.

2. Aggravating circumstances relate to the crime while mitigating circumstances relate to the criminal. A

balance sheet cannot be drawn up for comparing the two. The considerations for both are distinct and unrelated. The use of the mantra of aggravating and mitigating circumstances needs a review.

3. In the sentencing process, both the crime and the criminal are equally important. We have, unfortunately not taken the sentencing process as seriously as it should be with the result that in capital offences, it has become judge-centric sentencing rather than principled sentencing.

4. The Constitution Bench of this Court has not encouraged standardization and categorization of crimes and even otherwise it is not possible to standardize and categorize all crimes."

25. In *Bachan Singh* and *Machhi Singh* cases, this Court laid down various principles for awarding sentence:

"***Aggravating circumstances – (Crime test)***

1. The offences relating to the commission of heinous crimes like murder, rape, armed dacoity, kidnapping etc. by the accused with a prior record of conviction for capital felony or offences committed by the person having a substantial history of serious assaults and criminal convictions.

2. The offence was committed while the offender was engaged in the commission of another serious offence.

3. The offence was committed with the intention to create a fear psychosis in the public at large and was committed in a public place by a weapon or device which clearly could be hazardous to the life of more than one person.

4. The offence of murder was committed for ransom or like offences to receive money or mon

5. Hired killings.

6. The offence was committed outrageously for want only while involving inhumane treatment and torture to the victim.

7. The offence was committed by a person while in lawful custody.

8. The murder or the offence was committed, to prevent a person lawfully carrying out his duty like arrest or custody in a place of lawful confinement of himself or another. For instance, murder is of a person who had acted in lawful discharge of his duty under Section 43 Code of Criminal Procedure.

9. When the crime is enormous in proportion like making an attempt of murder of the entire family or members of a particular community.

10. When the victim is innocent, helpless or a person relies upon the trust of relationship and social norms, like a child, helpless woman, a daughter or a niece staying with a father/uncle and is inflicted with the crime by such a trusted person.

11. When murder is committed for a motive which evidences total depravity and meanness.

12. When there is a cold blooded murder without provocation.

13. The crime is committed so brutally that it pricks or shocks not only the judicial conscience but even the conscience of the society.

Mitigating Circumstances: (Criminal test)

1. The manner and circumstances in and under which the offence was committed, for example, extreme mental or emotional disturbance or extreme provocation in

contradistinction to all these situations in normal course.

2. The age of the accused is a relevant consideration but not a determinative factor by itself.

3. The chances of the accused of not indulging in commission of the crime again and the probability of the accused being reformed and rehabilitated.

4. The condition of the accused shows that he was mentally defective and the defect impaired his capacity to appreciate the circumstances of his criminal conduct.

5. The circumstances which, in normal course of life, would render such a behavior possible and could have the effect of giving rise to mental imbalance in that given situation like persistent harassment or, in fact, leading to such a peak of human behavior that, in the facts and circumstances of the case, the accused believed that he was morally justified in committing the offence.

6. Where the Court upon proper appreciation of evidence is of the view that the crime was not committed in a pre-ordained manner and that the death resulted in the course of commission of another crime and that there was a possibility of it being construed as consequences to the commission of the primary crime.

7. Where it is absolutely unsafe to rely upon the testimony of a sole eye-witness though prosecution has brought home the guilt of the accused."

26. In *Santosh Kumar Satishbhushan Bariyar vs. State of Maharashtra* (2009) 6 SCC 498, this Court held the nature, motive, and impact of crime, culpability, quality of evidence, socio economic circumstances, impossibility of rehabilitation and some of the factors, the Court may take into consideration while dealing with such cases.

27. In *Sangeet's* case this Bench has held that there is no question of balancing the above mentioned circumstances to determine the question whether the case falls into the rarest of rare cases category because the consideration for both are distinct and unrelated. In other words the "balancing test" is not the correct test in deciding whether capital punishment be awarded or not.

28. Aggravating Circumstances as pointed out above, of course, are not exhaustive so also the Mitigating Circumstances. In my considered view that the tests that we have to apply, while awarding death sentence, are "crime test", "criminal test" and the R-R Test and not "balancing test". To award death sentence, the "crime test" has to be fully satisfied, that is 100% and "criminal test" 0%, that is no Mitigating Circumstance favouring the accused. If there is any circumstance favouring the accused, like lack of intention to commit the crime, possibility of reformation, young age of the accused, not a menace to the society no previous track record etc., the "criminal test" may favour the accused to avoid the capital punishment. Even, if both the tests are satisfied that is the aggravating circumstances to the fullest extent and no mitigating circumstances favouring the accused, still we have to apply finally the Rarest of Rare Case test (R-R Test). R-R Test depends upon the perception of the society that is "society centric" and not "Judge centric" that is, whether the society will approve the awarding of death sentence to certain types of crimes or not. While applying that test, the Court has to look into variety of factors like society's abhorrence, extreme indignation and antipathy to certain types of crimes like sexual assault and murder of minor girls intellectually challenged, suffering from physical disability, old and infirm women with those disabilities etc.. Examples are only illustrative and not exhaustive. Courts award death sentence since situation demands so, due to constitutional compulsion, reflected by the will of the people and not the will of the judges.

29. We have to apply the above tests in the present case and decide whether the courts below were justified in awarding the death sentence.

Enormity of the Crime and execution thereof (Crime Test)

30. Victim was aged 11 years, on the date of the incident, a school going child totally innocent, defenceless and having moderate intellectual disability. Ex. P-4 was a certificate issued by the President of the Handicap Board General Hospital, Amravati which disclosed that the girl was physically handicapped and was having moderate mental retardation. Evidence of PW 10, PW 12 and PW13 also corroborates the fact that she was a minor girl with moderate intellectual disability, an aggravating circumstance which goes against the accused. Vulnerability of the victim with moderate intellectual disability is an aggravating circumstance. The accused was a fatherly figure aged 52 years.

31. Dr. Kewade – PW3, who conducted the post mortem, had deposed as well as stated in the report the ghastly manner in which the crime was executed. Rape was committed on more than one occasion and the manner in which rape as well as murder was executed had been elaborately discussed in the oral evidence as well as in report which we do not want to reiterate. The action of accused, in my view, not only was inhuman but barbaric. Ruthless crime of repeated actions of rape followed by murder of a young minor girl who was having moderate intellectual disability, shocks not only the judicial conscience, but the conscience of the society.

32. In my view, in this case the crime test has been satisfied fully against the accused.

Criminal Test

33. Let us now examine whether "Criminal Test' has been satisfied. The accused was aged 52 [illegible] of incident, a fatherly figure for the minor c[illegible]n

able bodied person has seen the world and is the father of two children. The accused repeatedly raped the girl for few days, ultimately strangulated her to death. Intellectually challenged minor girls will not be safe in our society if the accused is not given adequate punishment. Considering the age of the accused, a middle ager of 52 years, reformation or rehabilitation is practically ruled out. In the facts and circumstances of the case, in my view, criminal test has been fully satisfied against the accused and I do not find any mitigating factor favouring the accused. The only mitigating circumstance stated was that the accused is having two sons aged 26 and 27 years and are dependent on him, which in my view, is not a mitigating circumstance and the "criminal test" is fully satisfied against the accused. Both the crime test and criminal test are, therefore, independently satisfied against the accused.

34. Let us now apply the R-R Test. I have critically and minutely gone through the entire evidence and I am of the view that any other punishment other than life imprisonment would be completely inadequate and would not meet the ends of justice.

35. Remember, the victim was a minor girl aged 11 years, intellectually challenged and elders like the accused have an obligation and duty to take care of such children, but the accused has used her as a tool to satisfy his lust. Society abhors such crimes which shocks the conscience of the society and always attracts intense and extreme indignation of the community. R-R Test is fully satisfied against the accused, so also the Crime Test and the Criminal Test". Even though all the above mentioned tests have been satisfied in this case, I am of the view that the extreme sentence of Death penalty is not warranted since one of the factors which influenced the High Court to award death sentence was the previous track record of the accused.

Previous Criminal Record of the Accused

36. The Investigating Officer, during the course of hearing of the criminal appeal by the High Court, filed an affidavit dated 11.4.2008 stating that the accused was also figured as an accused in Crime No. 165/92 registered at Police Station Borgaon Manju, District Akola for the offence under Section 302 IPC on the allegation that he caused murder of his wife Chanda by assaulting her with stick on 4.10.1993 and that Sessions Trial No. 52/07 was pending before the Sessions Court, Akola. Further, it was also stated that another Crime No. 80/06 was also registered against the accused at Chandur Bazar Police Station for an offence under Sections 457 and 380 IPC. The High Court was of the view that the accused had not disclosed those facts before the Court and held as follows:

> "….However, fact remains that the accused has not disputed the pendency of these proceedings against him. Moreover, they cannot be said to be irrelevant for the purpose of deciding the appropriate sentence which deserves to be imposed on the appellant. We, therefore, deem it appropriate to consider the pendency of these cases as a circumstance against the accused….."

37. I find it difficult to endorse this view of the High Court. In my view, the mere pendency of criminal cases as such cannot be an aggravating factor to be taken note of while granting appropriate sentence. In *Gurmukh Singh v. State of Haryana* (2009) 15 SCC 635, this Court opined that criminal background and adverse history of the accused is a relevant factor. But, in my view, mere pendency of cases, as such, is not a relevant factor. This Court in *Mohd. Farooq Abdul Gafur v. State of Maharashtra* (2010) 14 SCC 641 dealt with a similar contention and Justice S. B. Sinha, while supplementing the leading judgment, stated as follows:

> "178. In our opinion the trial court had wrongly rejected the fact that even though the accused had a criminal history, but there had been no criminal conviction against the said three accused. It had rejected the e

ground that a conviction might not be possible in each and every criminal trial……..”

38. Therefore, the mere pendency of few criminal cases as such is not an aggravating circumstance to be taken note of while awarding death sentence unless the accused is found guilty and convicted in those cases. High Court was, therefore, in error in holding that those are relevant factors to be considered in awarding appropriate sentence.

39. But what disturbed me the most is that the police after booking the accused for offence under Section 377 IPC failed to charge sheet him, in spite of the fact the medical evidence had clearly established the commission of carnal intercourse on a minor girl with moderate intellectual disability. Dr. Kewade - PW3, who conducted the post mortem, had clearly spelt out the facts of sodomy in his report as well as in his deposition. Prosecuting agency has also failed in his duty to point out the same to the court that a case had been made out under Section 377 IPC.

Non-reporting the offence of sexual assault

40. Let me now refer to another disturbing trend in our society that is non-reporting of sexual assault on minor children, which has happened in this case as well. Ravindra Lavate (PW8), in his deposition, has stated as follows:

> “I heard that the girl was weeping. I, therefore, come in Verandah and observed that Accused No.1 was lying on the body of the said girl. I observed it in the electric light. I also observed that Accused No.1 was committing sexual intercourse with the girl. I and my wife asked Accused No.1 as to what he was doing. I asked Accused No.1 Shankar to take out the said girl. Accused No.1 thereafter took away the said girl on cycle.”

41. PW8 has admitted in his cross-examination that he had not reported the said fact to the police, possibly due to the

reason that there was no clear cut legislative provision casting an obligation on him to report to the J.J. Board or to the S.J.P.U. dealing with sexual offences towards children after having witnessed the incident. Is there not a duty cast on every citizen of this country if they witness or come to know any act of sexual assault or abuse on a minor child to report the same to the police or to the J.J. Board or can they keep mum so as to screen the culprit from legal punishment?

42. Article 15 (3) of the Constitution of India confers upon the State powers to make special provision for children. Article 39 *inter alia* provides that the State shall, in particular, direct its policy towards securing that the tender age of children are not abused and their childhood and youth are protected against exploitation and they are given facilities to develop in a healthy manner and in conditions of freedom and dignity.

43. The United Nations Convention on the Rights of Children, rectified by India on 11th December 1992, requires the State Parties to undertake all appropriate national, bilateral and multilateral measures to prevent the inducement or coercion of child to engage in any unlawful sexual activity, the exploitative use of children in prostitution or other unlawful sexual practices etc. Articles 3(2) and 34 of the Convention have placed a specific duty on the State to protect the child from all forms of sexual exploitation and abuse. National Crime Records Bureau (NCRB) 2011 report specifically deals with the statistics of rape victims which is as follows:

Rape Victims

44. There were 24,270 victims of Rape out of 24,206 reported Rape cases in the country. 10.6% (2,582) of the total victims of Rape were girls under 14 years of age, while 19.0% (4,646 victims) were teenaged girls (14-18 years). 54.7% (13,264 victims) were women in the age-group 18-30 years. However, 15.0% (3,637 victims) were in the age group of 30-50 years while 0.6% (141 victims) was

45. Offenders were known to the victims in as many as in 22,549 (94.2%) cases. Parents / close family members were involved in 1.2% (267 out of 22,549 cases) of these cases, neighbours were involved in 34.7% cases (7,835 out of 22,549 cases) and relatives were involved in 6.9% (1,560 out of 22,549 cases) cases.

46. A total of 7,112 cases of child rape were reported in the country during 2011 as compared to 5,484 in 2010 accounting for an increase of 29.7% during the year 2011. Madhya Pradesh has reported the highest number of cases (1,262) followed by Uttar Pradesh (1088) and Maharashtra (818). These three States altogether accounted for 44.5% of the total child rape cases reported in the country.

Crimes against Children in the country and % variation in 2011 over 2010

Sl. No.	Crime Head	YEAR			% Variation in 2011 over 2010
(1)	(2)	(3)	(4)	(5)	(6)
3.	Rape	5,368	5,484	7112	30

47. The Department of Women and Child Development conducted a study and prepared a Draft of the Offences against Children Bill, 2005 which was further discussed with the National Commission for Protection of Child Rights (NCPCR).

48. Parliament later passed the Act titled "The Protection of Children from Sexual Offences Act, 2012. (Act 32 of 2012) which received the assent of the President on 19th June, 2012. The Act provides for reporting of sexual offences and the punishment for failure to report or record punishment for filing false complaint and/or false information. The Act also provides for a Justice Delivery System for child victims and few other provisions to safeguard the interest of children.

49. Chapter V of the Act deals with the Procedure of reporting of cases. Sec. 19(1) deals with the manner in which the case has to be reported to the Special Juvenile Police Unit or local police. Section 20 deals with the obligation of media, studio and photographic facilities to report cases and the same reads as follows:

> "**20**. Any personnel of the media or hotel or lodge or hospital or club or studio or photographic facilities, by whatever name called, irrespective of the number of persons employed therein, shall, on coming across any material or object which is sexually exploitative of the child (including pornographic, sexually-related or making obscene representation of a child or children) through the use of any medium, shall provide such information to the Special Juvenile Police Unit, or to the local police, as the case may be.

Section 21 prescribes punishment for failure to report or record a case, which reads as follows:

> "**21.** (1) Any person, who fails to report the commission of an offence under sub-section (1) of section 19 or section 20 or who fails to record such offence under sub-section (2) of section 19 shall be punished with imprisonment of either description which may extend to six months or with fine or with both.
>
> (2) Any person, being in-charge of any company or an institution (by whatever name called) who fails to report the commission of an offence under sub-section (1) of section 19 in respect of a subordinate under his control, shall be punished with imprisonment for a term which may extend to one year and with fine."

50. I may also point out that, in large numbers of cases, children are abused by persons known to them or who have influence over them. Criminal Courts in

with cases where children are abused by adults addicted to alcohol, drugs, depression, marital discord etc. Preventive aspects have seldom been given importance or taken care of. Penal laws focus more on situations after commission of offences like violence, abuse, exploitation of the children. Witnesses of many such heinous crimes often keep mum taking shelter on factors like social stigma, community pressure, and difficulties of navigating the criminal justice system, total dependency on perpetrator emotionally and economically and so on. Some adult members of family including parents choose not to report such crimes to the police on the plea that it was for the sake of protecting the child from social stigma and it would also do more harm to the victim. Further, they also take shelter pointing out that in such situations some of the close family members having known such incidents would not extend medical help to the child to keep the same confidential and so on, least bothered about the emotional, psychological and physical harm done to the child. Sexual abuse can be in any form like sexually molesting or assaulting a child or allowing a child to be sexually molested or assaulted or encouraging, inducing or forcing the child to be used for the sexual gratification of another person, using a child or deliberately exposing a child to sexual activities or pornography or procuring or allowing a child to be procured for commercial exploitation and so on.

51. In my view, whenever we deal with an issue of child abuse, we must apply the best interest child standard, since best interest of the child is paramount and not the interest of perpetrator of the crime. Our approach must be child centric. Complaints received from any quarter, of course, have to be kept confidential without casting any stigma on the child and the family members. But, if the tormentor is the family member himself, he shall not go scot free. Proper and sufficient safeguards also have to be given to the persons who come forward to report such incidents to the police or to the Juvenile Justice Board.

52. The conduct of the police for not registering a case under Section 377 IPC against the accused, the agony undergone by a child of 11 years with moderate intellectual disability, non-reporting of offence of rape committed on her, after having witnessed the incident either to the local police or to the J.J. Board compel us to give certain directions for compliance in future which, in my view, are necessary to protect our children from such sexual abuses. This Court as *parens patriae* has a duty to do so because Court has guardianship over minor children, especially with regard to the children having intellectual disability, since they are suffering from legal disability. Prompt reporting of the crime in this case could have perhaps, saved the life of a minor child of moderate intellectual disability.

53. President of India on 3rd February, 2013 promulgated an ordinance titled "The Criminal Law (Amendment) Ordinance, 2013, further to amend the Code of Criminal Procedure Code, 1973, Indian Evidence Act, 1872 and the Indian Penal Code, 1860. By the ordinance Sections 375, 376, 376-A, 376-B, 376-C and 376-D of the Code have been substituted by new Sections. The word "rape" has been replaced by the word "sexual assault". Section 375 has also clarified that lack of physical resistance is immaterial for constituting an offence. A new Section 376-A has been added which reads as follows:

> 376A. Whoever, commits an offence punishable under sub-section (I) or sub-section (2) of Section 376 and in the course of such commission inflicts an injury which causes the death of the person or causes the person to be in a persistent vegetative state, shall be punished with rigorous imprisonment for a term which shall not be less than twenty years=, but which may extend to imprisonment for life, which shall mean the remainder of that person's natural life, or with death".

Therefore a person, who commits an offence punishable under sub-section (1) and sub-section (2) of S[illegible]s

death shall be punishable with rigorous imprisonment for a term which shall not be less than twenty years but which my extend to imprisonment for life, which shall mean the remainder of that person's natural life or with death.

54. Considering the entire facts and circumstances of the case, I am inclined to convert death sentence awarded to the accused to rigorous imprisonment for life and that all the sentences awarded will run consecutively.

55. In my opinion, the case in hand calls for issuing the following directions to various stake-holders for due compliance:

(1) The persons in-charge of the schools/educational institutions, special homes, children homes, shelter homes, hostels, remand homes, jails etc. or wherever children are housed, if they come across instances of sexual abuse or assault on a minor child which they believe to have committed or come to know that they are being sexually molested or assaulted are directed to report those facts keeping upmost secrecy to the nearest S.J.P.U. or local police, and they, depending upon the gravity of the complaint and its genuineness, take appropriate follow up action casting no stigma to the child or to the family members.

(2) Media personals, persons in charge of Hotel, lodge, hospital, clubs, studios, photograph facilities have to duly comply with the provision of Section 20 of the Act 32 of 2012 and provide information to the S.J.P.U., or local police. Media has to strictly comply with Section 23 of the Act as well.

(3) Children with intellectual disability are more vulnerable to physical, sexual and emotional abuse. Institutions which house them or persons in care and protection, come across any act of sexual

abuse, have a duty to bring to the notice of the J.J. Board/S.J.P.U. or local police and they in turn be in touch with the competent authority and take appropriate action.

(4) Further, it is made clear that if the perpetrator of the crime is a family member himself, then utmost care be taken and further action be taken in consultation with the mother or other female members of the family of the child, bearing in mind the fact that best interest of the child is of paramount consideration.

(5) Hospitals, whether Government or privately owned or medical institutions where children are being treated come to know that children admitted are subjected to sexual abuse, the same will immediately be reported to the nearest J.J. Board/ SJPU and the JJ Board, in consultation with SJPU, should take appropriate steps in accordance with the law safeguarding the interest of child.

(6) The non-reporting of the crime by anybody, after having come to know that a minor child below the age of 18 years was subjected to any sexual assault, is a serious crime and by not reporting they are screening offenders from legal punishment and hence be held liable under the ordinary criminal law and prompt action be taken against them, in accordance with law.

(7) Complaints, if any, received by NCPCR, S.C.P.C.R. Child Welfare Committee (CWC) and Child Helpline, NGO's or Women's Organizations etc., they may take further follow up action in consultation with the nearest J.J. Board, S.J.P.U. or local police in accordance with law.

(8) The Central Governme e

Governments are directed to constitute SJPUs in all the Districts, if not already constituted and they have to take prompt and effective action in consultation with J. J. Board to take care of child and protect the child and also take appropriate steps against the perpetrator of the crime.

(9) The Central Government and every State Government should take all measures as provided under Section 43 of the Act 32/2012 to give wide publicity of the provisions of the Act through media including television, radio and print media, at regular intervals, to make the general public, children as well as their parents and guardians, aware of the provisions of the Act.

56. Criminal appeals stand dismissed and the death sentence awarded to the accused is converted to that of rigorous imprisonment for life and that all the sentences awarded will run consecutively.

MADAN B. LOKUR, J. 1. While entirely agreeing with my learned Brother Justice Radhakrishnan that the conviction of the appellant must be upheld and that all sentences awarded to him must run consecutively, I feel it necessary to draw attention to the views expressed by this Court on awarding death penalty or converting it to imprisonment for life in cases concerning rape and murder.

Element of subjectivity:

2.In Swamy *Shraddananda (2) v. State of Karnataka,* (2008) 13 SCC 767 this Court noted in paragraph 44 of the Report that the expression "the rarest of rare cases" in *Bachan Singh v. State of Punjab,* (1980) 2 SCC 684 indicates a relative category based on a comparison with other cases. In paragraph 45 of the Report, this Court considered the expression as requiring a comparison between (i) cases of

murder with other cases of murder of the same or of a similar kind or even of a graver nature and (ii) the punishment awarded to the convicts in those cases. This Court also expressed the view that there is hardly any field available for comparison. In other words, this Court highlighted the difficulty in the practical application of the "rarest of rare" principle since there is a lack of empirical data for making the two-fold comparison.

3. The question therefore is: how does one determine that a case is rare as compared to another case? If such a comparison were possible, then on a relative basis could a particular case be described as rarer than an identified rare case? It is this inability to make a comparative evaluation and clarity on the issue due to a lack of information and any detailed study that the application of the rarest of rare principle becomes extremely delicate thereby making the awarding of a death sentence subjective as mentioned in *Swamy Shraddananda* or judge-centric as mentioned in *Sangeet v. State of Haryana,* 2013 (2) SCC 452.

Corridor of uncertainty:

4. My learned Brother Justice Radhakrishnan has put in great efforts in analyzing a species of cases (of which I am sure there would be many more) in which the victim was raped and murdered. These cases fall in two categories, namely, those in which the death penalty has been confirmed by this Court and those in which it has been converted to life imprisonment. In my view, there is a third category consisting of cases (which cannot be overlooked in the overall context of a sentencing policy) in which this Court has, while awarding a sentence of imprisonment for life, arrived at what is described as a *via media* and in which a fixed term of imprisonment exceeding 14 or 20 years (with or without remissions) has been awarded instead of a death penalty, or in which the sentence awarded has been consecutive and not concurrent.

5. For the present purposes, I w e

somewhat recent cases (say over the last about 15 years) where the death penalty was converted to imprisonment for life and cull out the main reasons for commuting it. However, it is necessary to enter two caveats: Firstly, the Constitution Bench in *Bachan Singh* has concluded in paragraph 164 of the Report that normally the punishment for murder is life imprisonment and a death penalty may be imposed only if there are special reasons for doing so. In other words, special reasons are required to be recorded not for awarding life imprisonment but for awarding death sentence. This is what the Constitution Bench held:

> "The normal rule is that the offence of murder shall be punished with the sentence of life imprisonment. The court can depart from that rule and impose the sentence of death only if there are special reasons for doing so. Such reasons must be recorded in writing before imposing the death sentence."

6. It was further held in paragraph 209 of the Report that the normal rule is of awarding life sentence but death sentence may be awarded only if the alternative of life sentence is unquestionably foreclosed. The Constitution Bench held:

> "It is, therefore, imperative to voice the concern that courts, aided by the broad illustrative guide-lines indicated by us, will discharge the onerous function with evermore scrupulous care and humane concern, directed along the highroad of legislative policy outlined in Section 354(3) viz. that for persons convicted of murder, life imprisonment is the rule and death sentence an exception. A real and abiding concern for the dignity of human life postulates resistance to taking a life through law's instrumentality. That ought not to be done save in the rarest of rare cases when the alternative option is unquestionably foreclosed."

7. Strictly speaking, therefore, this Court is not required to record reasons for commuting the death sentence to one of life

imprisonment – it is only required to record reasons for either confirming the death sentence or awarding it.

8. Secondly, though a sentence awarded by this Court relates to a specific case, nevertheless an exercise needs to be undertaken to identify some jurisprudential principle for awarding the death penalty. It is in this context that the present exercise has been undertaken. It is possible that the cases discussed are not exhaustive of the "rape and murder" category and perhaps some may have been left out of the discussion but the general principles or guidelines would be discernible from this exercise of finding a way through the existing corridor of uncertainty in sentencing.

Cases where the death penalty has been converted to imprisonment for life:

9. *State of Tamil Nadu v. Suresh,* (1998) 2 SCC 372 was a case of the rape and murder of a pregnant housewife. This Court took the view that though the crime was dastardly and the victim was a young pregnant housewife, it would not be appropriate to award the death penalty since the High Court had not upheld the conviction and also due to the passage of time. This is what was observed:

> "The above discussion takes us to the final conclusion that the High Court has seriously erred in upsetting the conviction entered by the Sessions Court as against A-2 and A-3. The erroneous approach has resulted in miscarriage of justice by allowing the two perpetrators of a dastardly crime committed against a helpless young pregnant housewife who was sleeping in her own apartment with her little baby sleeping by her side and during the absence of her husband. We strongly feel that the error committed by the High Court must be undone by restoring the conviction passed against A-2 and A-3, though we are not inclined, at this distance of time, to

restore the sentence of death passed by the trial court on those two accused."

10. *Nirmal Singh v. State of Haryana,* (1999) 3 SCC 670 was a case in which Dharampal had raped P and was convicted for the offence. Pending an appeal the convict was granted bail. While on bail, Dharampal along with Nirmal Singh murdered five members of P's family. Death penalty was awarded to Dharampal and Nirmal Singh by the Trial Court and confirmed by the High Court. This Court converted the death sentence in the case of Nirmal Singh to imprisonment for life since he had no criminal antecedents; there was no possibility of his committing criminal acts of violence; he would not continue being a threat to society; and he was not the main perpetrator of the crime. It was held:

> "There is nothing on record to suggest that Nirmal was having any past criminal antecedents or that there is a possibility that the accused would commit criminal acts of violence and would constitute a continuing threat to the society. The only aggravating circumstance is that he had come with his brother and had given 3 blows on deceased Krishna only after Dharampal chased Krishna and gave kulhari blows hitting on the neck while Krishna was running and on sustaining that blow, she fell down and then Dharampal gave two to three blows to Krishna and only thereafter Nirmal gave burchi blows on the said Krishna. It is no doubt true that the presence of Nirmal at the scene of the occurrence with a burchi in his hand had emboldened Dharampal to take the drastic action of causing murder of 5 persons of Tale's family as a result of which Tale's family was totally wiped off. But because of the fact that Nirmal has not assaulted any other person and assaulted Krishna only after Dharampal had given her 3 or 4 blows, the case of Nirmal cannot be said to be the rarest of rare case attracting the extreme penalty of death. While, therefore, we uphold his conviction under Sections 302/34, we commute his sentence of death into imprisonment for life."

11. *Kumudi Lal v. State of Uttar Pradesh,* (1999) 4 SCC 108 was a case of rape and murder of a 14 year old. This Court was of the view that the applicability of the rarest of rare principle did not arise in this case apparently because the crime had no 'exceptional' feature. This Court noted as follows:

> "The circumstances indicate that probably she (the victim) was not unwilling initially to allow the appellant to have some liberty with her. The appellant not being able to resist his urge for sex went ahead in spite of her unwillingness for a sexual intercourse who offered some resistance and started raising shouts at that stage. In order to prevent her from raising shouts the appellant tied the salwar around her neck which resulted in strangulation and her death. We, therefore, do not consider this to be a fit case in which the extreme penalty of death deserves to be imposed upon the appellant."

12. *Akhtar v. State of Uttar Pradesh,* (1999) 6 SCC 60 was a case of rape and murder of a young girl. The sentence of death awarded to the accused was converted to one of life imprisonment since he took advantage of finding the victim alone in a lonely place and her murder was not premeditated. It was observed:

> "But in the case in hand on examining the evidence of the three witnesses it appears to us that the accused-appellant has committed the murder of the deceased girl not intentionally and with any premeditation. On the other hand the accused-appellant found a young girl alone in a lonely place, picked her up for committing rape; while committing rape and in the process by way of gagging the girl has died. The medical evidence also indicates that the death is on account of asphyxia. In the circumstances we are of the considered opinion that the ca e

held to be one of the rarest of rare cases justifying the punishment of death."

13. In *State of Maharashtra v. Suresh,* (2000) 1 SCC 471 death penalty was not awarded to the accused since he had been acquitted by the High Court, even though the case was said to be "perilously near" to falling within the category of rarest of rare cases. The test of whether the lesser option was "unquestionably foreclosed" was adopted by this Court, which held:

> "We, therefore, set aside the impugned judgment and restore the conviction passed by the trial court. Regarding sentence we would have concurred with the Sessions Court's view that the extreme penalty of death can be chosen for such a crime, but as the accused was once acquitted by the High Court we refrain from imposing that extreme penalty in spite of the fact that this case is perilously near the region of "rarest of the rare cases" envisaged by the Constitution Bench in *Bachan Singh v. State of Punjab*. However, the lesser option is not unquestionably foreclosed and so we alter the sentence, in regard to the offence under Section 302 IPC, to imprisonment for life."

14. In *Mohd. Chaman v. State (NCT of Delhi),* (2001) 2 SCC 28 the accused, a 30 year old man, had raped and killed a one and a half year old child. Despite concluding that the crime was serious and heinous and that the accused had a dirty and perverted mind, this Court converted the death penalty to one of imprisonment for life since he was not such a dangerous person who would endanger the community and because it was not a case where there was no alternative but to impose the death penalty. It was also held that a humanist approach should be taken in the matter of awarding punishment. It was held:

> "Coming to the case in hand, the crime committed is undoubtedly serious and heinous and the conduct of the

> appellant is reprehensible. It reveals a dirty and perverted mind of a human being who has no control over his carnal desires. Then the question is: Whether the case can be classified as of a "rarest of rare" category justifying the severest punishment of death. Treating the case on the touchstone of the guidelines laid down in *Bachan Singh*, *Machhi Singh* [(1983) 3 SCC 470] and other decisions and balancing the aggravating and mitigating circumstances emerging from the evidence on record, we are not persuaded to accept that the case can be appropriately called one of the "rarest of rare cases" deserving death penalty. We find it difficult to hold that the appellant is such a dangerous person that to spare his life will endanger the community. We are also not satisfied that the circumstances of the crime are such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances in favour of the offender. It is our considered view that the case is one in which a humanist approach should be taken in the matter of awarding punishment."

15. *Raju v. State of Haryana,* (2001) 9 SCC 50 was a case in which this Court took into account three factors for converting the death sentence of the accused to imprisonment for life for the rape and murder of an eleven year old child. Firstly, the murder was committed without any premeditation (however, there is no mention about the rape being not premeditated); secondly, the absence of any criminal record of the accused; and thirdly, there being nothing to show that the accused could be a grave danger to society. This is what was said:

> "[T]he evidence on record discloses that the accused was not having an intention to commit the murder of the girl who accompanied him. On the spur of the moment without there being any premeditation, he gave two brick-blows which caused her death. There is nothing

that the appellant was having any criminal record nor can he be said to be a grave danger to the society at large. In these circumstances, it would be difficult to hold that the case of the appellant would be rarest of rare case justifying imposition of death penalty."

16. *In Bantu v. State of Madhya Pradesh,* (2001) 9 SCC 615 this Court converted the death sentence awarded to the accused to imprisonment for life. The accused was a 22 year old man who had raped and murdered a 6 year old child. It was acknowledged that the rape and murder was heinous, but this Court took into account that the accused had no previous criminal record and that he would not be a grave danger to society at large. On this basis, the death penalty was converted to life imprisonment. This is what was said:

"In the present case, there is nothing on record to indicate that the appellant was having any criminal record nor can it be said that he will be a grave danger to the society at large. It is true that his act is heinous and requires to be condemned but at the same time it cannot be said that it is the rarest of the rare case where the accused requires to be eliminated from the society. Hence, there is no justifiable reason to impose the death sentence."

17. In *State of Maharashtra v. Bharat Fakira Dhiwar,* (2002) 1 SCC 622 this Court converted the death sentence to imprisonment for life since the accused was acquitted by the High Court and imprisonment for life was not unquestionably foreclosed. This is what this Court held:

"Regarding sentence we would have concurred with the Sessions Court's view that the extreme penalty of death can be chosen for such a crime. However, as the accused was once acquitted by the High Court we refrain from imposing that extreme penalty in spite of the fact that this case is perilously near the region of "rarest of the rare cases", as envisaged by the Constitution Bench in *Bachan*

Singh v. State of Punjab. However, the lesser option is not unquestionably foreclosed and so we alter the sentence, in regard to the offence under Section 302 IPC, to imprisonment for life."

18. In *Amit v. State of Maharashtra,* (2003) 8 SCC 93 the death penalty awarded to the accused for the rape and murder of an eleven year old child was converted to imprisonment for life for the reason that he was a young man of 20 years when the incident occurred; he had no prior record of any heinous crime; and there was no evidence that he would be a danger to society. This Court held:

"The next question is of the sentence. Considering that the appellant is a young man, at the time of the incident his age was about 20 years; he was a student; there is no record of any previous heinous crime and also there is no evidence that he will be a danger to the society, if the death penalty is not awarded. Though the offence committed by the appellant deserves severe condemnation and is a most heinous crime, but on cumulative facts and circumstances of the case, we do not think that the case falls in the category of rarest of the rare cases. We hope that the appellant will learn a lesson and have an opportunity to ponder over what he did during the period he undergoes the life sentence."

19. *Surendra Pal Shivbalakpal v. State of Gujarat,* (2005) 3 SCC 127 was a case in which the death penalty awarded to the accused who had raped a minor child, was converted to life imprisonment considering the fact that he was 36 years old and there was no evidence of the accused being involved in any other case and there was no material to show that he would be a menace to society. It was held:

"The next question that arises for consideration is whether this is a "rarest of rare case"; we do not think that this is a "rarest of rare case" in which dea

imposed on the appellant. The appellant was aged 36 years at the time of the occurrence and there is no evidence that the appellant had been involved in any other criminal case previously and the appellant was a migrant labourer from U.P. and was living in impecunious circumstances and it cannot be said that he would be a menace to society in future and no materials are placed before us to draw such a conclusion. We do not think that the death penalty was warranted in this case."

20. *In State of Maharashtra v. Mansingh,* (2005) 3 SCC 131 the accused was acquitted by the High Court of the offence of rape and murder of the victim. In a brief order, this Court noted this fact as well as the fact that this was a case of circumstantial evidence and, therefore, the death sentence was converted to imprisonment for life to meet the ends of justice. It was observed:

"Now the question which arises is as to whether the present case would come within the ambit of rarest of the rare case. In the facts and circumstances of the case, we are of the view that the trial court was not justified in imposing extreme penalty of death against the respondent and ends of justice would be met in case the sentence of life imprisonment is awarded against the respondent."

21. *Rahul v. State of Maharashtra,* (2005) 10 SCC 322 was a case of the rape and murder of a four and a half year old child by the accused. The death sentence awarded to him was converted by this Court to one of life imprisonment since the accused was a young man of 24 years when the incident occurred; apparently his behavior in custody was not uncomplimentary; he had no previous criminal record; and would not be a menace to society. It was held:

"We have considered all the relevant aspects of the case. It is true that the appellant committed a serious crime in a very ghastly manner but the fact that he was aged 24 years

at the time of the crime, has to be taken note of. Even though, the appellant had been in custody since 27-11-1999 we are not furnished with any report regarding the appellant either by any probationary officer or by the jail authorities. The appellant had no previous criminal record, and nothing was brought to the notice of the Court. It cannot be said that he would be a menace to the society in future. Considering the age of the appellant and other circumstances, we do not think that the penalty of death be imposed on him."

22. In *Amrit Singh v. State of Punjab,* (2006) 12 SCC 79 a 6 or 7 year old child was raped and murdered by a 31 year old. This Court took the view that though the rape may be brutal and the offence heinous, "it could have been a momentary lapse" on the part of the accused and was not premeditated. The victim died "as a consequence of and not because of any overt act" by the accused. Consequently, the case did not fall in the category of rarest of rare cases. It was held:

"The opinion of the learned trial Judge as also the High Court that the appellant being aged about 31 years and not suffering from any disease, was in a dominating position and might have got her mouth gagged cannot be held to be irrelevant. Some marks of violence not only on the neck but also on her mouth were found. Submission of Mr Agarwal, however, that the appellant might not have an intention to kill the deceased, thus, may have some force. The death occurred not as a result of strangulation but because of excessive bleeding. The deceased had bleed half a litre of blood. Dr. Reshamchand Singh, PW 1 did not state that injury on the neck could have contributed to her death. The death occurred, therefore, as a consequence of and not because of any specific overt act on the part of the appellant.

"Imposition of death penalty in a case of this nature, in our opinion, was, thus, improper. Even

said to be a rarest of rare cases. The manner in which the deceased was raped may be brutal but it could have been a momentary lapse on the part of the appellant, seeing a lonely girl at a secluded place. He had no premeditation for commission of the offence. The offence may look heinous, but under no circumstances, can it be said to be a rarest of rare cases."

23. *Bishnu Prasad Sinha v. State of Assam,* (2007) 11 SCC 467 was a case concerning the rape and murder of a child aged about 7 or 8 years by two accused persons. The death penalty awarded to them was converted to life imprisonment since the conviction was based on circumstantial evidence and appellant No.1 had expressed remorse in his statement under Section 313 of the Code of Criminal Procedure and admitted his guilt. It appears that the second accused either did not admit his guilt or express any remorse. This Court held:

> "The question which remains is as to what punishment should be awarded. Ordinarily, this Court, having regard to the nature of the offence, would not have differed with the opinion of the learned Sessions Judge as also the High Court in this behalf, but it must be borne in mind that the appellants are convicted only on the basis of the circumstantial evidence. There are authorities for the proposition that if the evidence is proved by circumstantial evidence, ordinarily, death penalty would not be awarded. Moreover, Appellant No.1 showed his remorse and repentance even in his statement under Section 313 of the Code of Criminal Procedure. He accepted his guilt."

24. *Santosh Kumar Singh v. State,* (2010) 9 SCC 747 was a case in which the sentence of death was converted to life imprisonment by this Court since the accused had been acquitted by the Trial Court and the High Court had reversed the acquittal on circumstantial evidence. The accused was young man of 24 years when the incident occurred; he had got married in the meanwhile and had a daughter; his father had

died a year after his conviction; his family faced a dismal future; and there was nothing to suggest that he was not capable of reform. It was held:

> "Furthermore, we see that the mitigating circumstances need to be taken into account, more particularly that the High Court has reversed a judgment of acquittal based on circumstantial evidence. The appellant was a young man of 24 at the time of the incident and, after acquittal, had got married and was the father of a girl child. Undoubtedly also, the appellant would have had time for reflection over the events of the last fifteen years, and to ponder over the predicament that he now faces, the reality that his father died a year after his conviction and the prospect of a dismal future for his young family. On the contrary, there is nothing to suggest that he would not be capable of reform.
>
> "There are extremely aggravating circumstances as well. In particular we notice the tendency of parents to be overindulgent to their progeny often resulting in the most horrendous of situations. These situations are exacerbated when an accused belongs to a category with unlimited power or pelf or even more dangerously, a volatile and heady cocktail of the two. The reality that such a class does exist is for all to see and is evidenced by regular and alarming incidents such as the present one.
>
> "Nevertheless, to our mind, the balance sheet tilts marginally in favour of the appellant, and the ends of justice would be met if the sentence awarded to him is commuted from death to life imprisonment under Section 302 of the Penal Code; the other part of the sentence being retained as it is."

25. *Rameshbhai Chandubhai Rathod (2) v. State of Gujarat,* (2011) 2 SCC 764 was an unusual case in as much as the two learned Judges hearing the case had differed on the sentence to be awarded. Accord[illegible]s

referred to a larger Bench which noted that the accused was about 28 years of age and had raped and killed a child studying in a school in Class IV. The accused was awarded a sentence of imprisonment for life subject to remissions and commutation at the instance of the Government for good and sufficient reasons. It was held as follows:

> "Both the Hon'ble Judges have relied extensively on *Dhananjoy Chatterjee case* [(1994) 2 SCC 220]. In this case the death sentence had been awarded by the trial court on similar facts and confirmed by the Calcutta High Court and the appeal too dismissed by this Court leading to the execution of the accused. Ganguly, J. has, however, drawn a distinction on the facts of that case and the present one and held that as the appellant was a young man, only 27 years of age, it was obligatory on the trial court to have given a finding as to a possible rehabilitation and reformation and the possibility that he could still become a useful member of society in case he was given a chance to do so.
>
> "We are, therefore, of the opinion that in the light of the findings recorded by Ganguly, J. it would not be proper to maintain the death sentence on the appellant…."

26. Incidentally, Dhananjoy Chatterjee was also 27 years of age when he committed the offence of rape and murder, while Rameshbhai Chandubhai Rathod was 28 years of age when he committed the offence.

27. In *Haresh Mohandas Rajput v. State of Maharashtra,* (2011) 12 SCC 56 the Trial Court had awarded life sentence to the accused for the rape and murder of a 10 year old child but the High Court enhanced it to a sentence of death. Taking into account the view of the Trial Court, this Court converted the death sentence to one of life imprisonment. It was observed:

> "So far as the sentence part is concerned, in view of the

> law referred to hereinabove, we are of the considered opinion that the case does not fall within the "rarest of rare cases". The High Court was not justified in enhancing the punishment. Thus, in the facts and circumstances of the case, we set aside the punishment of death sentence awarded by the High Court and restore the sentence of life imprisonment awarded by the trial court. With this modification, the appeals stand disposed of."

28. In *Amit v. State of Uttar Pradesh,* (2012) 4 SCC 107 the death penalty awarded to the accused for the rape and murder of a 3 year old child was converted to imprisonment for life since the accused was a young man of 28 years when he committed the offence; he had no prior history of any heinous offence; there was nothing to suggest that he would repeat such a crime in future; and given a chance, he may reform. This Court sentenced him to life imprisonment subject to remissions or commutation. This Court held:

> "In the present case also, we find that when the appellant committed the offence he was a young person aged about 28 years only. There is no evidence to show that he had committed the offences of kidnapping, rape or murder on any earlier occasion. There is nothing on evidence to suggest that he is likely to repeat similar crimes in future. On the other hand, given a chance he may reform over a period of years. Hence, following the judgment of the three-Judge Bench in *Rameshbhai Chandubhai Rathod (2) v. State of Gujarat*, we convert the death sentence awarded to the appellant to imprisonment for life and direct that the life sentence of the appellant will extend to his full life subject to any remission or commutation at the instance of the Government for good and sufficient reasons."

Broad analysis:

29. A study of the above cases suggests that there are several reasons, cumulatively taken, fo h

penalty to that of imprisonment for life. However, some of the factors that have had an influence in commutation include (1) the young age of the accused (*Amit v. State of Maharashtra* aged 20 years, *Rahul* aged 24 years, *Santosh Kumar Singh* aged 24 years, *Rameshbhai Chandubhai Rathod (2)* aged 28 years and *Amit v. State of Uttar Pradesh* aged 28 years); (2) the possibility of reforming and rehabilitating the accused (*Santosh Kumar Singh* and *Amit v. State of Uttar Pradesh* the accused, incidentally, were young when they committed the crime); (3) the accused had no prior criminal record (*Nirmal Singh*, *Raju*, *Bantu*, *Amit v. State of Maharashtra*, *Surendra Pal Shivbalakpal*, *Rahul* and *Amit v. State of Uttar Pradesh*); (4) the accused was not likely to be a menace or threat or danger to society or the community (*Nirmal Singh*, *Mohd. Chaman*, *Raju*, *Bantu*, *Surendra Pal Shivbalakpal*, *Rahul* and *Amit v. State of Uttar Pradesh*). A few other reasons need to be mentioned such as the accused having been acquitted by one the Courts (*State of Tamil Nadu v. Suresh*, *State of Maharashtra v. Suresh*, *Bharat Fakira Dhiwar, Mansingh* and *Santosh Kumar Singh*); the crime was not premeditated (*Kumudi Lal*, *Akhtar*, *Raju* and *Amrit Singh*); the case was one of circumstantial evidence (*Mansingh* and *Bishnu Prasad Sinha*). In one case, commutation was ordered since there was apparently no 'exceptional' feature warranting a death penalty (*Kumudi Lal*) and in another case because the Trial Court had awarded life sentence but the High Court enhanced it to death (*Haresh Mohandas Rajput*).

Cases where the death penalty has been confirmed:

30. *Jumman Khan v. State of Uttar Pradesh,* (1991) 1 SCC 752 was a case in which the death penalty was confirmed by this Court for the rape and murder of a 6 year old child on the basis of the brutality of the crime and on circumstantial evidence. This Court quoted the order dismissing the special leave petition of the accused against his conviction, in which it was said:

> "Although the conviction of the petitioner under Section 302 of the Indian Penal Code, 1860 rests on circumstantial evidence, the circumstantial evidence against the petitioner leads to no other inference except that of his guilt and excludes every hypothesis of his innocence……...
>
> Failure to impose a death sentence in such grave cases where it is a crime against the society - particularly in cases of murders committed with extreme brutality - will bring to naught the sentence of death provided by Section 302 of the Indian Penal Code. It is the duty of the court to impose a proper punishment depending upon the degree of criminality and desirability to impose such punishment. The only punishment which the appellant deserves for having committed the reprehensible and gruesome murder of the innocent child to satisfy his lust, is nothing but death as a measure of social necessity and also as a means of deterring other potential offenders. The sentence of death is confirmed."

31. In *Dhananjoy Chatterjee v. State of West Bengal,* (1994) 2 SCC 220 this Court confirmed the death sentence of the 27 year old married accused taking into consideration the rising crime graph, particularly violent crime against women; society's cry for justice against criminals; and the fact that the rape and murder of an 18 year old was premeditated and committed in a brutal manner by a security guard against a young defenceless person to satisfy his lust and in retaliation for a complaint made by her against him. This is what this Court had to say:

> "In recent years, the rising crime rate — particularly violent crime against women has made the criminal sentencing by the courts a subject of concern…….
>
> "In our opinion, the measure of punishment in a given case must depend upon the atrocity of the crime; the conduct of the criminal and the defenceless

of the victim. Imposition of appropriate punishment is the manner in which the courts respond to the society's cry for justice against the criminals. Justice demands that courts should impose punishment befitting the crime so that the courts reflect public abhorrence of the crime. The courts must not only keep in view the rights of the criminal but also the rights of the victim of crime and the society at large while considering imposition of appropriate punishment.

"The sordid episode of the security guard, whose sacred duty was to ensure the protection and welfare of the inhabitants of the flats in the apartment, should have subjected the deceased, a resident of one of the flats, to gratify his lust and murder her in retaliation for his transfer on her complaint, makes the crime even more heinous. Keeping in view the medical evidence and the state in which the body of the deceased was found, it is obvious that a most heinous type of barbaric rape and murder was committed on a helpless and defenceless school-going girl of 18 years……."

32. In *Laxman Naik v. State of Orissa,* (1994) 3 SCC 381 this Court was of the opinion that since the accused was the guardian of the helpless victim, his 7 year old niece, and since the crime was pre-planned, cold blooded, brutal and diabolical, the appropriate punishment would be a sentence of death. This Court held:

> "The hard facts of the present case are that the appellant Laxman is the uncle of the deceased and almost occupied the status and position that of a guardian. Consequently the victim who was aged about 7 years must have reposed complete confidence in the appellant and while reposing such faith and confidence in the appellant must have believed in his bona fides and it was on account of such a faith and belief that she acted upon the command of the appellant in accompanying him under the impression that she was being taken to her village unmindful of the

> preplanned unholy designs of the appellant. The victim was a totally helpless child there being no one to protect her in the desert where she was taken by the appellant misusing her confidence to fulfil his lust. It appears that the appellant had preplanned to commit the crime by resorting to diabolical methods and it was with that object that he took the girl to a lonely place to execute his dastardly act."

33. *Kamta Tiwari v. State of Madhya Pradesh,* (1996) 6 SCC 250 was a case where the accused was close to the family of the victim, a 7 year old child. In fact, she would address him as 'Uncle Tiwari'. He was, therefore, in the nature of a person of trust, while the victim was in a hapless condition and was brutally raped and murdered in a premeditated manner. This Court held:

> "Taking an overall view of all the facts and circumstances of the instant case in the light of the above propositions we are of the firm opinion that the sentence of death should be maintained. In vain we have searched for mitigating circumstances — but found aggravating circumstances aplenty. …… When an innocent hapless girl of 7 years was subjected to such barbaric treatment by a person who was in a position of her trust his culpability assumes the proportion of extreme depravity and arouses a sense of revulsion in the mind of the common man. In fine, the motivation of the perpetrator, the vulnerability of the victim, the enormity of the crime, the execution thereof persuade us to hold that this is a "rarest of rare" cases where the sentence of death is eminently desirable not only to deter others from committing such atrocious crimes but also to give emphatic expression to society's abhorrence of such crimes."

34. *Nirmal Singh v. State of Haryana,* (1999) 3 SCC 670 has already been referred to above. One of the accused Dharampal, had been convicted for rape and had filed an appeal. Pending the appeal, he applie[illegible]d

bail. While on bail, he killed five members of the family who had given evidence against him in the case for which he was convicted of rape, thereby carrying out the threat he had earlier given. The crime was pre-planned and executed in a brutal manner. Confirming the death penalty awarded to him, this Court held:

> "…… Coming to the question of sentence, however, we find that the High Court has not considered the individual role played by each of the appellants. So far as accused Dharampal is concerned, it is he who had given the threat on the previous occasion that if anybody gives evidence in the rape case, the whole family will be wiped off. It is he who after being convicted in the said rape case preferred an appeal and obtained a bail from the High Court and has totally misutilised that privilege of bail by killing 5 persons who were all the members of the family of P whose deposition was responsible for his conviction in the rape case. It is he who has assaulted each of the 5 deceased persons by means of a kulhari and the nature of the injuries as found by the doctor would indicate that the act is an act of a depraved mind and is most brutal and heinous in nature. It is he who had consecrated the plan to put into action his earlier threat but he has taken the help of his brother Nirmal."

35. *Jai Kumar v. State of Madhya Pradesh,* (1999) 5 SCC 1 was a case in which the death penalty was confirmed since this Court accepted the view of the High Court that the accused was a "living danger" and incapable of rehabilitation. The crime was that of an attempted rape of a 30 year old pregnant woman followed by her murder and the murder of her 8 year old child. This Court held that the crime was brutal and committed in a gruesome and depraved manner. The fact that the accused was a young man of 22 years was held not to be a relevant factor, given the nature of the crime. The judicial conscience of this Court was shocked by the facts of the case. It was held:

> "….. [W]e are unable to record our concurrence with the submissions of Mr Muralidhar that there are some mitigating circumstances and there is likelihood of the accused being reformed or rehabilitated. Incidentally, the High Court has described the accused as "a living danger" and we cannot agree more therewith in view of the gruesome act as noticed above.
>
> "The facts establish the depravity and criminality of the accused in no uncertain terms. No regard being had for the precious life of the young child also. The compassionate ground of the accused being 22 years of age cannot in the facts of the matter be termed to be at all relevant……
>
> "In the present case, the savage nature of the crime has shocked our judicial conscience. The murder was cold-blooded and brutal without any provocation. It certainly makes it a rarest of the rare cases in which there are no extenuating or mitigating circumstances.

36. In *Molai & Anr. v. State of M.P.,* (1999) 9 SCC 581 death penalty awarded to both the accused for the rape and murder of a 16 year old was confirmed. Molai was a guard in a Central Jail and Santosh was undergoing a sentence in that jail. The victim was the daughter of the Assistant Jailor. Taking into account the manner of commission of the offence and the fact that they took advantage of the victim being alone in a house, the death penalty was confirmed by this Court although the case was one of circumstantial evidence. This Court held:

> "…… It cannot be overlooked that N, a 16-year-old girl, was preparing for her Class 10th examination at her house and suddenly both the accused took advantage of she being alone in the house and committed a most shameful act of rape. The accused did not stop there but they strangulated her by using her undergarment and thereafter took her to the septic tank along wit[illegible]d

injuries with a sharp-edged weapon. The accused did not even stop there but they exhibited the criminality in their conduct by throwing the dead body into the septic tank totally disregarding the respect for a human dead body. Learned counsel for the accused (appellants) could not point any mitigating circumstance from the record of the case to justify the reduction of sentence of either of the accused."

37. *State of Uttar Pradesh v. Satish,* (2005) 3 SCC 114 is a remarkable case for the reason that the accused was acquitted by the High Court and yet the death penalty awarded by the Trial Court was upheld by this Court for the rape and murder of a school going child. The case was also one of circumstantial evidence. The special reasons for awarding the death penalty were the diabolic and inhuman nature of the crime. It was held:

"Considering the view expressed by this Court in *Bachan Singh case* and *Machhi Singh case* we have no hesitation in holding that the case at hand falls in the rarest of rare category and death sentence awarded by the trial court was appropriate. The acquittal of the respondent-accused is clearly unsustainable and is set aside. In the ultimate result, the judgment of the High Court is set aside and that of the trial court is restored. The appeals are allowed."

38. *Shivu & Anr. v. Registrar General, High Court of Karnataka,* (2007) 4 SCC 713 was a case in which the special reasons for confirming the death penalty given to both the accused who were aged about 20 and 22 years old respectively were the heinous rape and murder of an 18 year old. It was noted that the accused had twice earlier attempted to commit rape but were not successful. Though no case was lodged against them, they were admonished by the village elders and the Panchayat and asked to mend their ways. It was held:

"Considering the view expressed by this Court in *Bachan Singh case* and *Machhi Singh case* we have no hesitation in holding that the case at hand falls in rarest of rare category and death sentence awarded by the trial court and confirmed by the High Court was appropriate."

39. In *Bantu v. State of Uttar Pradesh,* (2008) 11 SCC 113 the death sentence was confirmed for the special reason of the depraved and heinous act of rape and murder of a 5 year old child, which included the insertion of a wooden stick in her vagina to the extent of 33 cms. to masquerade the crime as an accident. This Court held:

"The case at hand falls in the rarest of the rare category. The depraved acts of the accused call for only one sentence, that is, death sentence."

40. In *Shivaji v. State of Maharashtra,* (2008) 15 SCC 269 this Court categorically rejected the view that death sentence cannot be awarded in a case where the evidence is circumstantial. The death sentence was upheld also because of the depraved acts of the accused in raping and murdering a 9 year old child. This Court held:

"The plea that in a case of circumstantial evidence death should not be awarded is without any logic. If the circumstantial evidence is found to be of unimpeachable character in establishing the guilt of the accused, that forms the foundation for conviction. That has nothing to do with the question of sentence as has been observed by this Court in various cases while awarding death sentence. The mitigating circumstances and the aggravating circumstances have to be balanced. In the balance sheet of such circumstances, the fact that the case rests on circumstantial evidence has no role to play.....

"The case at hand falls in the rarest of the rare category. The circumstances highlighted e

depraved acts of the accused, and they call for only one sentence, that is, death sentence."

41. In *Ankush Maruti Shinde v. State of Maharashtra,* (2009) 6 SCC 667 of the six accused, three were awarded life sentence by the High Court while for the remaining three, the death sentence was confirmed. The accused were found to have committed five murders and had raped a lady (who survived) and a child of 15 years of age (who died). This Court awarded the death penalty to all the six accused. This Court found the crime to be cruel and diabolic; the collective conscience of the community was shocked; the victims were of a tender age and defenceless; the victims had no animosity towards the accused and the attack against them was unprovoked. Considering these factors, this Court awarded the death penalty to all the accused and held:

"The murders were not only cruel, brutal but were diabolic. The High Court has held that those who were guilty of rape and murder deserve death sentence, while those who were convicted for murder only were to be awarded life sentence. The High Court noted that the whole incident is extremely revolting, it shocks the collective conscience of the community and the aggravating circumstances have outweighed the mitigating circumstances in the case of accused persons 1, 2 and 4; but held that in the case of others it was to be altered to life sentence.

"The High Court itself noticed that five members of a family were brutally murdered, they were not known to the accused and there was no animosity towards them. Four of the witnesses were of tender age, they were defenceless and the attack was without any provocation. Some of them were so young that they could not resist any attack by the accused. A minor girl of about fifteen years was dragged to the open field, gang-raped and done to death.

"Above being the position, the appeals filed by the

accused persons deserve dismissal, which we direct and the State's appeals deserve to be allowed. A-2, A-3 and A-5 are also awarded death sentence. In essence all the six accused persons deserve death sentence."

42. *B.A. Umesh v. Registrar General, High Court of Karnataka,* (2011) 3 SCC 85 was a case of the rape and murder of a lady, a mother of a 7 year old child. In the High Court, there was a difference of opinion on the sentence to be awarded – one of the learned judges confirmed the death penalty while the other learned judge was of the view that imprisonment for life should be awarded. The matter was referred to a third learned judge who agreed with the award of a death penalty. This Court confirmed the death penalty since the crime was unprovoked and committed in a depraved and merciless manner; the accused was alleged to have been earlier and subsequently involved in criminal activity; he was a menace to society and incapable of rehabilitation; the accused did not feel any remorse for what he had done. It was held:

"On the question of sentence we are satisfied that the extreme depravity with which the offences were committed and the merciless manner in which death was inflicted on the victim, brings it within the category of the rarest of rare cases which merits the death penalty, as awarded by the trial court and confirmed by the High Court. None of the mitigating factors as were indicated by this Court in *Bachan Singh case* or in *Machhi Singh case* are present in the facts of the instant case. The appellant even made up a story as to his presence in the house on seeing PW 2 Suresh, who had come there in the meantime. Apart from the above, it is clear from the recoveries made from his house that this was not the first time that he had committed crimes in other premises also, before he was finally caught by the public two days after the present incident, while trying to escape from the house of one Seeba where he made a similar attempt to rob and [illegible] process causing injuries to her.

"As has been indicated by the courts below, the antecedents of the appellant and his subsequent conduct indicates that he is a menace to the society and is incapable of rehabilitation. The offences committed by the appellant were neither under duress nor on provocation and an innocent life was snuffed out by him after committing violent rape on the victim. He did not feel any remorse in regard to his actions, inasmuch as, within two days of the incident he was caught by the local public while committing an offence of a similar type in the house of one Seeba."

43. *Mohd. Mannan v. State of Bihar,* (2011) 5 SCC 317 was a case which a 42 year old man had raped and killed a 7 year old child. This Court looked at the factors for awarding death sentence both in the negative as well as in the positive sense. It was held that the number of persons killed by the accused is not a decisive factor; nor is the mere brutality of the crime decisive. However if the brutality of the crime shocks the collective conscience of the community, one has to lean towards the death penalty. Additionally, it is to be seen if the accused is a menace to society and can be reformed or not. Applying these broad parameters, this Court held that the accused was a mature man of 43 years; that he held a position of trust in relation to the victim; that the crime was pre-planned; and that the crime was, pre-planned, unprovoked and gruesome against a defenceless child. It was held:

"……. The appellant is a matured man aged about 43 years. He held a position of trust and misused the same in a calculated and pre-planned manner. He sent the girl aged about 7 years to buy betel and few minutes thereafter in order to execute his diabolical and grotesque desire proceeded towards the shop where she was sent. The girl was aged about 7 years of thin built and 4 ft of height and such a child was incapable of arousing lust in normal situation. The appellant had won the trust of the child and

she did not understand the desire of the appellant which would be evident from the fact that while she was being taken away by the appellant no protest was made and the innocent child was made prey of the appellant's lust.

"The post-mortem report shows various injuries on the face, nails and body of the child. These injuries show the gruesome manner in which she was subjected to rape. The victim of crime is an innocent child who did not provide even an excuse, much less a provocation for murder. Such cruelty towards a young child is appalling. The appellant had stooped so low as to unleash his monstrous self on the innocent, helpless and defenceless child. This act no doubt had invited extreme indignation of the community and shocked the collective conscience of the society. Their expectation from the authority conferred with the power to adjudicate is to inflict the death sentence which is natural and logical. We are of the opinion that the appellant is a menace to the society and shall continue to be so and he cannot be reformed."

44. In *Rajendra Pralhadrao Wasnik v. State of Maharashtra,* (2012) 4 SCC 37 the accused, a 31 year old, had raped and murdered a 3 year old child. This Court considered the brutality of the crime and the conduct of the accused prior to, during and after the crime. Prior to the incident, the accused had worked under a false name and had gained the trust and confidence of the victim. The accused had, after committing a brutal crime, left the injured victim in the open field without any clothes, thereby exhibiting his unfortunate and abusive conduct. It was held:

"This Court has to examine the conduct of the accused prior to, at the time as well as after the commission of the crime. Prior thereto, the accused had been serving with PW 5 and PW 6 under a false name and took advantage of his familiarity with the family of the deceased. He committed the crime in the most brutal manner

opted not to explain any circumstances and just took up the plea of false implication, which is unbelievable and unsustainable.

"Another aspect of the matter is that the minor child was helpless in the cruel hands of the accused. The accused was holding the child in a relationship of "trust-belief" and "confidence", in which capacity he took the child from the house of PW 2. In other words, the accused, by his conduct, has belied the human relationship of trust and worthiness. The accused left the deceased in a badly injured condition in the open fields without even clothes. This reflects the most unfortunate and abusive facet of human conduct, for which the accused has to blame no one else than his own self."

Broad analysis:

45. The principal reasons for confirming the death penalty in the above cases include (1) the cruel, diabolic, brutal, depraved and gruesome nature of the crime (*Jumman Khan*, *Dhananjoy Chatterjee*, *Laxman Naik*, *Kamta Tewari*, *Nirmal Singh*, *Jai Kumar*, *Satish*, *Bantu*, *Ankush Maruti Shinde*, *B.A. Umesh*, *Mohd. Mannan* and *Rajendra Pralhadrao Wasnik*); (2) the crime results in public abhorrence, shocks the judicial conscience or the conscience of society or the community (*Dhananjoy Chatterjee*, *Jai Kumar*, *Ankush Maruti Shinde* and *Mohd. Mannan*); (3) the reform or rehabilitation of the convict is not likely or that he would be a menace to society (*Jai Kumar*, *B.A. Umesh* and *Mohd. Mannan*); (4) the victims were defenceless (*Dhananjoy Chatterjee*, *Laxman Naik*, *Kamta Tewari*, *Ankush Maruti Shinde*, *Mohd. Mannan* and *Rajendra Pralhadrao Wasnik*); (5) the crime was either unprovoked or that it was premeditated (*Dhananjoy Chatterjee*, *Laxman Naik*, *Kamta Tewari*, *Nirmal Singh*, *Jai Kumar*, *Ankush Maruti Shinde*, *B.A. Umesh* and *Mohd. Mannan*) and in three cases the antecedents or the prior history of the convict was taken into

consideration (*Shivu*, *B.A. Umesh* and *Rajendra Pralhadrao Wasnik*).

46. However, what is more significant is that there are cases where the factors taken into consideration for commuting the death penalty were given a go-bye in cases where the death penalty was confirmed. The young age of the accused was not taken into consideration or held irrelevant in *Dhananjoy Chatterjee* aged about 27 years, *Jai Kumar* aged about 22 years and *Shivu & another* aged about 20 and 22 years while it was given importance in *Amit v. State of Maharashtra*, *Rahul*, *Santosh Kumar Singh*, *Rameshbhai Chandubhai Rathod (2)* and *Amit v. State of Uttar Pradesh*. The possibility of reformation or rehabilitation was ruled out, without any expert evidence, in *Jai Kumar*, *B.A. Umesh* and *Mohd. Mannan* in much the same manner, without any expert evidence, as the benefit thereof was given in *Nirmal Singh*, *Mohd. Chaman*, *Raju*, *Bantu*, *Surendra Pal Shivbalakpal*, *Rahul* and *Amit v. State of Uttar Pradesh*. Acquittal or life sentence awarded by the High Court was considered not good enough reason to convert the death sentence in *Satish*, *Ankush Maruti Shinde* and *B.A. Umesh* but it was good enough in *State of Tamil Nadu v. Suresh*, *State of Maharashtra v. Suresh*, *Bharat Fakira Dhiwar* and *Santosh Kumar Singh*. Even though the crime was not premeditated, the death penalty was confirmed in *Molai* notwithstanding the view expressed in *Akhtar*, *Raju* and *Amrit Singh*. Circumstantial evidence was held not to be a 'mitigating' factor in *Jumman Khan*, *Kamta Tewari*, *Molai* and *Shivaji* but it was so held in *Bishnu Prasad Sinha*.

47. *Bachan Singh* is more than clear that the crime is important (cruel, diabolic, brutal, depraved and gruesome) but the criminal is also important and this, unfortunately has been overlooked in several cases in the past (as mentioned in *Santosh Kumar Satishbhushan Bariyar v. State of Maharashtra,* (2009) 6 SCC 498) and even in some of the cases referred to above. It is this individ[illegible]at

has made this Court wary, in the recent past, of imposing death penalty and instead substituting it for fixed term sentences exceeding 14 years (the term of 14 years or 20 years being erroneously equated with life imprisonment) or awarding consecutive sentences. Some of these cases, which are not necessarily cases of rape and murder, are mentioned below.

Minimum fixed term sentences:

48. There have been several cases where life sentence has been awarded by this Court with a minimum fixed term of incarceration. Many of them have been discussed in *Swamy Shraddananda* and so it is not necessary to refer to them individually. *Swamy Shraddananda* refers to *Aloke Nath Dutta v. State of West Bengal,* (2007) 12 SCC 230 which in turn refers to five different cases. I propose to refer to them at this stage.

49. In *Subhash Chander v. Krishan Lal,* (2001) 4 SCC 458 it was held that the convict shall remain in prison "for the rest of his life. He shall not be entitled to any commutation or premature release under Section 401 of the Code of Criminal Procedure, Prisoners Act, Jail Manual or any other statute and the rules made for the purposes of grant of commutation and remissions."

50. In *Shri Bhagwan v. State of Rajasthan,* (2001) 6 SCC 296, *Prakash Dhawal Khairnar (Patil) v. State of Maharashtra*, (2002) 2 SCC 35 and *Ram Anup Singh v. State of Bihar,* (2002) 6 SCC 686 the convict was directed to serve out at least 20 years of imprisonment.

51. In *Mohd. Munna v. Union of India,* (2005) 7 SCC 417 the convict had undergone 21 years of incarceration. This Court held that he was not entitled to release as a matter of course but was required to serve out his sentence till the remainder of his life subject to remissions by the appropriate authority or State Government.

52. *Swamy Shraddananda* also refers to *Jayawant Dattatraya Suryarao v. State of Maharashtra,* (2001) 10 SCC 109 in which it was directed that the convict "will not be entitled to any commutation or premature release under Section 433-A of the Criminal Procedure Code, Prisoners Act, Jail Manual or any other statute and the Rules made for the purpose of commutation and remissions." Similarly, in *Nazir Khan v. State of Delhi, (2003) 8 SCC 461* while sentencing the convicts to imprisonment for 20 years it was held that they would not be entitled to any remission from this period.

53. The death sentence to the convict in *Swamy Shraddananda* was converted to imprisonment for life with a further direction that he shall not be released till the rest of his life.

54. *Sebastian v. State of Kerala,* (2010) 1 SCC 58 was a case of a 24 year old extremely violent pedophile accused of raping a two-year old child and then murdering her. While commuting the death sentence, this Court held that he should remain in jail for the rest of his life in terms of *Swamy Shraddananda*. It was observed:

> "The evidence that the appellant was a paedophile with extremely violent propensities also stands proved on record in that he had been convicted and sentenced for an offence punishable under Section 354 in the year 1998 and later for the offences punishable under Sections 363, 376, 379, 302 and 201 IPC for the rape and murder of a young child and had been awarded a sentence of imprisonment for life under Section 302, and several other terms of imprisonment with respect to the other sections, though, an appeal in this connection was pending as on date. It is also extremely relevant that the appellant had, in addition, been tried for the murders of several other children but had been acquitted on 28-7-2005 with the benefit of doubt. The present incident happened three days later.

"We accordingly dismiss the appeals but modify the sentence of death to one for the rest of his life in terms of the judgment in *Shraddananda case*."

55. In *Ramnaresh v. State of Chhattisgarh,* (2012) 4 SCC 257 this Court converted the death sentence of the accused to imprisonment for life though the crime of rape and murder was heinous, since the accused persons were young at the time of commission of the offence (between 21 and 31 years of age); the possibility of the death of the victim being accidental; and the accused not being a social menace with possibility of reforming themselves. It was held, while modifying the sentence that the accused serve a term of imprisonment of 21 years:

"While we cumulatively examine the various principles and apply them to the facts of the present case, it appears to us that the age of the accused, possibility of the death of the deceased occurring accidently and the possibility of the accused reforming themselves, they cannot be termed as "social menace". It is unfortunate but a hard fact that all these accused have committed a heinous and inhumane crime for satisfaction of their lust, but it cannot be held with certainty that this case falls in the "rarest of rare" cases. On appreciation of the evidence on record and keeping the facts and circumstances of the case in mind, we are unable to hold that any other sentence but death would be inadequate.

"Accordingly, while commuting the sentence of death to that of life imprisonment (21 years), we partially allow their appeals only with regard to the quantum of sentence."

56. In *Neel Kumar v. State of Haryana,* (2012) 5 SCC 766 this Court modified the death penalty awarded to the accused for the rape and murder of his 4 year old daughter to one of 30 years imprisonment without remissions. It was held:

"A three-Judge Bench of this Court in *Swamy*

Shraddananda (2) v. State of Karnataka, considering the facts of the case, set aside the sentence of death penalty and awarded the life imprisonment but further explained that in order to serve the ends of justice, the appellant therein would not be released from prison till the end of his life.

"Similarly, in *Ramraj v. State of Chhattisgarh* [(2010) 1 SCC 573] this Court while setting aside the death sentence made a direction that the appellant therein would serve minimum period of 20 years including remissions earned and would not be released on completion of 14 years' imprisonment.

"Thus, in the facts and circumstances of the case, we set aside the death sentence and award life imprisonment. The appellant must serve a minimum of 30 years in jail without remissions, before consideration of his case for premature release."

57. In *Sandeep v. State of U.P.,* (2012) 6 SCC 107 the death sentence awarded to the convict for the murder of his pregnant friend and pouring acid on her head was converted to sentence of life for a minimum period of 30 years without any remission before his case could be considered for premature release.

58. In *Brajendrasingh v. State of Madhya Pradesh,* (2012) 4 SCC 289 the accused had murdered his wife and three children since he suspected his wife's fidelity. The death penalty awarded to him was converted to imprisonment for life by this Court with a minimum imprisonment of 21 years. This is what was said by this Court:

"Considering the above aspects, we are of the considered view that it is not a case which falls in the category of the "rarest of rare" cases where imposition of death sentence is imperative. It is also not a case

other sentence would not serve the ends of justice or would be entirely inadequate.

"Once we draw the balance sheet of aggravating and mitigating circumstances and examine them in the light of the facts and circumstances of the present case, we have no hesitation in coming to the conclusion that this is not a case where this Court ought to impose the extreme penalty of death upon the accused. Therefore, while partially accepting the appeals only with regard to quantum of sentence, we commute the death sentence awarded to the accused to one of life imprisonment (21 years)."

59. In *State of Uttar Pradesh v. Sanjay Kumar,* (2012) 8 SCC 537 this Court converted the death penalty awarded to the accused for the rape and murder of an 18 year old into one of life imprisonment with a further direction that he would not be granted premature release under the guidelines framed for that purpose, that is, the Jail Manual or even under Section 433-A of the Cr. P.C. It was said:

"In view of the above, we reach the inescapable conclusion that the submissions advanced by the learned counsel for the State are unfounded. The aforesaid judgments make it crystal clear that this Court has merely found out the *via media*, where considering the facts and circumstances of a particular case, by way of which it has come to the conclusion that it was not the "rarest of rare cases", warranting death penalty, but a sentence of 14 years or 20 years, as referred to in the guidelines laid down by the States would be totally inadequate. The life imprisonment cannot be equivalent to imprisonment for 14 years or 20 years, rather it always meant as the whole natural life. This Court has always clarified that the punishment so awarded would be subject to any order passed in exercise of the clemency powers of the President of India or the Governor of the State, as the case may be. Pardons, reprieves and remissions are granted in exercise of prerogative power.

There is no scope of judicial review of such orders except on very limited grounds, for example, non-application of mind while passing the order; non-consideration of relevant material; or if the order suffers from arbitrariness. The power to grant pardons and to commute sentences is coupled with a duty to exercise the same fairly and reasonably. Administration of justice cannot be perverted by executive or political pressure. Of course, adoption of uniform standards may not be possible while exercising the power of pardon. Thus, such orders do not interfere with the sovereign power of the State. More so, not being in contravention of any statutory or constitutional provision, the orders, even if treated to have been passed under Article 142 of the Constitution do not deserve to be labelled as unwarranted. The aforesaid orders have been passed considering the gravity of the offences in those cases that the accused would not be entitled to be considered for premature release under the guidelines issued for that purpose i.e. under the Jail Manual, etc. or even under Section 433-A CrPC."

60. In *Gurvail Singh v. State of Punjab,* (2013) 2 SCC 713 the death sentence was converted to imprisonment for life with the requirement that the convict spends a minimum of thirty years in jail without remission. It was held:

"We are of the view, so far as this case is concerned, that the extreme sentence of capital punishment is not warranted. Due to the fact that the appellants are instrumental for the death of four persons and nature of injuries they have inflicted, in front of PW 1, whose son, daughter-in-law and two grandchildren were murdered, we are of the view that the appellants deserve no sympathy. Considering the totality of facts and circumstances of this case we hold that imposition of death sentence on the appellants was not warranted but while awarding life imprisonment to the appellants, w[illegible]st serve a minimum of thirty years in [illegible].

The sentence awarded by the trial court and confirmed by the High Court is modified as above. Under such circumstances, we modify the sentence from death to life imprisonment. Applying the principle laid down by this Court in *Sandeep* we are of the view that the minimum sentence of thirty years would be an adequate punishment, so far as the facts of this case are concerned."

Consecutive sentence cases:

61. *Ravindra Trimbak Chouthmal v. State of Maharashtra,* (1996) 4 SCC 148 is perhaps among the earliest cases where consecutive sentences were awarded. This was not a case of rape and murder but one of causing a dowry death of his pregnant wife. It was held that it was not the "rarest of rare" cases "because dowry death has ceased to belong to *that* species of killing." The death sentence was, therefore, not upheld. Since the accused had attempted to cause disappearance of the evidence by severing the head and cutting the body into nine pieces, this Court directed that he should undergo the sentence for that crime after serving out his life sentence. It was held:

"We have given considered thought to the question and we have not been able to place the case in that category which could be regarded as the "rarest of the rare" type. This is so because dowry death has ceased to belong to *that* species of killing. The increasing number of dowry deaths would bear this. To halt the rising graph, we, at one point, thought to maintain the sentence; but we entertain doubt about the deterrent effect of a death penalty. We, therefore, resist ourselves from upholding the death sentence, much though we would have desired annihilation of a despicable character like the appellant before us. We, therefore, commute the sentence of death to one of RI for life imprisonment.

"But then, it is a fit case, according to us, where, for the

offence under Sections 201/34, the sentence awarded, which is RI for seven years being the maximum for a case of the present type, should be sustained, in view of what had been done to cause disappearance of the evidence relating to the commission of murder — the atrocious way in which the head was severed and the body was cut in nine pieces. These cry for maximum sentence. Not only this, the sentence has to run consecutively, and not concurrently, to show our strong disapproval of the loathsome, revolting and dreaded device adopted to cause disappearance of the dead body. To these sentences, we do not, however, desire to add those awarded for offences under Sections 316 and 498-A/34, as killing of the child in the womb was not separately intended, and Section 498-A offence ceases to be of significance and importance in view of the murder of Vijaya.

"The result is that the appeal stands allowed to the extent that the sentence of death is converted to one of imprisonment for life. But then, the sentence of seven years' RI for the offence under Sections 201/34 IPC would start running after the life imprisonment has run its course as per law."

Since imprisonment for life means that the convict will remain in jail till the end of his normal life, what this decision mandates is that if the convict is to be earlier released by the competent authority for any reason, in accordance with procedure established by law, then the second sentence will commence immediately thereafter.

62. *Ronny v. State of Maharashtra,* (1998) 3 SCC 625 is also among the earliest cases in the recent past where consecutive sentences were awarded. The three accused, aged about 35 years (two of them) and 25/27 years had committed three murders and a gang rape. This Court converted the death sentence of all thr[illegible]r

life since it was not possible to identify whose case would fall in the category of "rarest of rare" cases. However, after awarding a sentence of life imprisonment, this Court directed that they would all undergo punishment for the offence punishable under Section 376(2)(g) of the IPC consecutively, after serving the sentences for other offences. It was held:

> "Considering the cumulative effect of all the factors, it cannot be said that the offences were committed under the influence of extreme mental or emotional disturbance for the whole thing was done in a pre-planned way; having regard to the nature of offences and circumstances in which they were committed, it is not possible for the Court to predict that the appellant would not commit criminal act of violence or would not be a threat to the society. A-1 is 35 years' old, A-2 is 35 years' old and A-3 is 25 (*sic* 27) years' old. The appellants cannot be said to be too young or too old. The possibility of reform and rehabilitation, however, cannot be ruled out. From the facts and circumstances, it is not possible to predict as to who among the three played which part. It may be that the role of one has been more culpable in degree than that of the others and vice versa. Where in a case like this it is not possible to say as to whose case falls within the "rarest of the rare" cases, it would serve the ends of justice if the capital punishment is commuted into life imprisonment. Accordingly, we modify the sentence awarded by the courts below under Section 302 read with Section 34 from death to life imprisonment. The sentences for the offences for which the appellants are convicted, except under Section 376(2)(*g*) IPC, shall run concurrently; they shall serve sentence under Section 376(2)(*g*) IPC consecutively, after serving sentence for the other offences."

63. In *Sandesh v. State of Maharashtra,* (2013) 2 SCC 479 this Court converted the death penalty awarded to the accused to imprisonment for life, inter alia, for the rape of a pregnant lady, attempted murder and the murder of her mother

in law to imprisonment for life with a further direction that all the sentences were to run consecutively.

64. In *Sanaullah Khan v. State of Bihar,* MANU/SC/0165/2013 the death sentence awarded to the accused for the murder of three persons was converted by this Court to imprisonment for life for each of the three murders and further the sentences were directed to run consecutively.

65. These decisions clearly suggest that this Court has been seriously reconsidering, though not in a systemic manner, awarding life sentence as an alternative to death penalty by applying (though not necessarily mentioning) the "unquestionably foreclosed" formula laid down in *Bachan Singh*.

66. Off and on, the issue has been the interpretation of "life sentence" – does it mean imprisonment for only 14 years or 20 years or does it mean for the life of the convict. This doubt has been laid to rest in several cases, more recently in *Sangeet* where it has been unequivocally laid down that a sentence of imprisonment for life means imprisonment for the rest of the normal life of the convict. The convict is not entitled to any remission in a case of sentence of life imprisonment, as is commonly believed. However, if the convict is sought to be released before the expiry of his life, it can only be by following the procedure laid down in Section 432 of the Code of Criminal Procedure or by the Governor exercising power under Article 161 of the Constitution or by the President exercising power under Article 72 of the Constitution. There is no other method or procedure. Whether the statutory procedure under Section 432 of the Code of Criminal Procedure can be stultified for a period of 20 years or 30 years needs further discussion as observed in *Sangeet*, which did not deal with the constitutional power. This side issue does not arise in the present case also, and is therefore, not being discussed.

Information from the National Crime

67. Quite apart from the above discussion, assuming a case can be identified as the rarest of rare, the chapter does not end with awarding the death sentence. From the information available in the annual reports published by the National Crime Records Bureau (NCRB) and which is freely available on the internet, it appears that between 2001 and 2011 (both years included) death sentence has been awarded to as many as 1455 persons and one person (Dhananjoy Chatterjee) was executed in 2004. However, death sentence has been converted to life imprisonment during the same period in respect of 4321 persons. The figures (of death sentence awarded and commuted) obviously do not match. It is unlikely that all the commutations were by the Executive. Perhaps (it is not at all clear) the NCRB has also taken into account cases where the death sentence awarded by the Trial Court has not been confirmed by the High Court and those cases where the High Court has confirmed the sentence, but it has been modified by this Court or cases where a plea of not guilty has been accepted by this Court for want of conclusive evidence. Whatever the reason, there is an obvious and glaring mismatch.

68. There are also an extraordinarily high number of "commutations" granted in Delhi. In 2005 Delhi granted 919 commutations; in 2006 Delhi granted 806 commutations; and in 2007 Delhi granted 726 commutations. A correspondingly high number of death sentences were not awarded in Delhi in the relevant years, but it is difficult to say whether there were such a large number of pending death sentences awaiting execution. There appears to be an inexplicable error in this regard also but even if the commutations granted in Delhi are taken out of calculation, there would still be a baffling mismatch in figures. The commutation figures given by the NCRB may not be entirely reliable, but in any case there is no reason to doubt the correctness of the number of death sentences awarded, which too is rather high, making it unclear whether death penalty is really being awarded only in the rarest of rare cases.

69. The details mentioned above, as obtained from a study of the publications of the NCRB, are compiled in the following chart:

DETAILS OF DEATH SENTENCE DURING 2001 TO 2011

STATE/U.T.	CONVICTS SENTENCED TO DEATH	CONVICTS WHOSE SENTENCE COMMUTED TO LIFE IMPRISON-MENT	EXECUTED
Andhra Pradesh	8	3	0
Assam	21	97	0
Bihar	132	343	0
Chhattisgarh	18	24	0
Goa	1	0	0
Gujarat	57	3	0
Haryana	31	23	0
Himachal Pradesh	3	2	0
Jharkhand	81	300	0
Jammu & Kashmir	20	18	0

Karnataka	95	2	0
Kerala	34	23	0
Madhya Pradesh	87	62	0
Maharashtra	125	175	0
Manipur	3	1	0
Meghalaya	6	2	0
Mizoram	0	0	0
Nagaland	0	15	0
Orissa	33	68	0
Punjab	19	24	0
Rajasthan	38	33	0
Sikkim	0	0	0
Tamil Nadu	95	24	0
Tripura	2	9	0
Uttar Pradesh	370	458	0
Uttarakhand	16	46	0
West Bengal	79	98	1
Total	**1374**	**1853**	**1**
Chandigarh	4	3	0

Dadra & Nagar Haveli	0	0	0
Daman & Diu	4	0	0
Delhi	71	2462	0
Lakshadweep	0	2	0
Pondicherry	2	1	0
Total	**81**	**2468**	**0**
Grand Total	**1455**	**4321**	**1**

70. The significance of these figures is that even though the Courts have awarded death penalty in appropriate cases applying the rarest of rare principle, the death sentence has been commuted in many of them. The reasons for commuting the death sentence by the Executive are not in the public domain and therefore it is not possible to know what weighed with the Executive in commuting the death sentence of each convict. Was the reason for commutation that the crime and the criminal did not fall in the category of rarest of rare and if so what was the basis for coming to this conclusion when the competent Court has come to a different conclusion?

71. It seems to me that though the Courts have been applying the rarest of rare principle, the Executive has taken into consideration some factors not known to the Courts for converting a death sentence to imprisonment for life. It is imperative, in this regard, since we are dealing with the lives of people (both the accused and the rape-murder victim) that the Courts lay down a jurisprudential basis for awarding the death penalty and when the alternative is unquestionably foreclosed so that the prevailing uncertainty is avoided. Death penalty and its execution should not become a matter of uncertainty nor should converting a

imprisonment for life become a matter of chance. Perhaps the Law Commission of India can resolve the issue by examining whether death penalty is a deterrent punishment or is retributive justice or serves an incapacitative goal.

72. It does *prima facie* appear that two important organs of the State that is the Judiciary and the Executive are treating the life of convicts convicted of an offence punishable with death with different standards. While the standard applied by the Judiciary is that of the rarest of rare principle (however subjective or judge-centric it may be in its application) the standard applied by the Executive in granting commutation is not known. Therefore, it could happen (and might well have happened) that in a given case the Sessions Judge, the High Court and the Supreme Court are unanimous in their view in awarding the death penalty to a convict, any other option being unquestionably foreclosed, but the Executive has taken a diametrically opposite opinion and has commuted the death penalty. This may also need to be considered by the Law Commission of India.

Conclusion:

73. While agreeing with my learned Brother Justice Radhakrishnan that the conviction of the appellant should be upheld, but keeping the above discussion in mind, I endorse the direction that all the sentences awarded to the appellant should run consecutively.

74. The appeals are disposed of accordingly.

K.K.T. Appeals disposed of.

ASSOCIATION OF MANAGEMENT OF PRIVATE COLLEGES

v.

ALL INDIA COUNCIL FOR TECHNICAL EDUCATION & ORS.

(Civil Appeal No. 1145 of 2004)

APRIL 25, 2013

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

All India Council for Technical Education Act, 1987 – ss.2(h), 10, 11, 12 and 13 – Technical education imparted by Universities and their affiliated colleges – Status of the affiliated colleges – Purview of definition of "technical institution" – Role of AICTE – Held: The role of the inspection conferred upon the AICTE vis-à-vis Universities is limited to the purpose of ensuring proper maintenance of norms and standards in the technical education system so as to conform to the standard laid down by it with no further or direct control over such Universities or scope for any direct action except bringing it to the notice of UGC – Role of AICTE vis-à-vis Universities is only advisory, recommendatory and one of providing guidance and has no authority empowering it to issue or enforce any sanctions by itself – Colleges affiliated to University/Universities are part of them and the exclusion of University in the definition of technical institution as defined in s.2(h) of the AICTE Act must be extended to the affiliated colleges also – Provisions of AICTE Act are to be implemented through UGC as Universities and its affiliated colleges are all governed by provisions of the said Act u/s.12A of the UGC Act read with Rules Regulations framed by the UGC in exercise of its power u/ss.25 and 26 of the said Act – Autonomy of the University is recognized and the object and intendment of the Parliament in excluding the Universities from the definition of technical institution as defined u/s.2(h)

of the AICTE Act makes this explicitly clear – The powers and functions conferred for controlling and regulating the universities and its affiliated colleges has been explicitly conferred upon the UGC – University Grants Commission Act, 1956 – s.12A r/w ss.25 and 26.

All India Council for Technical Education Act, 1987 – s.2(g) – Technical education – Course in Computer Applications at post graduation level (MCA) – Contention raised on behalf of the AICTE that technical education includes MCA – Held: Stands to its reasoning and logic in view of the nature of MCA course imparted to the students at post graduation level by the institutions, constituent colleges and affiliated colleges to the Universities – Meanings of the words 'technology' and 'engineering' as per the dictionaries clearly show that MCA also comes within the definition of technology – The same is technical education and therefore, comes within the definition of technical education but for its proper conduct of courses and regulation, the role of AICTE must be advisory and for the same, a note shall be given to the UGC for its implementation by it but not the AICTE.

All India Council for Technical Education Act, 1987 – s.2(g) – Course in Management at post-graduate level (MBA) – If 'technical education' u/s.2(g) of the AICTE Act – Non-production of any material by the AICTE to show that MBA course is technical education – Held: MBA course is not a technical course within definition of the AICTE Act – Reasons assigned for MCA course being 'technical education' does not hold for MBA course – Approval from the AICTE not required for obtaining permission and running MBA course by the appellant colleges.

All India Council for Technical Education Act, 1987 – s.24 – AICTE Regulations – Amended regulation introduced by AICTE in exercise of its power u/s.10(k) of the AICTE Act – However, amended Regulation not placed before the Parliament as mandatorily required as per s.24 of the AICTE

Act – Effect – Held: If the Statute prescribes a particular procedure to do an act in a particular way, that act must be done in that manner, otherwise it is not at all done – Non-placing of the amended Regulations on the floor of the Houses of the Parliament as required u/s.24 of the AICTE Act vitiated the amended Regulations in law – Administrative Law.

Writ petition was filed by the appellant association of colleges seeking relief to prohibit the All India Council for Technical Education (AICTE) from exercising its jurisdiction over its' member colleges (affiliated to Bharathidasan University or Manonmaniam Sundaranar University) with reference to the Master of Business Administration (MBA) and Master of Computer Applications (MCA) courses conducted by them. The writ petition was dismissed by the single Judge of the High Court holding that the All India Council for Technical Education Act, 1987 (AICTE Act) and the AICTE Regulations were enforceable against the member colleges of the appellant Association. Writ appeal filed thereagainst was also dismissed.

Vide the impugned judgment, the High Court interpreted the provisions of the AICTE Act and held that even though the University concerned was not required to take permission from the AICTE, its affiliated colleges were required to do so; and further that the appellant colleges should get its course of Master of Computer Applications (MCA) ratified by AICTE as per the prescribed format.

In the instant appeals, therefore, the following questions of law arose for consideration:-

(1) Whether the colleges affiliated to the University concerned comes within the purview of exclusion of the definition of "Technical Institution" as defined u of

the AICTE Act, 1987; and whether the AICTE has got the control and supervision upon the affiliated colleges of the respective universities of the member colleges of the appellant in C.A.No.1145/2004 and the appellants in connected appeals?

(2) Whether the MCA course be construed as technical education in terms of definition under section 2(g) of the AICTE Act?

(3) Whether the Regulation 8(c) and 8(iv) of the AICTE Regulations by way of amendment in the year 2000 inserting the words 'MBA and MCA' before Architecture and Hotel Management courses is applicable to the concerned colleges of the appellants; and whether non placement of the amended Regulations before Houses of the Parliament as required under Section 24 of the AICTE Act is vitiated in law?

Allowing the appeals, the Court

HELD: 1.1. The AICTE Act does not contain any evidence of an intention to belittle and destroy the authority or autonomy of other statutory bodies which they are assigned to perform. Further, the AICTE Act does not intend to be an authority either superior or to supervise or control the universities and thereby superimpose itself upon the said universities merely for the reason that it is laying down certain teaching standards in technical education or programmes formulated in any of the department or units. While enacting the AICTE Act, the Parliament was fully alive to the existence of the provisions of UGC Act, 1956. Special care has consciously and deliberately been taken to make specific mention of university, wherever and

whenever the AICTE alone was expected to interact with university and its departments as well as constituent institutions and units. The role of the inspection conferred upon the AICTE vis-à-vis universities is limited to the purpose of ensuring proper maintenance of norms and standards in the technical education system so as to conform to the standard laid down by it with no further or direct control over such universities or scope for any direct action except bringing it to the notice of UGC. The role of AICTE vis-à-vis universities is only advisory, recommendatory and one of providing guidance and has no authority empowering it to issue or enforce any sanctions by itself. It can only advise the UGC for formulating the standard of education and other aspects to the UGC. AICTE norms can be applied to the affiliated colleges through UGC. [Para 38] [1108-E-H; 1109-A-C, F; 1110-C]

1.2. It is also relevant to refer to the exclusion of university from the definition of 'technical institution' as defined under section 2(h) of the AICTE Act. The Institution means an institution not being university, the applicability of bringing the university as defined under clause 2 (f) of UGC Act includes the institution deemed to be a university under Section 3 of the said Act and therefore the affiliated colleges are excluded from the purview of technical institution definition of the AICTE Act. Section 12A of the UGC Act clearly speaks of regulation of fees and provisions of donation in certain cases which refers to the phrase affiliation together with its grammatical variation included in relation to a college, recognition of such college by, association of such college with, and admission of such college to the privileges of universities. A careful reading of sub-sections (2)(c), (3), (4) and (5) of Section 12A of the UGC Act makes it abundantly clear about colleges which are required to be affiliated to run the

sanction/approval will be accorded by the university or under the control and supervision of such universities. Therefore, affiliated colleges to the university/universities are part of them and the exclusion of university in the definition of technical institution as defined in Section 2(h) of the AICTE Act must be extended to the affiliated colleges to the university also, otherwise, the object and purpose of the UGC Act enacted by the Parliament will be defeated. The enactment of UGC Act is also traceable to Entry 66 of List I. The role of the AICTE Act is only advisory in nature and is confined to submitting report or giving suggestions to the UGC for the purpose of implementing its suggestions to maintain good standards in technical education in terms of definition under Section 2(h) of the AICTE Act and to see that there shall be uniform education standard throughout the country to be maintained which is the laudable object of the AICTE Act for which it is enacted by the Parliament. The provisions of the AICTE Act shall be implemented through the UGC as the universities and its affiliated colleges are all governed by the provisions of the said Act under Section 12A of the UGC Act read with Rules Regulations that will be framed by the UGC in exercise of its power under Sections 25 and 26 of the said Act. The autonomy of the university is recognized and the object and intendment of the Parliament in excluding the universities from the definition of technical institution as defined under Section 2(h) of the AICTE Act makes this explicitly clear, after scanning the definition of education institution with reference to the exclusion of universities and Sections 10, 11, 12 and 13 of the AICTE Act. The powers and functions conferred for controlling and regulating the universities and its affiliated colleges has been explicitly conferred upon the UGC. Hence, it has been given the power to regulate such universities and regulations in relation to granting sanctions/approvals and also maintaining educational standards and over-seeing the

prescription of the fee structure including the admission of students in various courses and programmes that will be conducted by the university and its institutions, constituent colleges, units and the affiliated colleges. [Paras 39, 40] [1110-E-H; 1111-A-G; 1116-G-H; 1117-A-D]

Bharathidasan University & Anr. v. AICTE & Ors. **(2001) 8 SCC 676: 2001 (3) Suppl. SCR 253 – held applicable.**

Unni Krishnan J.P. & Ors. v. State of Andhra Pradesh & Ors. **1993 (1) SCC 645: 1993 (1) SCR 594 – held overruled.**

TMA Pai Foundation v. State of Karnataka **(2002) 8 SCC 481: 2002 (3) Suppl. SCR 587 – followed.**

Parashavananth Charitable Trust & Ors. v. AICTE **2013 (3) SCC 385 – relied on.**

State of Tamil Nadu v. Adhiyaman Education and Research Institute **(1995) 4 SCC 104: 1995 (2) SCR 1075 and** *Jaya Gokul Educational Trust v. Commissioner and Secretary to Government High Education Department, Thiruvananthapuram* **(2000) 5 SCC 231: 2000 (2) SCR 1234 – distinguished.**

2.1. The meanings of the words 'technology' and 'engineering' as per the dictionaries would clearly go to show that MCA also comes within the definition of technology. Therefore, the contention that technical education includes MCA as raised on behalf of the AICTE stand to its reasoning and logic in view of the nature of MCA course which is being imparted to the students at post graduation level which is being conducted by the institutions, constituent colleges and affiliated colleges to the universities. The same is a technical education and therefore, it comes within the definition of technical education but for its proper conduct of courses and regulation the role of AICTE must be advisory and for the same, a note shall be given to the UGC for its implementation by it but not the AICTE [illegible]

2.2. As per definition of 'technical education' under Section 2(g) of the AICTE Act and non production of any material by the AICTE to show that MBA course is a technical education, it is held that MBA course is not a technical course within the definition of the AICTE Act and insofar as reasons assigned for MCA course being 'technical education', the same does not hold for MBA course. Therefore, approval from the AICTE is not required for obtaining permission and running MBA course by the appellant colleges. [Para 43] [1120-H; 1121-A-B]

Webster's *Comprehensive Dictionary*; Wharton's *Law Lexicon*; *Encyclopedia Law Lexicon*; *The New Shorter Oxford English dictionary* and *Advanced Law Lexicon* **– referred to.**

3. The amended Regulation Nos. 8(c) and 8(iv) of 2000 were introduced by the AICTE in exercise of its power under section 10(k) of AICTE Act by adding the MBA and MCA courses within the purview of the provisions of AICTE as it is included in the Regulation as a technical education. However, the amended Regulation has not been placed before the Parliament which is mandatory as per the provisions of Section 24 of the AICTE Act. The position of law is well settled that if the Statute prescribes a particular procedure to do an act in a particular way, that act must be done in that manner, otherwise it is not at all done. Not placing the amended Regulations on the floor of the Houses of Parliament as required under Section 24 of the AICTE Act vitiates the amended Regulations in law. [Para 44] [1121-C-E; 1122-A-B, F]

Babu Verghese v. Bar Council of Kerala **1999 (3) SCC 422: 1999 (1) SCR 1121 – relied on.**

4. The relief sought for is granted insofar as not to seek approval from the AICTE for MBA and MCA courses are concerned. [Para 46] [1123-C]

Case Law Reference:

2001 (3) Suppl. SCR 253	**held applicable**	**Para 1**
2013 (3) SCC 385	**relied on**	**Para 17**
2002 (3) Suppl. SCR 587	**followed**	**Para 18**
1995 (2) SCR 1075	**distinguished**	**Para 20**
2000 (2) SCR 1234	**distinguished**	**Para 20**
1993 (1) SCR 594	**held overruled**	**Para 39**
1999 (1) SCR 1121	**relied on**	**Para 44**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 1145 of 2004.

From the Judgment & Order dated 19.11.2003 of the High Court of Judicature at Madras in Writ Appeal No. 2652 of 2001.

WITH

Civil Appeal No. 5736-5745 of 2004

Dr. Rajeev Dhavan, Rakesh Dwivedi, V. Balachandran, Prashant Bhushan, Rohit Kumar Singh, Sumeet Sharma, Amitesh Kumar, Ravi Kant, C.S. Singh, Gopal Singh, V.G. Pragasam, S. Thananjayan, Navin Prakash for the appearing parties.

The Judgment of the Court was delivered by

V. GOPALA GOWDA, J. 1. The appellants filed these civil appeals questioning the correctness of the common judgment and order dated 19.11.2003 passed by the High Court of judicature at Madras in W.A. 2652 of 2001, W.A. No. 3090 of 2001, WA 2835 of 2001, WA 3087 of 2001, WA 2836 of 2001, WA 3091 of 2001, WA 3092 of 2001, WA 2837 of 2001, WA 3088 of 2001, WA 2838 of 2001 and WA 3089 of 2001, dismissing the writ appeals thereby affi[illegible]of

writ petitions by wrongly interpreting the provisions of All India Council for Technical Education Act, 1987 (for short AICTE Act) and held that even though the University is not required to take permission from the All India Council for Technical Education (for short AICTE), its affiliated colleges are required to do so. Further, the High Court has held, while dismissing the writ appeals, that the appellant colleges should get its course of MCA ratified by AICTE as per the prescribed format which according to the appellants herein is in contravention of settled principles of interpretation of Statutes and also runs contrary to the law laid down by this Court in case of *Bharathidasan University & Anr. Vs. AICTE & Ors*[1].

2. Certain relevant facts in relation to the appeals are stated hereunder:—

The appellant colleges in the State of Tamil Nadu are running Arts and Science courses. Most of them are affiliated to Bharathidasan University and some of them are affiliated to Manonmaniam Sundaranar University. The member colleges of the appellant in C.A.No.1145 of 2004 and the appellants in the connected appeals are running MCA course which have so far not obtained the approval of the AICTE. According to the information placed before the Court by the AICTE, as of the academic year 2001-2002, there were 865 institutions in the country offering 40,792 seats for the MCA course which had the approval of the AICTE. Within the State of Tamil Nadu the number of institutions which have received such approval are 208. As per the affidavit filed on behalf of the State, it is stated that apart from the member colleges of the first appellant and colleges of the second appellant, all other institutions offering MCA have obtained the approval of the AICTE.

3. Regulations 1994 have been prescribed in Form II which is in terms of Regulation 5(2)(b) and were framed pursuant to Section 10(k) of the AICTE Act for grant of approval to the

1. (2001) 8 SCC 675.

colleges who have started new technical institutions, introduction of courses or programmes and approval of intake capacity of seats for the courses or programmes. Form II is titled "Application for Existing Institution(s) seeking AICTE approval without additional course(s) and/or additional intake(s) in engineering/technology, architecture, pharmacy, applied arts, etc."

4. In the 1997, Regulation 2(2) framed by the AICTE was added by way of an amendment to the 1994 Regulations, providing that the regulations are not applicable *inter alia*, to the proposals relating to post graduate courses for MBA, MCA or equivalent.

5. On 16.8.2000, the aforesaid sub-regulation (2) was deleted and the said courses were added in Regulation 8(c) enabling the AICTE to prescribe the land and deposit requirements even in respect of Arts and Science Colleges having MBA or MCA courses.

6. On 3.3.2001, a communication was sent by the AICTE to the member colleges of the appellant in C.A. No.1145 of 2004 in respect of its proposal to commence MCA course requiring the colleges to furnish information regarding the proposed land and building. On 14.3.2001, a writ petition was filed by the appellant's association seeking relief to prohibit the AICTE from in any way exercising its jurisdiction over its member colleges with reference to the MBA and MCA courses conducted by them. The said writ petition was dismissed by the learned single Judge holding that the AICTE Act and Regulations are enforceable against the said member colleges of the appellant, against which the Association had filed writ appeal. The same came to be dismissed by affirming the judgment of the learned single Judge by passing impugned common judgment which is under challenge in CA No.1145 of 2004.

6(a) So far as the facts in the c[illegible]e

concerned, they are stated in brief as under:

The colleges run by the appellants in the connected appeals are affiliated to Bharathidasan University and it has approved the courses and programmes which are being conducted by the said colleges including MCA and MBA. The AICTE Regulation is applicable to professional colleges only that to from academic year 1994. There is no provision for existing arts and science colleges which are running MCA courses. The letter dated 31.5.2000 from the AICTE was received by Bharathidasan University wherein it was mentioned that no admission should be made by the competent authorities in unapproved or unrecognized professional colleges from the academic year 1994. Some of the colleges filed writ petitions in the High Court of Judicature at Madras challenging the letter dated 31.5.2000 being ultravires of the AICTE Act itself. The High Court passed an interim order dated 20.7.2000 staying the direction of the AICTE as contained in its letter dated 31.5.2000. During the pendency of the writ petition, the AICTE amended regulations vide notification dated 16.8.2000. By the said amendment it deleted the earlier amendment of 1997 in which MCA course was not within the purview of the AICTE Act. Through the said amendment MCA course was conspicuously added in Rule 8(c) of the Regulations. By virtue of the said amendment, the AICTE claimed that it has got powers to check and regulate the MCA course. The High Court of Madras after hearing some of the appellant colleges quashed the letter dated 31.5.2000 of the AICTE. However, the High Court left it open to the appellant colleges to challenge the vires of the amended AICTE Regulation vide order dated 22.11.2000.

The appellant colleges preferred writ petitions in the High Court of Madras challenging the amended Regulation dated 16.8.2000 mainly on the ground that it is ultra vires to the AICTE Act as the MCA course which are being run by the appellants colleges do not fall under the definition of technical education

as contained in Section 2(g) of the Act and it was also challenged on the ground that since the amended Regulation has not been placed before the Houses of Parliament for approval they cannot be enforced.

The aforesaid appeals are filed framing certain questions of law which are mentioned hereunder:-

(a) Whether the colleges affiliated to University are obliged to take separate permission/approval from the AICTE to run classes in Technical Courses in which the affiliated university of the colleges is not required to obtain any permission/approval under the AICTE Act itself?

(b) Whether the course leading to a degree of Master of Computer Applications is a technical course within the purview of the definition of 'technical education' as contained in Section 2(g) of the AICTE Act as it stands today?

(c) Whether the Courts can read something in a Statute, which is not expressly provided in the language of the Act, and/or insert words and/or punctuations, which are not there?

(d) Whether the impugned amendment dated 16.8.2000 of the 1994 Regulations would not take effect without the same being placed before the Parliament?

(e) Whether the Rules or Regulations made under an Act can override or enlarge the provisions of the Act?

7. In support of the aforesaid questions of law, the learned senior counsel and other counsel on behalf of the appellants have urged the following legal contentions:-

The High Court has erred in holding that even though the University is not required to take permission of the AICTE to start or run a course of technical nature, the colleges affiliated to the University/Universities cannot claim such a right. This interpretation is not the correct legal position for the reason that when the Universities are exempted from taking permission/ approval from the AICTE, the High Court in view of the law laid down in Bharathidasan University's case (supra) could not have held that the colleges affiliated to their respective universities which are imparting tuition to the students under them by conducting courses are required to take permission or approval from the AICTE.

8. It is further contended that the colleges who have opened the courses in question are affiliated to the universities. They are the controlling authorities with regard to their intake capacity for each course, the standards to be followed for each course, the syllabus of the course, the examination process etc. It is urged that the High Court has failed to consider the relevant aspects of the case namely that it is the university/universities only which awards/confers degree on the students studying the course in question in their affiliated colleges. Thus, for all intents and purposes the courses are being run by the Universities.

9. It is further urged that if the interpretation given by the High Court with regard to the provisions of the AICTE Act and Regulations is accepted by this Court, it will run contrary to the law laid down by this Court in the *Bharathidasan University* case (supra). In this decision, this Court clearly dealt with the scope and purpose of the University for which it has been established, the relevant para of which reads as under:-

> "**2.** The Bharathidasan University Act, 1981 created the University in question to provide, among other things, for instruction and training in such branches of learning as it may determine; to provide for research and for the advancement and dissemination of knowledge; to institute degrees, titles, diplomas and other academic distinctions;

> to hold examinations and to confer degrees, titles, diplomas and other academic distinctions on persons who have pursued an approved course of study in a university college or laboratory or in an affiliated or approved college and have passed the prescribed examinations of the University; to confer honorary degrees or other academic distinction under conditions prescribed; and to institute, maintain and manage institutes of research, university colleges and laboratories, libraries, museums and other institutions necessary to carry out the objects of the University etc. In other words, it is a full-fledged University recognized by the University Grants Commission also."

10. The High Court has noticed that the University was created under the statute "to provide, among other things, for rendering instruction and training to their students of the affiliated colleges in such branches of learning as it may determine; to provide for research and for the dissemination of knowledge; to institute degrees, titles, diplomas and other academic distinctions on persons who have pursued an approved course of study in a university college or laboratory and have passed the prescribed examination of the university" in the light of the afore-mentioned judgment pronounced by this Court.

11. It is clear from the Bharathidasan University Act that the colleges affiliated to University impart education in different courses run by University in which the students have to pass the prescribed examination of the University for making themselves eligible for degrees. Therefore, the interpretation given by the High Court in the impugned judgment that the colleges affiliated to the University which are imparting education to their students on behalf of the University will have to seek AICTE's approval for technical courses, though such approval is not required to be obtained by the affiliated colleges as the same will be contrary to the judgment of this Court referred to supra.

12. Further, it is contended that the High Court has erred in not appreciating that the colleges are affiliated to a University, which is their controlling authority and has been established by an Act of State legislature which has given it suitable powers to regulate the procedure of the affiliated colleges regarding their education standards, infrastructure, examinations etc. This can be noticed by perusing various provisions of Bharathidasan University Act, 1981 and especially Section 8, 33 (xvii) and (xviii), 39 and 63, which read as under:-

"8. **Visitation**- The Chancellor shall have the right to cause an inspection or inquiry to be made, by such person or persons as he may direct, of the University, its buildings, laboratories, library, museums, workshops and equipment, and of any institutions maintained, recognized or approved by, or affiliated to, the University, and also of the examinations, teaching and other work conducted or done by the university and to cause an inquiry to be made in respect of any matter connected with the University, The chancellor shall in every case give notice to the University of his intention to cause such inspection or inquiry to be made and the university shall be entitled to be represented thereat.

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

….

(xvii) the conditions of recognition of approved colleges and of affiliation to the University of affiliated colleges;

(xviii) the manner in which, and the conditions subject to which a college may be designated as an autonomous college or the designation of such college may be cancelled and the matters incidental the administration of

autonomous colleges including the constitution and reconstitution, powers and duties of Standing Committee on Academic Affairs, Staff Council, Boards of Studies and Boards of Examiners;

39. **Admission to University examinations**.- No candidate shall be admitted to any University examination unless he is enrolled as a member of a University college or a laboratory or of an affiliated or approved college and has satisfied the requirements as to the attendance required under the regulations for the same or unless he is exempted from such requirements of enrolment or attendance or both by an order of the Syndicate passed on the recommendation of the Standing Committee on Academic Affairs made under the regulations prescribed. Exemptions granted under this section shall be subject to such condition, as the syndicate may think fit.

63. **Report on affiliated colleges**- The syndicate shall, at the end of every three years from the notified date, submit a report to the Government on the condition of affiliated and approved colleges within the University area. The Government shall take such action on it as they deem fit."

Therefore, the control upon the affiliated colleges of the University is vested with the University itself and it cannot be said that for certain type of courses the control will be with the AICTE. Further, the High Court has failed to notice the fact that the University to which the member colleges of the appellants belong is controlled by the University Grants Commission, which is a Central Governing Body formed under the Act of Parliament known as University Grants Commission Act of 1956, for controlling the affairs of the University recognized by it. The Bharathidasan University is recognized by the UGC. The relevant provisions of this Act which cover the said University and its colleges are Sections 12, 12A, 13 and 14, which will be extracted in the relevant paragraphs

further urged that the aforesaid provisions would show that the UGC provisions for controlling the University are applicable and analogous to its affiliated colleges also and therefore to carve out a distinction between the University and its affiliated colleges and not treating the affiliated colleges as an integral part of the University in the impugned judgment by the High Court is not only erroneous in law but also suffers from error in law.

13. The High Court has failed to take into consideration the relevant legal aspect of the cases viz. that the AICTE has been given adequate power to inspect the colleges and University running technical courses, to check the syllabus, standard of education being imparted in them and their examination process under Section 10 of the AICTE Act.

14. Dr. Rajiv Dhavan, learned senior counsel appearing on behalf of the appellant in CA No.1145 of 2004 submits that the AICTE Act and its Regulations do not apply to University/ Universities or constituent colleges and its institutions but according to the AICTE the provisions of AICTE Act would apply to the affiliated colleges of the Universities. He further submits that the issues in questions in this case are— notification of 6th February, 2001 about the governing body of the member colleges of the appellant Association, notification of 3rd March, 2001 regarding land area and also pointed out the other notifications issued by the AICTE covering a wide canvas namely notifications issued on 9.9.2002 in relation to the governing body, staff etc. of the member colleges of the appellant, notification dated 22.10.2003 regarding the unaided institutions, notification dated 30.10.2003 regarding salary and notification dated 28.10.2003 regarding guidelines for common entrance test(s) for admission to MCA Programmes in the country. In contrast, UGC guidelines are issued on 20th December, 2003 and 29th December, 2003 whereby instructions were given not to issue the advertisement for admission and not to conduct any entrance test for admission

to professional programmes until they receive the policy guidelines of the UGC. He submits that the notifications issued by the AICTE amount to AICTE having control over the colleges affiliated by the Universities by displacing UGC norms.

15. Further, the learned senior counsel places strong reliance on *Bharathidasan University's* case (supra) and contends that the affidavit filed by the UGC does not raise any issue which has been dealt with by this Court in the *Bharathidasan University's* case. He has placed reliance upon paragraph 8 of the *Bharathidasan University's* judgment in support of his submissions, that though legislative intent finds specific mention in the provisions of the Act itself, the same cannot be curtailed by conferring undue importance to the object underlying the Act particularly, when the AICTE Act does not contain any evidence of an intention to belittle and destroy the authority or autonomy of other statutory bodies, having their own assigned roles to perform. Further strong emphasis is placed by him at Paragraph 10 of the **Bharathidasan University's** case (supra) wherein this Court, with reference to the provisions of AICTE Act held that the Act is not intended to be an authority either superior to or supervise and control the universities and thereby superimpose itself upon such universities merely for the reason that it is imparting technical education or programmes in any of its departments or units. Further, observations are made after careful scanning of the provisions of the AICTE Act and the provisions of the UGC Act in juxtaposition, will show that the role of AICTE vis-à-vis the Universities is only advisory, recommendatory and a guiding factor and thereby subserves the cause of maintaining appropriate standards and qualitative norms and not as an authority empowered to issue and enforce any sanctions by itself, except submitting a report to UGC for appropriate action. Further, he had placed reliance on Paragraph 12 of the abovementioned case and contended that the intention of the Parliament was very clear while enacting the AICTE Act as it was fully alive of the existence of the pro ct

which was in full force and its effect and which specifically dealt with coordination and determination of standards at university level of institutions as well as institutions for higher studies. Further, with reference to definition of "technical institution" as defined in Section 2(h) of the AICTE Act, the Parliament has taken special care to make conspicuous and deliberate mention of the universities to highlight wherever and whenever the AICTE alone was expected to interact with the university, its departments as well as its constituent institutions. In this regard, he also placed strong reliance upon Section 12A of the UGC Act under Chapter III which deals with the powers and functions of the University Grants Commission. Clause (a) of Section 12A speaks of affiliation with its grammatical variations and includes in relation to a college, recognition of such college, Association of such college with admission of such college to the privileges of a university. Clause (d) speaks of qualification which means a degree or any other qualification awarded by a University. Also strong reliance is placed upon sub-section (4) of Section 12A which authorizes UGC to conduct an inquiry in the manner provided under the Regulations, if the Commission is satisfied after providing reasonable opportunity to such colleges that such college contravenes the provisions of sub-section (3) of the above Section of the Act. In such case, the Commission may, with the previous approval of the Central Government pass an order prohibiting such college from presenting any students then undergoing such course of study therein to any university for the award of the Degree for the qualification concerned. Sub-section (5) of Section 12A further provides for the Commission to forward a copy of the order made by it under sub-section (4) to the University concerned, and on and from the date of receipt by the University of a copy of such order, the affiliation of such college to such University shall, in so far as it relates to the course of study specified in such order, stand terminated and on and from the date of termination of such affiliation for a period of three years thereafter affiliation shall not be granted to such college in relation to such similar course of study by that or any other

University. Sub-Section (6) speaks that in case of termination of affiliation of any college under sub-section (5), the Commission shall take all such steps as it may consider appropriate for safeguarding the interests of the students concerned. Sub-section (7) further states that regulations made for the purpose of the aforesaid provisions of Section 12A of the UGC Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.

16. Further, reliance has been placed by him upon Section 12B of the UGC Act which confers power on the Commission to pass an order of prohibition regarding giving any grant to a University declared by the Commission not fit to receive such grant. This provision was inserted in the UGC Act through an Amendment Act, 1972 (33 of 1972) which came into force on 17.6.1972. Further, reliance was also placed upon Section 13 regarding the power of inspection upon the UGC for the purpose of ascertaining the financial needs of the university or its standards of teaching, examination and research.

17. Dr. Dhavan, learned senior counsel for the appellant placing reliance upon the aforesaid provisions of the UGC Act, submits that the provisions of the UGC Act will regulate and control the functions of the university as defined in terms of Section 2(f) of the UGC Act and also its affiliated colleges. He has placed reliance upon the observations made by this Court in Para 19 of *Parashavananth Charitable Trust & Ors. v. AICTE*[2]. In the written submission submitted by the appellant's counsel with reference to UGC affidavit filed in this Court he has placed reliance upon Para 20 of the case referred to supra wherein it is observed by this Court in the said decision that the AICTE created under the Act is not intended to be an authority either superior to or to supervise and control the universities and thereby superimpose itself upon such universities merely for the reason that they are imparting the

2. 2013 (3) SCC 385.

technical education or programmes in any of their departments or units. He further submitted that a careful scanning of the provisions of the AICTE Act and the provisions of UGC Act, 1956 in juxtaposition it is observed that the said provision will show that the role of AICTE with regard to the university/ universities is only advisory, recommendatory and one of providing guidance, to subserve the cause of maintaining appropriate standards and qualitative norms and not as an authority empowered to issue and enforce any sanctions by itself.

18. Further, it is stated with reference to the UGC's affidavit on the question of affiliated colleges that it is very mechanical; and is simply gratuitous and without foundation, it adds affiliated colleges of a university to the definition of technical institution. Paragraph 23 of its affidavit is without any foundation and it has stated that the affiliated colleges are distinct and different than the constituent colleges of the University, therefore, it cannot be said that constituent colleges also include affiliated colleges. The learned senior counsel further submitted that the assertion made by the UGC that the UGC Act does not have any provision to grant approval to technical institution, is facile. It is stated in its written submission that the AICTE norms will apply through UGC as observed by this Court in *Bharathidasan University and Parshvanath Charitable Trust* cases (supra). A reading of the notifications referred to supra issued by the AICTE shows that regulation of governing council, infrastructure such as land and in matters of salary and employment of staff in the affiliated colleges are totally without jurisdiction and contrary to the decisions of this Court. Further, strong reliance is placed by learned senior counsel Dr. Dhavan that issues which are raised in this case are answered in the *TMA Pai Foundation v. State of Karnataka*[3].

19. The learned senior counsel submitted that Section 14 of the UGC Act provides for consequences of failure by

3. (2002) 8 SCC 481.

Universities to comply with recommendations of the Commission which provides that if any University grants affiliation in respect of any course of study to any college referred to in sub-section (5) of Section 12A in contravention of the provision of that sub-section or fails within a reasonable time to comply with any recommendation made by the Commission under Section 12 or Section 13 or contravenes the provisions of any rule made under sub-section 2(f) or 2(g) of Section 25, or of any regulation made under clauses (e), (f) or (g) of Section 26, the Commission after taking into consideration the cause, if any, shown by the University or such failure or contravention, may withhold from the University the grants proposed to be made out of the fund of the Commission. This clearly goes to show that there is control of the functions of the university by the UGC under the provisions of UGC Act, Rules and Regulations. Therefore, the learned senior counsel Dr. Dhavan submits that the role of AICTE under the provisions of the Act is only advisory and recommendatory in nature and it cannot have any administrative or any other control upon the colleges which are affiliated to the universities which fall within the definition of Section 2 (f) of the UGC Act including the grant of approval for opening of a new course in relation to technical education including MCA.

20. Further, after referring to the earlier decisions of this Court, namely, *State of Tamil Nadu v. Adhiyaman Education and Research Institute*[4], *Jaya Gokul Educational Trust v. Commissioner and Secretary to Government High Education Department, Thiruvananthapuram*[5] and *Parshvanath Charitable Trust* (supra), wherein this Court has referred to the provisions of UGC Act and made certain observations that if there is conflict between two legislations namely the State Legislation and the Central Legislation, under clause (2) of Article 254 of the Constitution, the State Legislation being

4. (1995) 4 SCC 104.
5. (2000) 5 SCC 231.

repugnant to the Central legislation would be inoperative as the State Law encroaches upon Entry 66 of Union List under which AICTE Act of 1987 is enacted by the Parliament and the Bharathidasan University Act, 1981 enacted by the State Legislature under Entry 25 of the Concurrent List. The observations and conclusions arrived at in those cases that the provisions of AICTE Act must prevail over the State enactments is totally untenable in law. Learned senior counsel submits that the legislation can be derived from a single Entry from the List mentioned in VIIth Schedule of the Constitution. For a single Legislation that is AICTE Act, the Parliament cannot operate under both, List I as well as List III. He further submits that the phrase "subject to' used in Entry 25 of List III of VIIth Schedule limits the power of both the Union as well as the State. Therefore, reference to Article 254 in those judgments by this Court in the cases referred to supra are wholly inapplicable to the fact situation in this case on the question of repugnancy under Article 254 (2) of the Constitution as it does not arise for the reason that the law in relation to establishment of Bharathidasan University and other University in respect of which member colleges of the appellant Association are affiliated to, is legislated by the State legislature and the AICTE Act is enacted by the Parliament under Entry 66 of List I. Therefore, the question of repugnancy between the two enactments referred to supra do not arise at all since repugnancy under Article 254(2) of the Constitution would accrue only in relation to the law legislated by the Parliament and the State legislature from the entries of the concurrent list of VII schedule.

21. Learned senior counsel Dr. Dhavan has also placed strong reliance upon the report of Kothari Commission (1964-1966) which shows that the AICTE Act should be held to cover only non-university education and the said report emphasizes upon the importance of education and universities and further emphasizes the importance of autonomy of the university and finances of the universities and the role of UGC. Further, he

placed reliance upon the National Policy of Education which envisages vesting of statutory authority for planning, formulation and the maintenance of norms and standards in the education. Therefore, he submits that the AICTE cannot have any kind of control or regulation for the functioning of the colleges affiliated to the universities which are governed by the provisions of the respective Universities Act and the UGC Rules and Regulations.

22. Mr. Prashant Bhushan, the learned counsel for the appellants in the connected appeals contended that in the impugned judgment, the High Court has erred in holding that the Master of Computer Applications is a technical education course and is therefore covered by the definition of 'technical education' as defined in Section 2(g) of the AICTE Act, which is extracted in the relevant portion of the judgment. It is further contended by learned counsel that the definition of 'technical education' in the Act as it stands today is an exclusive definition and does not cover the courses of Master of Computer Applications imparted by the colleges run by the appellant colleges. The Central Government has been given power to include any other area or course/courses in its purview by issuing an official notification to be published in the Official Gazette to this effect. Such notification has not been issued so far by the Central Government. Therefore, he submits that when the MCA course is not covered within the definition of 'technical education' it does not come under the purview of the AICTE Act at all and the question of the AICTE exercising its power on the institutions/colleges running MCA course does not arise.

23. Further, Mr. Prashant Bhushan, the learned counsel has vehemently urged that the High Court has committed serious error in reading a comma in between the words 'engineering' and 'technology' when it is one word in the statute and is mentioned as "engineering technology" in the definition of 'technical education' as contained in Section 2(g) of the AICTE Act. The High Court has committed seri

an erroneous reading of the aforesaid provision of Section 2(g) and enlarging the scope of the Act and extending its sphere to the colleges involved in these proceeding which was not intended by the Parliament. Therefore, the learned counsel submits that the interpretation made by the High Court on the phrase 'engineering technology' by reading the words 'engineering' and 'technology' to bring within the definition of the "technical education" as defined in Section 2(g) of the AICTE Act, is not only in contravention of the settled principles of interpretation of statutes but also in contravention to the settled position of law as laid down by this Court in catena of cases.

24. It is further contended by the learned counsel that this Court has held in number of cases that the courts cannot add or delete words or punctuations in a statute. It is also well settled proposition of law that the court shall gather the meaning of the statute by its simple and plain reading specially where there is no ambiguity in the language used in the definition provision and it should be construed in its literal sense.

25. It is further urged by him that the High Court has failed to take into consideration that the amendment dated 16.8.2000, i.e. deletion of Regulation No. 2(2) and addition of 8(c) and 8(iv) of Regulations of 1994 could not take effect unless the same was placed before the Parliament as required under Section 24 of the AICTE Act, wherein the amended Regulations have been framed. The amendments must be laid before both the Houses of the Parliament which is mandatory as provided under the aforesaid provision of the Act. The authority which frames Regulations as provided under Section 23 could not be validly exercised unless such Regulations are laid before both the Houses of the Parliament at the earliest opportunity. The very amendment dated 16.8.2000 of Regulations 2(2), 8(c) and 8(iv) has been kept ignoring the mandatory provision of Section 24 and therefore the impugned amendment to the aforesaid Regulations has been rendered

invalid and void ab initio in law. This aspect of the matter has not been considered by the High Court while interpreting the said provisions in holding that as a result of the amendment of the aforesaid Regulations, the provisions of AICTE Act will be applicable to the courses which are being conducted by the colleges affiliated to the University/Universities. This approach of the High Court is erroneous and therefore the same cannot be allowed to sustain in law.

Further, it is contended by the learned counsel that the High Court has failed to examine the above said legal aspect of the amendment to the Regulations of AICTE in the year 2000 enlarging the scope of the Act to areas for which it is not meant. Such amendment in Regulations will be ultra vires to the Act itself and cannot be sustained on this count alone. This Court in several cases has laid down the legal principle that the Rules and Regulations made under the Act cannot override or enlarge the object or purpose of the Act.

26. The learned counsel further contended that 7 out of 10 colleges of the appellants herein in the connected appeals were granted approval by the Bharathidasan University under the Bharathidasan University Act, 1981 before the amended AICTE Regulations, 1994 came into force and undoubtedly all the colleges of the appellants herein got approval from the above said University and started running MCA course much before the amended Regulations of 2000 came into force. Therefore, the said regulations cannot be applied to the appellants' colleges. Further, the provision of Section 10 (k) of the AICTE Act, which deals with power and functions of the Council, clearly states that the council may "grant approval for starting new technical institutions and for introduction of new courses or programmes in consultation with the agencies concerned".

27. The learned counsel further contends that the Bharathidasan University is regulated and controlled by the UGC constituted under the provisions of the UGC Act, Rules and Regulations. The relevant provision[illegible]er

the institutions and its constituents colleges as well as its affiliated colleges which are being run by the appellants herein and similarly placed colleges under Section 12, 12A, 13 and 14 of the UGC Act.

The aforesaid provisions of UGC Act would show that those provisions would speak of Regulations of the university that is applicable and analogous to its affiliated colleges also.

28. Further, the learned counsel placing strong reliance upon the law laid down in the judgment of this Court in *Bharathidasan University* case **(**supra) wherein this Court has specifically held after referring to certain provisions of the AICTE Act and earlier judgments of this Court in *Adhiyaman Education and Research Institute* (supra) and *Jaya Gokul Educational Trust* (supra) that the AICTE is not intended to be controlling or supervising authority over the University merely because the University is also imparting courses of "Technical Education". Further, it was held that Regulation No.4 insofar as it compels the university to seek for and obtain prior approval and not start any new department or course or programme in Technical Education and empower itself to withdraw such approval, in a given case of contravention of the Regulation No.12, is directly opposed to and inconsistent with the provisions of Section 10 (k) of the AICTE Act and consequently void and unenforceable in law.

Placing strong reliance on the observations made in para 14 of said judgment and after referring to the Regulations, this Court held that the AICTE could not have been made to bind universities/UGC within the confines of the powers conferred upon it. It cannot be enforced against or to bind a university as a matter of any necessity to seek prior approval to commence a new department or course and programme in technical education in any university or any of its departments and constituent institutions. The said observation also applies in the present case that the Regulations have no application to the

MCA course which is being run by the colleges of the appellants herein.

29. It is further contended by the learned counsel that Bharathidasan University which was incorporated under the provisions of UGC Act, 1956 is a controlling authority of its affiliated colleges for all its courses including MCA course. The University confers degrees on the students studying in its affiliated colleges. Thus, for all intents and purposes, the courses are run by the University. In fact in *Bharathidasan University's* case (supra) at paragraph 2, this Court has dealt with the scope and purpose of the University. It says that the University has been created "to provide among other things, instruction and training in such branches of learning as it may determine; to provide for research and for the dissemination of knowledge; to confer degrees, titles, diplomas and other academic distinctions on persons who have pursued an approved course of study in a university college or laboratory or in an affiliated or approved college and have passed the prescribed examination of the University". Thus, it is clear that the colleges are affiliated to the university to impart education in different courses run by the university in which the students have to pass the prescribed examination of the University for making themselves eligible to obtain degrees. Therefore, any provision or direction requiring the colleges affiliated to university or imparting education to the students on behalf of the university to seek AICTE's approval for conducting MCA course when no such approval is required for the university for the aforesaid purpose will be contrary to the judgment rendered in *Bharathidasan University's* case (supra).

30. Learned counsel placed strong reliance upon the counter affidavit filed by the AICTE on 16.1.2013 in Civil Appeal No.1145 of 2004. Subsequent to the filing of the present appeal in 2004, the AICTE framed new Regulations in 2005 and 2006 which provide that "technical institution" means institution conducting the course, inter alia, in

education, training and research in engineering, technology including MCA. The Regulations of 2005 and 2006 further provide that not only new technical institutions but even existing technical institution cannot conduct any technical course without prior approval of the AICTE. The learned counsel submitted that it is more than apparent that the said Regulations have been specifically framed to counter the challenges posed by the appellant institutions to their authorities and power to regulate the course of MCA. Also after taking clues from the impugned judgment in *Bharathidasan University's* case they had taken care that there is comma in between 'engineering' and 'technology' in the definition of "technical institution". Therefore, it is submitted that the said Regulation which has not only come into force much after the introduction of MCA course in the appellant colleges but also after the impugned judgment in this appeal and after filing of the appeals, cannot be made applicable to the colleges of the appellant herein who are running MCA course since this will result in giving the amended Regulations retrospective effect as the Regulations do not provide for it.

31. On the other hand, Mr. Rakesh Dwivedi, learned senior counsel appearing on behalf of respondent AICTE, sought to justify the impugned judgment in these appeals by placing strong reliance upon the dictionary meaning of the expression "engineering" and "technology" from the following dictionaries, namely Webster's Comprehensive Dictionary, Wharton's Law Lexicon, Encyclopedic Law Lexicon, The New Shorter Oxford English Dictionary, Advanced Law Lexicon, P Ramanatha Aiyar's the Law Lexicon and Stroud's Judicial Dictionary of Words and Phrases. After a careful reading of the meanings of 'technical engineering' which speaks of the art or source of making practical applications of the knowledge of pure science as physics, chemistry, etc. as in the construction of engines, bridges, buildings, mines, chemical plants and the like, he submits that the expression 'technology' by itself is very wide and also comprehends 'engineering'. The Institutes of

Technology Act, 1961 envisages imparting of education in technology and Section 6(1) of the Act empowers it to provide instruction and research in such branches of engineering and technology, science and arts as the institute may think fit. Further, the National Institute of Technology Act, 2007 envisages certain institutions of national importance to provide for instructions and research in branches of engineering, technology, management, education, sciences and arts. He further contends that though one does not find a comma, between 'engineering' and 'technology' in Section 2(g) of the AICTE Act, the composition of the council envisaged by Section 3(4)(f)(iii) and (iv) and Section 13(1)(iii) and (iv) in relation to establishment of Board of Studies would clearly go to show that engineering and technology are two separate branches of study. Even if, 'engineering technology' is considered to be a single expression that will not reduce the width and scope of the subject, it will nevertheless indicate both the branches of study of engineering and technology and will cover both the subjects. Therefore, the existence or absence of comma between the two words is of no significance and the crucial issue is delineation of the scope of 'engineering technology'. Existence and absence of comma and its scope should be determined with reference to the entire object and purpose of the Act that is, the proper planning and coordinated development of the "technical education" system throughout the country. Therefore, the regulation and proper maintenance of norms and standards in the "technical education" system in the Preamble of AICTE Act is very important.

32. Further, strong reliance was placed by the learned senior counsel for the respondent upon *Parshvanath Charitable Trust case* (supra) wherein the course content of the three years MCA course with six semesters would clearly go to show that the course undertaken by the colleges affiliated to the Universities in the cases is very wide and covers the fundamentals of computer engineering including software

engineering as well as the technology of computer system. Section 2(g) of the AICTE Act reads as under:-

> "Technical Education" means programmes of education, research and training in engineering technology, architecture, town planning, management, pharmacy and applied arts and crafts and such other programme or areas as the Central Government may, in consultation with the Council, by notification in the Official Gazette, declare;"

The expression "Engineering Technology" in Section 2(g) of AICTE Act would clearly comprehend within its scope, the MCA course offered by the appellant colleges. The contention on behalf of the appellants herein is that the colleges affiliated to the universities are outside the scope and purview of the AICTE Act in relation to obtaining approval from the AICTE for establishing technical institution or introducing new course or programme as required under Section 10(k) read with Section 2(h) of the Act. Since the definition of "technical institution" makes no mention of colleges providing technical education which are affiliated to the universities thereby expressly excluding such colleges from the definition of "technical institution" under the AICTE Act as they are covered under the affiliated colleges of the universities, the contention made above is not tenable in law. Also, the said definition, based on the judgment of this Court in *Bharathidasan University's* case referred to supra and reliance placed upon Kothari Commission Report by the learned senior counsel on behalf of the appellant member colleges, is wholly untenable in law for the reasons mentioned in the said case. In the earlier judgments of this Court, namely, *Adhiyaman Education and Research Institute* (supra) and *Jaya Gokul Educational Trust* (supra) referred to in Paragraph 11 of the *Bharathidasan University* case, the powers of AICTE under the AICTE Act and Regulations framed thereunder, are lucidly explained and it is held that the provisions of the UGC Act enacted by the Parliament are also applicable to the university under State

enactments in so far as technical education is concerned. Learned senior counsel submits that in *Bharathidasan University's* case the earlier judgments in *Adhiyaman Education and Research Institute* and *Jaya Gokul Educational Trust* were noted but their correctness was not considered. Also, the *Bharathidasan University* case did not make any observation about their actual accuracy and in the said case this Court did not go into the question as to whether the AICTE Act would prevail over the UGC Act or the effect of competing entries in the three lists of VII Schedule of the Constitution. On the other hand, a bare perusal of *Adhiyaman Education and Research Institute and Jaya Gokul Educational Trust* cases would clearly show that this Court was considering the applicability of AICTE Act to the engineering colleges affiliated to universities and whose courses included programmes of Engineering and Computer Sciences. Also, in both the cases, the two Judge Bench examined the competing entries in the List 1 and List III in the VIIth Schedule of the Constitution and held that the State enactment-UGC Act would not prevail over the AICTE Act and rather to the extent of repugnancy the enactment of the UGC Act would be impliedly repealed. It was held in those cases that power of universities to affiliate such colleges would depend on compliance of norms and standards fixed by the AICTE and the approval granted by the AICTE and also that if AICTE grants approval to such colleges then they need not obtain the approval of the State Government and the universities should not insist upon obtaining the approvals from the State Government. Heavy reliance has been placed on the two judgments of this Court in *Adhiyaman Education and Research Institute* case (supra) and *Jaya Gokul Education Trust* case (supra).

The relevant portions of the *Adhiyaman Education and Research Institute* case are extracted hereunder:

> **"12.** The subject "coordination and determination of standards in institutions for higher [illegible] h

and scientific and technical institutions" has always remained the special preserve of Parliament. This was so even before the Forty-second Amendment, since Entry 11 of List II even then was subject, among others, to Entry 66 of List I. After the said Amendment, the constitutional position on that score has not undergone any change. All that has happened is that Entry 11 was taken out from List II and amalgamated with Entry 25 of List III. However, even the new Entry 25 of List III is also subject to the provisions, among others, of Entry 66 of List I. It cannot, therefore, be doubted nor is it contended before us, that the legislation with regard to coordination and determination of standards in institutions for higher education or research and scientific and technical institutions has always been the preserve of Parliament. What was contended before us on behalf of the State was that Entry 66 enables Parliament to lay down the minimum standards but does not deprive the State legislature from laying down standards above the said minimum standards. We will deal with this argument at its proper place.

27. The provisions of the State Act enumerated above show that if it is made applicable to the technical institutions, it will overlap and will be in conflict with the provisions of the Central Act in various areas and, in particular, in the matter of allocation and disbursal of grants, formulation of schemes for initial and in-service training of teachers and continuing education of teachers, laying down norms and standards for courses, physical and institutional facilities, staff pattern, staff qualifications, quality instruction assessment and examinations, fixing norms and guidelines for charging tuition and other fees, granting approval for starting new technical institutions and for introduction of new courses or programmes, taking steps to prevent commercialisation of technical education, inspection of technical institutions, withholding or discontinuing grants in respect of courses and taking such other steps as may be

necessary for ensuring compliance of the directions of the Council, declaring technical institutions at various levels and types fit to receive grants, the constitution of the Council and its Executive Committee and the Regional Committees to carry out the functions under the Central Act, the compliance by the Council of the directions issued by the Central Government on questions of policy etc. which matters are covered by the Central Act. What is further, the primary object of the Central Act, as discussed earlier, is to provide for the establishment of an All India Council for Technical Education with a view, among others, to plan and coordinate the development of technical education system throughout the country and to promote the qualitative improvement of such education and to regulate and properly maintain the norms and standards in the technical education system which is a subject within the exclusive legislative field of the Central Government as is clear from Entry 66 of the Union List in the Seventh Schedule. All the other provisions of the Act have been made in furtherance of the said objectives. They can also be deemed to have been enacted under Entry 25 of List III. This being so, the provisions of the State Act which impinge upon the provisions of the Central Act are void and, therefore, unenforceable. It is for these reasons that the appointment of the High Power Committee by the State Government to inspect the respondent-Trust was void as has been rightly held by the High Court.

41. What emerges from the above discussion is as follows:

(*i*) The expression 'coordination' used in Entry 66 of the Union List of the Seventh Schedule to the Constitution does not merely mean evaluation. It means harmonisation with a view to forge a uniform pattern for a concerted action according to a certain design, scheme or plan of development. It, therefore, includes action not only for removal of disparities in standards [illegible] g

the occurrence of such disparities. It would, therefore, also include power to do all things which are necessary to prevent what would make 'coordination' either impossible or difficult. This power is absolute and unconditional and in the absence of any valid compelling reasons, it must be given its full effect according to its plain and express intention.

(*ii*) To the extent that the State legislation is in conflict with the Central legislation though the former is purported to have been made under Entry 25 of the Concurrent List but in effect encroaches upon legislation including subordinate legislation made by the Centre under Entry 25 of the Concurrent List or to give effect to Entry 66 of the Union List, it would be void and inoperative.

(*iii*) If there is a conflict between the two legislations, unless the State legislation is saved by the provisions of the main part of clause (2) of Article 254, the State legislation being repugnant to the Central legislation, the same would be inoperative.

(*iv*)Whether the State law encroaches upon Entry 66 of the Union List or is repugnant to the law made by the Centre under Entry 25 of the Concurrent List, will have to be determined by the examination of the two laws and will depend upon the facts of each case.

(*v*) When there are more applicants than the available situations/seats, the State authority is not prevented from laying down higher standards or qualifications than those laid down by the Centre or the Central authority to short-list the applicants. When the State authority does so, it does not encroach upon Entry 66 of the Union List or make a law which is repugnant to the Central law.

(*vi*) However, when the situations/seats are available and the State authorities deny an applicant the same on the

ground that the applicant is not qualified according to its standards or qualifications, as the case may be, although the applicant satisfies the standards or qualifications laid down by the Central law, they act unconstitutionally. So also when the State authorities de-recognise or disaffiliate an institution for not satisfying the standards or requirement laid down by them, although it satisfied the norms and requirements laid down by the Central authority, the State authorities act illegally."

Also, the relevant paragraphs of the *Jaya Gokul Education Trust* case are extracted hereunder:

"**16. ……** It was held that the AICTE Act was referable to Entry 66 List I of the Constitution of India, relating to "coordination and determination of standards in institutions for higher education or research and scientific and technical institutions". After the constitutional amendment (Forty-second Amendment Act, 1976) Entry 25 of List III in the Concurrent List read:

"Education, included *technical education*, medical education and universities, *subject to the provisions* of Entries 63, 64, 65 and *66* of List I; vocational and technical training of labour."

Thus, the State law under Entry 23 of List III would be repugnant to any law made by Parliament under Entry 66 of List I, to the extent of inconsistency. The Tamil Nadu Act was of 1976 and the University Act was of 1923 and were laws referable to List III. Whether they were pre-constitutional or post-constitutional laws, they would be repugnant to the AICTE Act passed by Parliament under Entry 66 of List I. In the above case this Court referred to the various provisions of the AICTE Act and on the question of repugnancy held (see SCC p. 120) as follows: (SCC para 22)

"Hence, on the subjects covered by

could not make a law under Entry 11 of List II prior to Forty-second Amendment nor can it make a law under Entry 25 of List III after the Forty-second Amendment. If there was any such existing law immediately before the commencement of the Constitution within the meaning of Article 372 of the Constitution, as the Madras University Act, 1923, on the enactment of the present Central Act, the provisions of the said law if repugnant to the provisions of the Central Act would stand impliedly repealed to the extent of repugnancy. Such repugnancy would have to be adjudged on the basis of the tests which are applied for adjudging repugnancy under Article 254 of the Constitution."

17. ..... It was held (see SCC p. 126) that Section 10 of the Central Act dealt with various matters (including *granting approval for starting* new technical institutions), and that so far as these matters were concerned

"it is not the University Act and the University but it is the Central Act and the Council created under it which will have the jurisdiction. To that extent, after the coming into operation of the Central Act, the provisions of the University Act will be deemed to have become unenforceable". (SCC pp. 126-27, para 30)

Thus, in the two passages set out above, this Court clearly held that because of Section 10(k) of the Central Act which vested the powers of granting approval in the Council, the T.N. Act of 1976 and the University Act, 1923 could not deal with any questions of "approval" for establishment of technical institutions. All that was necessary was that under the Regulations, the AICTE Council had to consult them.

19. ..... In our opinion, even if there was a State law in the State of Kerala which required the approval of the State Government for establishing technical institutions, such a law would have been repugnant to the AICTE Act and void

to that extent, as held in *T.N. case.*

22. ..... If, indeed, the University statute could be so interpreted, such a provision requiring approval of the State Government would be repugnant to the provisions of Section 10(k) of the AICTE Act, 1987 and would again be void. As pointed out in *T.N. case* there were enough provisions in the Central Act for consultation by the Council of AICTE with various agencies, including the State Governments and the universities concerned. The State-Level Committee and the Central Regional Committees contained various experts and State representatives. In case of difference of opinion as between the various consultees, AICTE would have to go by the views of the Central Task Force. These were sufficient safeguards for ascertaining the views of the State Governments and the universities. No doubt the question of affiliation was a different matter and was not covered by the Central Act but in *T.N. case* it was held that the University could not impose any conditions inconsistent with the AICTE Act or its Regulation or the conditions imposed by AICTE. Therefore, the procedure for obtaining the affiliation and any conditions which could be imposed by the University, could not be inconsistent with the provisions of the Central Act. The University could not, therefore, in any event have sought for "approval" of the State Government.

30. Thus, the University ought to have considered the grant of final or further affiliation without waiting for any approval from the State Government and should have acted on the basis of the permission granted by AICTE and other relevant factors in the University Act or statutes, which are not inconsistent with the AICTE Act or its Regulations."

33. The learned senior counsel further submits that the question of law which was being considered was whether the universities created in the Bharathidasan University Act, 1981 should seek prior approval of the AICTE

or imparting a course or a programme in technical education or technical institution as an adjunct to the university itself to conduct technical courses of its choice. In that case, this Court was not concerned with the question of starting of a college/ technical institution by private persons which were merely affiliated to the university for the purposes of pursuing courses of study and participating in examinations for degree/diploma.

34. By perusal of the observations made in *Bharathidasan University's* case supra upon which strong reliance was placed by the learned senior counsel for the appellant, would show that this Court referred to Section 2(h) of the AICTE Act where the definition of 'technical institution' excludes university from its scope. In the said judgment, this court has observed that the AICTE Act maintains a complete dichotomy between a 'University' and a 'Technical Institution'. It was further submitted that the expression 'constituent institutions' as used in paragraphs 12 and 15 of the *Bharathidasan University's* judgment refers to technical institutions which are started by the university itself or as an adjunct to the university or affiliated colleges or are not started, managed and governed by the university itself, whereas constituent institutions are started, managed and governed by the university itself under powers given by the university enactment. In view of the aforesaid factual position he submits that issues in relation to coverage of affiliated colleges imparting technical education under Section 10(k) of AICTE Act stand decided and concluded by the judgments in **Adhiyaman Education and Research Institute** and **Jaya Gokul Educational Trust** cases whereas the **Bharathidasan University's** case deals with the department and constituent institutions and units of the university itself. It was further submitted that the contention of the appellant colleges that they do not require prior approval from the AICTE since they are not covered by Section 10(k) read with Section 2(g) & (h) of the Act, is not tenable in law. This Court took care to make observations that universities have to maintain the norms and standards fixed by the AICTE, even

though they do not need prior approval for starting a department or constituent institutions and units. Further, strong reliance was placed by the learned senior counsel upon the provisions of Sections 10, 11 and 22 of the AICTE Act. A careful analysis of the said provision would go to show the role of inspection conferred upon the AICTE vis-à-vis Universities which is limited to the purpose of ensuring the proper maintenance of norms and standards in the technical education system in the country so as to conform to the standards laid down by it. Therefore, learned senior counsel for the respondent AICTE submits that the contention urged by Dr. Dhavan, with respect to the member colleges of the appellant and learned counsel Mr.Prashant Bhushan in connected appeals that the AICTE, except bringing to the notice of UGC regarding standards to be maintained by the colleges affiliated to the universities in relation to technical education, has no role to play or it has no power to regulate or control such colleges, is wholly untenable in law and therefore the submissions made in this regard cannot be accepted.

35. On the basis of the factual and rival legal contentions urged on behalf of the parties the following points would arise for consideration of this Court in these civil appeals:—

(1) Whether the colleges affiliated to a university comes within the purview of exclusion of the definition of "Technical Institution" as defined under Section 2(h) of the AICTE Act, 1987?

(2) Whether the AICTE has got the control and supervision upon the affiliated colleges of the respective universities of the member colleges of the appellant in C.A.No.1145/2004 and the appellants in connected appeals?

(3) Whether the MCA course be construed as technical education in terms of definition under section 2(g) of the AICTE Act?

(4) Whether the Regulation 8(c) and 8(iv) by way of amendment in the year 2000 inserting the words 'MBA and MCA' before Architecture and Hotel Management courses is applicable to the concerned colleges of the appellants?

(5) Whether non placement of the amended Regulations before Houses of the Parliament as required under Section 24 of the AICTE Act is vitiated in law?

(6) Whether the law laid down by this Court in *Bharathidasan University's* case, *Adhiyaman Education and Research Institute* case and *Jaya Gokul Educational Trust* case is applicable to the fact situation of the concerned colleges of the appellants?

Answer to the points framed above

36. Point Nos. 1 and 2 are answered in favour of the appellants by assigning the following reasons:-

For this purpose, it would be very much necessary to extract the definition of 'technical institution', 'university' and 'technical education' in Sections 2(h), 2(i) and 2(g) respectively read with Section 10(k) of the AICTE Act and also the definition of 2(f) of the UGC Act read with Sections 12, 12A, 12B, 12(2)(c) of the UGC Act.

Section 2 (f), (g), (h) and (i) of the AICTE Act read as:

"2. **Definitions.**

……..

(f*) "Regulations*" means regulations made under this Act.

(g) "*Technical education*" means programmes of

education, research and training in engineering technology, architecture, town planning, management, pharmacy and applied arts and crafts and such other programme or areas as the Central Government may, in consultation with the Council, by notification in the Official Gazette, declare;

(h) "*Technical institution*" means an institution, not being a university which offers courses or programmes of technical education, and shall include such other institutions as the Central Government may, in consultation with the Council, by notification in the Official Gazette, declare as technical institutions:

(i) "*University*" means a University defined under clause (f) of Section 2 of the University Grants Commission Act, 1956 (3 of 1956) and includes an institution deemed to be a University under section 3 of that Act.

10. **Functions of the Council**.- It shall be the duty of the Council to take all such steps as it may think fit for ensuring coordinated and integrated development of technical education and management and maintenance of standards and for the purposes of performing its functions under this Act, the Council may-

……

(k) grant approval for starting new technical institutions and for introduction of new courses or programmes in consultation with the agencies concerned:"

Further, the relevant sections of University Grants Commission Act, 1956 read as under:

"2.**Definitions**.

……..

(f) "*University*" means a University established or incorporated by or under a Central Act, a Provincial Act or a State Act, and includes any such institution as may, in consultation with the University concerned, be recognized by the Commission in accordance with the regulations made in this behalf under this Act.

12. **Functions of the Commission**- It shall be the general duty of the Commission to take, in consultation with the Universities or other bodies concerned, all such steps as it may think fit for the promotion and co-ordination of University education and for the determination and maintenance of standards of teaching, examination and research in Universities, and for the purpose of performing its functions under this Act, the Commission may-

(a) inquire into the financial needs of Universities;

(b) allocate and disburse, out of the Fund of the Commission, grants to Universities established or incorporated by or under a Central Act for the maintenance and development of such Universities or for any other general or specified purpose:

(c) allocate and disburse, out of the Fund of the Commission, such grants to other Universities as it may deem 1[necessary or appropriate for the development of such Universities or for the maintenance, or development, or both, of any specified activities of such Universities] or for any other general or specified purpose: Provided that in making any grant to any such University, the Commission shall give due consideration to the development of the University concerned, its financial needs, the standard attained by it and the national purposes which it may serve, 2[(cc) allocate and disburse out of the Fund of the Commission, such grants to institution deemed to be Universities in pursuance of a declaration made by the Central Government under section

3, as it may deem necessary, for one or more of the following purposes, namely:-

(i) for maintenance in special cases,

(ii) for development,

(iii) for any other general or specified purpose;]

1["(ccc) establish, in accordance with the regulations made under this Act, institutions for providing common facilities, services and programmes for a group of universities or for the universities in general and maintain such institutions or provide

for their maintenance by allocating and, disbursing out of the Fund of the Commission such grants as the Commission may deem necessary".]

(d) recommend to any University the measures necessary for the improvement of University education and advise the University upon the action to be taken for the purpose of implementing such recommendation;

(e) advise the Central Government or any State Government on the allocation of any grants to Universities for any general or specified purpose out of the Consolidated Fund of India or the

Consolidated Fund of the State, as the case may be;

(f) advise any authority, if such advice is asked for, on the establishment of a new University or on proposals connected with the expansion of the activities of any University;

(g) advise the Central Government or any State Government or University on any question which may be referred to the Commission by the Central Government or

the State Government or the University, as the case may be;

(h) collect information on all such matters relating to University education in India and other countries as it thinks fit and make the same available to any University;

(i) require a University to furnish it with such information as may be needed relating to the financial position of the University or the studies in the various branches of learning undertaken in that University, together with all the rules and regulations relating to the standards of teaching and examination in that University respecting each of such branches of learning;

(j) perform such other functions as may be prescribed or as may be deemed necessary by the Commission for advancing the cause of higher education in India or as may be incidental or conducive to the discharge of the above functions.

12A. **Regulation of fees and prohibition of donations in certain cases**-

(1) In this section-

(a) "affiliation", together with its grammatical variation, includes, in relation to a college, recognition of such college by, association of such college with, and admission of such college to the privileges of, a university;

(b) "college" means any institution, whether known as such or by any other name which provides for a course of study for obtaining any qualification from a university and which, in accordance with the rules and regulations of such university, is recognized as competent to provide for such course of study and present students undergoing such course of study

for the examination for the award of such qualification.

(c) "prosecution" in relation to a course of study, includes promotion from one part or stage of the course of study to another part or stage of the course of study.

(d) "qualification" means a degree or any other qualification awarded by a university.

(e) "regulations" means regulations made under this Act.

(f) "specified course of study" means a course of study in respect of which regulation of the nature mentioned in sub-section (2) have been made.

(g) "student" includes a person seeking admission as a student;

(h) "university" means a university or institution referred to in sub-section (1) of Section 22.

(2) Without prejudice to the generality of the provisions of section 12 if, having regard to-

.....

(c) the minimum standards which a person possessing such qualification should be able to maintain in his work relating to such activities and the consequent need for ensuring, so far as may be, that no candidate secures admission to such course of study by reason of economic power and thereby prevents a more meritorious candidate from securing admission to such course of study; and

(d) all other relevant factors, the commission is satisfied that it is necessary so to do in the public interest, it may, after consultation with the univ s

concerned, specify by regulations the matters in respect of which fees may be charged and the scale of fees in accordance with which fees shall be charged in respect of those matters on and from such date as may be specified in the regulation in this behalf, by any college providing for such course of study from, or in relation to, any student in connection with his admission to, and prosecution of, such course of study;……..

13. **Inspection**.- (1) For the purpose of ascertaining the financial needs of a University or its standards of teaching, examination and research, the Commission may, after consultation with the University, cause an inspection of any department or departments thereof to be made in such manner as may be prescribed and by such person or persons as it may direct.

(2) The Commission shall communicate to the University the date on which any inspection under sub-section (1) is to be made and the University shall be entitled to be associated with the inspection in such manner as may be prescribed.

(3) The Commission shall communicate to the University its views in regard to the results of any such inspection and may, after ascertaining the opinion of the University, recommend to the University the action to be taken as a result of such inspection.

(4) All communications to a University under this section shall be made to the executive authority thereof and the executive authority of the University shall report to the Commission the action, if any, which is proposed to be taken for the purpose of implementing any such recommendation as is referred to in sub-section (3).

14. **Consequences of failure of Universities to comply with recommendations of the Commission**- If any

University [grants affiliation in respect of any course of study to any college referred to in sub-section (5) of section 12-A in contravention of the provisions of that sub-section or] fails within a reasonable time to comply with any recommendation made by the Commission under section 12 or section 13 [or contravenes the provisions of any rule made under clause (f) or clause (g) of sub-section (2) of section 25, or of any regulation made under clause (e) or clause (f) or clause (g) of section 26,] the Commission, after taking into consideration the cause, if any, shown by the university [for Such failure or contraventions] may withhold from the University the grants proposed to be made out of the Fund of the Commission."

37. In *Bharathidasan University's* case, the question which fell for consideration is referred to in the first paragraph of the judgment upon which strong reliance is placed by the learned senior counsel for the respondent Mr. Rakesh Dwivedi to substantiate his submission that the ratio laid down in *Bharathidasan University's* case (supra) is in relation to the question raised regarding the university created under the Bharathidasan Universities Act to start a department for imparting a course or programme in technical education or a technical institution as an adjunct to the university itself for conducting technical courses of its choice and selection. Therefore, the ratio laid down in the said case has no application to the fact situation of these education institutions/ colleges which are run by the appellants herein though they are affiliated to their respective universities. Therefore, he placed strong reliance upon the ratio laid down by this Court in *Adhiyaman Education and Research Institute and Jaya Gokul Educational Trust's* cases wherein this Court has clearly enunciated the law after elaborately adverting to the legislative entries in List I Entry 66 and List III Entry 25 regarding the respective legislative competence of the Parliament and the State Legislature. To substantiate his contention, he claimed that the AICTE Act is enacted by the P y

66 of List I and the Universities are established under the provisions of Bharathidasan University Act which was enacted by the State Legislature from Entry 25 of List III. The Bharathidasan University Act, fell for consideration of this Court in the above said judgments. Therefore, in those cases this Court had clearly held that the AICTE Act is relatable to Entry 66 and must prevail over the State Enactments covered in those cases. Therefore, the said decisions are applicable to the fact situation of this case. This contention is rightly rebutted by the learned senior counsel Dr. Rajiv Dhavan and Mr. Prashant Bhushan, the learned counsel appearing on behalf of the appellants in both set of appeals inviting our attention to the various provisions of the AICTE Act and UGC Act with reference to the principles laid down in *Bharathidasan University's* case. Also, the relevant paragraphs from the decision rendered in *T.M.A. Pai Foundation* (supra) will be referred to in this judgment. With reference to the above said rival legal contentions, it will be worthwhile to refer to the principle laid down in *Bharathidasan University* and *Parashavananth Charitable Trust* cases (supra). The relevant paragraphs of *Bharathidasan University* case (supra) read as under:

> **"8.** We have bestowed our thoughtful consideration to the submissions made on either side. When the legislative intent finds specific mention and expression in the provisions of the Act itself, the same cannot be whittled down or curtailed and rendered nugatory by giving undue importance to the so-called object underlying the Act or the purpose of creation of a body to supervise the implementation of the provisions of the Act, particularly when the AICTE Act does not contain any evidence of an intention to belittle and destroy the authority or autonomy of other statutory bodies, having their own assigned roles to perform. Merely activated by some assumed objects or desirabilities, the courts cannot adorn the mantle of the legislature. It is hard to ignore the legislative intent to give

definite meaning to words employed in the Act and adopt an interpretation which would tend to do violence to the express language as well as the plain meaning and patent aim and object underlying the various other provisions of the Act. Even in endeavouring to maintain the object and spirit of the law to achieve the goal fixed by the legislature, the courts must go by the guidance of the words used and not on certain preconceived notions of ideological structure and scheme underlying the law. In the Statement of Objects and Reasons for the AICTE Act, it is specifically stated that AICTE was originally set up by a government resolution as a national expert body to advise the Central and State Governments for ensuring the coordinated development of technical education in accordance with approved standards was playing an effective role, but, "[h]owever, in recent years, a large number of private engineering colleges and polytechnics have come up in complete disregard of the guidelines, laid down by the AICTE" and taking into account the serious deficiencies of even rudimentary infrastructure necessary for imparting proper education and training and the need to maintain educational standards and curtail the growing erosion of standards statutory authority was meant to be conferred upon AICTE to play its role more effectively by enacting the AICTE Act.

9. Section 2(*h*) defines "technical institution" for the purposes of the Act, as follows:

> "2. (*h*) 'technical institution' means an institution, not being a university, which offers courses or programmes of technical education, and shall include such other institutions as the Central Government may, in consultation with the Council, by notification in the Official Gazette, declare as technical institutions;"

10. Since it is intended to be other than a university, the Act defines in Section 2(*i*) "universit[illegible]y

defined under clause (*f*) of Section 2 of the University Grants Commission Act, 1956 and also to be inclusive of an institution deemed to be a university under Section 3 of the said Act. Section 10 of the Act enumerates the various powers and functions of AICTE as also its duties and obligations to take steps towards fulfilment of the same. One such as envisaged in Section 10(1)(*k*) is to "grant approval for starting new technical institutions and for introduction of new courses or programmes in consultation with the agencies concerned". Section 23, which empowers the Council to make regulations in the manner ordained therein emphatically and specifically, mandates the making of such Regulations only "not inconsistent with the provisions of this Act and the Rules". The Act, for all purposes and throughout maintains the distinct identity and existence of "technical institutions" and "universities" and it is in keeping tune with the said dichotomy that wherever the university or the activities of the university are also to be supervised or regulated and guided by AICTE, specific mention has been made of the university alongside the technical institutions and wherever the university is to be left out and not to be roped in merely refers to the technical institution only in Sections 10, 11 and 22(2)(*b*). It is necessary and would be useful to advert to Sections 10(1)(*c*), (*g*), (*o*) which would go to show that universities are mentioned alongside the "technical institutions" and clauses (*k*), (*m*), (*p*), (*q*), (*s*) and (*u*) wherein there is conspicuous omission of reference to universities, reference being made to technical institutions alone. It is equally important to see that when AICTE is empowered to inspect or cause to inspect any technical institution in clause (*p*) of sub-section (1) of Section 10 without any reservation whatsoever, when it comes to the question of universities it is confined and limited to ascertaining the financial needs or its standards of teaching, examination and research. The inspection may be made or cause to be made of any department or departments only and that too, in such manner as may be prescribed as envisaged in Section 11 of the Act. Clause (*t*) of sub-section (1) of Section 10 envisages AICTE to only advise UGC for declaring any institution imparting technical education as a deemed university and not do any such thing by itself. Likewise, clause (*u*) of the same provision which envisages the setting up of a National Board of Accreditation to periodically conduct evaluation of technical institutions or programmes on the basis of guidelines, norms and standards specified by it to make recommendation to it, or to the Council, or to the Commission or to other bodies, regarding recognition or derecognition of the institution or the programme. All these vitally important aspects go to show that AICTE created under the Act is not intended to be an authority either superior to or supervise and control the universities and thereby superimpose itself upon such universities merely for the reason that it is imparting teaching in technical education or programmes in any of its departments or units. A careful scanning-through of the provisions of the AICTE Act and the provisions of the UGC Act in juxtaposition, will show that the role of AICTE vis-à-vis the universities is only advisory, recommendatory and a guiding factor and thereby subserves the cause of maintaining appropriate standards and qualitative norms and not as an authority empowered to issue and enforce any sanctions by itself, except submitting a report to UGC for appropriate action. The conscious and deliberate omission to enact any such provision in the AICTE Act in respect of universities is not only a positive indicator but should be also one of the determining factors in adjudging the status, role and activities of AICTE vis-à-vis universities and the activities and functioning of its departments and units. All these vitally important facets with so much glaring significance of the scheme underlying the Act and the language of the various provisions seem to have escaped the notice of the learned Judges

merited attention and consideration in their proper and correct perspective. The ultra-activist view articulated in *M. Sambasiva Rao case* on the basis of supposed intention and imagined purpose of AICTE or the Act constituting it, is uncalled for and ought to have been avoided, all the more so when such an interpretation is not only bound to do violence to the language of the various provisions but also inevitably render other statutory authorities like UGC and universities irrelevant or even as non-entities by making AICTE a superpower with a devastating role undermining the status, authority and autonomous functioning of those institutions in areas and spheres assigned to them under the respective legislations constituting and governing them."

38. Paragraphs 19 and 20 of *Parashavananth Charitable Trust's* case (supra) read as hereunder:

"19. Section 10 of the AICTE Act enumerates various powers and functions of AICTE as also its duties and obligations to take steps towards fulfillment of the same. One such power as envisaged in Section 10(1)(k) is to "grant approval for starting new technical institutions and for introduction of new courses or programmes in consultation with the agencies concerned". It is important to see that the AICTE is empowered to inspect or cause to inspect any technical institution in clause (p) of sub-section (1) of Section 10 without any reservation whatsoever. However, when it comes to the question of universities, it is confined and limited to ascertaining the financial needs or its standards of teaching, examination and research. The inspection may be made or caused to be made of any department or departments only and that too, in such a manner as may be prescribed, as envisaged in Section 11 of the AICTE Act.

20. All these vitally important aspects go to show that the Council (AICTE) created under the AICTE Act is not

intended to be an authority either superior to or to supervise and control the universities and thereby superimpose itself upon such universities merely for the reason that they are imparting teaching in technical education or programmes in any of their departments or units. A careful scanning of the provisions of the AICTE Act and the provisions of the University Grants Commission Act, 1956 in juxtaposition will show that the role of AICTE vis-à-vis the universities is only advisory, recommendatory and one of providing guidance, thereby subserving the cause of maintaining appropriate standards and qualitative norms and not as authority empowered to issue and enforce any sanction by itself. Reference can be made to the judgments of this Court in the case of *Adarsh Shiksha Mahavidyalaya v. Subhash Rahangdale* [(2012) 2 SCC 425], *State of Tamil Nadu v. Adhiyaman Educational & Research Institute* [(1995) 4 SCC 104] and *Bharathidasan Univesity v. All India Council for Technical Education* [(2001) 8 SCC 676]"

(emphasis supplied)

The underlined portions from the said decision referred to supra would make it clear that the AICTE Act does not contain any evidence of an intention to belittle and destroy the authority or autonomy of other statutory bodies which they are assigned to perform. Further, the AICTE Act does not intend to be an authority either superior or to supervise or control the universities and thereby superimpose itself upon the said universities merely for the reason that it is laying down certain teaching standards in technical education or programmes formulated in any of the department or units. It is evident that while enacting the AICTE Act, the Parliament was fully alive to the existence of the provisions of UGC Act, 1956 particularly, the said provisions extracted above. Therefore, the definition in Section 2(h) technical institution in AICTE Act which authorizes the AICTE to do certain thi[illegible]s

consciously and deliberately been taken to make specific mention of university, wherever and whenever the AICTE alone was expected to interact with university and its departments as well as constituent institutions and units. It was held after analyzing the provision of Sections 10, 11 and 12 of the AICTE Act that the role of the inspection conferred upon the AICTE vis-à-vis universities is limited to the purpose of ensuring proper maintenance of norms and standards in the technical education system so as to conform to the standard laid down by it with no further or direct control over such universities or scope for any direct action except bringing it to the notice of UGC. In that background, this Court in *Bharathidasan University* case made it very clear by making the observation that it has examined the scope of the enactment as to whether the AICTE Act prevails over the UGC Act or the fact of competent entries fall in Entry 66 List I vis-à-vis Entry 25 of List III of the VII Schedule of the Constitution. A cumulative reading of the aforesaid paragraphs of *Bharathidasan University's* case which are extracted above makes it very clear that this Court has exempted universities, its colleges, constituent institutions and units from seeking prior approval from the AICTE. Also, from the reading of paragraphs 19 and 20 of *Parashvanath Chartitable Trust* case it is made clear after careful scanning of the provisions of the AICTE Act and the University Grants Commission Act, 1956 that the role of AICTE vis-à-vis universities is only advisory, recommendatory and one of providing guidance and has no authority empowering it to issue or enforce any sanctions by itself. It is rightly pointed out from the affidavit filed by UGC as directed by this Court in these cases on the question of affiliated colleges to the university, that the affidavit is very mechanical and it has simply and gratuitously without foundation, added as technical institutions including affiliated colleges without any legal foundation. In paragraphs 13, 14, 15 and 19 of the Affidavit filed by the UGC and the assertion made in paragraph 23 is without any factual foundation, which reads as under:

"That it is further submitted that affiliated colleges are

distinct and different than the constituent colleges. Thus, it cannot be said that constituent colleges also include affiliated colleges."

Further, the assertion of UGC as rightly pointed out by Dr. Dhavan in the written submission filed on behalf of the appellant in CA No. 1145 of 2004 that the claim that UGC does not have any provision to grant approval of technical institution, is facile as it has already been laid down by this Court that the AICTE norms can be applied to the affiliated colleges through UGC. It can only advise the UGC for formulating the standard of education and other aspects to the UGC. In view of the law laid down in *Bharathidasan University and Parashvanath Charitable Trust* cases (supra), the learned senior counsel Dr. Dhavan has rightly submitted for rejection of the affidavit of the UGC, which we have to accept as the same is without any factual foundation and also contrary to the intent and object of the Act.

39. It is also relevant to refer to the exclusion of university from the definition of 'technical institution' as defined under section 2(h) of the AICTE Act. The Institution means an institution not being university, the applicability of bringing the university as defined under clause 2 (f) of UGC Act includes the institution deemed to be a university under Section 3 of the said Act and therefore the affiliated colleges are excluded from the purview of technical institution definition of the AICTE Act. The submission made on behalf of the colleges which are affiliated to the respective universities which are being run by the appellants in the connected appeals will also come within the purview of the university referred to in the above definition of technical institution. The above interpretation sought to be made by the learned senior counsel and another counsel is supported by the provisions of the UGC Act. Section 12A of the UGC Act clearly speaks of regulation of fees and provisions of donation in certain cases which refers to the phrase affiliation together with its grammatical variation i[illegible]a

college, recognition of such college by, association of such college with, and admission of such college to the privileges of universities. A careful reading of sub-sections (2)(c), (3), (4) and (5) of Section 12A of the UGC Act makes it abundantly clear about colleges which are required to be affiliated to run the courses for which sanction/approval will be accorded by the university or under the control and supervision of such universities. Therefore, affiliated colleges to the university/ universities are part of them and the exclusion of university in the definition of technical institution as defined in Section 2(h) of the AICTE Act must be extended to the affiliated colleges to the university also, otherwise, the object and purpose of the UGC Act enacted by the Parliament will be defeated. The enactment of UGC Act is also traceable to Entry 66 of List I. The aforesaid provisions of the UGC Act have been examined by this Court with reference to the provisions of AICTE Act in *Bharathidasan University's* case. Therefore, it has clearly laid down the principle that the role of the AICTE Act is only advisory in nature and is confined to submitting report or giving suggestions to the UGC for the purpose of implementing its suggestions to maintain good standards in technical education in terms of definition under Section 2(h) of the AICTE Act and to see that there shall be uniform education standard throughout the country to be maintained which is the laudable object of the AICTE Act for which it is enacted by the Parliament. The provisions of the AICTE Act shall be implemented through the UGC as the universities and its affiliated colleges are all governed by the provisions of the said Act under Section 12A of the UGC Act read with Rules Regulations that will be framed by the UGC in exercise of its power under Sections 25 and 26 of the said Act. Therefore, the conclusions arrived at in *Bharathidasan University* case is supported by the eleven Judge Constitution Bench decision in *T.M.A. Pai* case (supra) wherein this Court has overruled the directions given in *Unni Krishnan J.P. & Ors. v. State of Andhra Pradesh & Ors*[6]. to

6. 1993 (1) SCC 645.

the Central Government and others regarding the reservations and schemes. The relevant paragraphs of *T.M.A. Pai* case read as under:-

> **"37.** *Unni Krishnan* judgment has created certain problems, and raised thorny issues. In its anxiety to check the commercialization of education, a scheme of "free" and "payment" seats was evolved on the assumption that the economic capacity of the first 50% of admitted students would be greater than the remaining 50%, whereas the converse has proved to be the reality. In this scheme, the "payment seat" student would not only pay for his own seat, but also finance the cost of a "free seat" classmate. *When one considers the Constitution Bench's earlier statement that higher education is not a fundamental right, it seems unreasonable to compel a citizen to pay for the education of another, more so in the unrealistic world of competitive examinations which assess the merit for the purpose of admission solely on the basis of the marks obtained, where the urban students always have an edge over the rural students. In practice, it has been the case of the marginally less merited rural or poor student bearing the burden of a rich and well-exposed urban student.*
>
> **38.** The scheme in *Unni Krishnan case* has the effect of nationalizing education in respect of important features viz. the right of a private unaided institution to give admission and to fix the fee. By framing this scheme, which has led to the State Governments legislating in conformity with the scheme, the private institutions are indistinguishable from the government institutions; curtailing all the essential features of the right of administration of a private unaided educational institution can neither be called fair nor reasonable. Even in the decision in *Unni Krishnan case* it has been observed by Jeevan Reddy, J., at p. 749, para 194, as follows:
>
> "*194*. The hard reality that em e

> educational institutions are a necessity in the present-day context. It is not possible to do without them because the governments are in no position to meet the demand — particularly in the sector of medical and technical education which call for substantial outlays. While education is one of the most important functions of the Indian State it has no monopoly therein. Private educational institutions — including minority educational institutions — too have a role to play."

It has been clearly held that the decision in *Unni Krishnan's* case in so far as it framed the scheme relating to the grant of admission and the existing of fee, is not correct and the consequent directions given to UGC, AICTE and Medical Council of India, Central Government and the State Government etc. are overruled. It is worthwhile to mention paragraphs 29 and 31 of the UGC Report of the University Education Commission headed by late Dr. S. Radhakrishnan as its Chairman and nine other renowned educationists as its members. The report which is extracted at paragraph 51 in the said *T.M.A. Pai* case reads thus:

> **"51.** A University Education Commission was appointed on 4-11-1948, having Dr S. Radhakrishnan as its Chairman and nine other renowned educationists as its members. The terms of reference, *inter alia*, included matters relating to means and objects of university education and research in India and maintenance of higher standards of teaching and examination in universities and colleges under their control. In the report submitted by this Commission, in paras 29 and 31, it referred to autonomy in education which reads as follows:
>
> "*University autonomy*.—Freedom of individual development is the basis of democracy. Exclusive control of education by the State has been an important factor in facilitating the maintenance of totalitarian tyrannies. In such States institutions of higher learning controlled and

> managed by governmental agencies act like mercenaries, promote the political purposes of the State, make them acceptable to an increasing number of their population and supply them with the weapons they need. We must resist, in the interests of our own democracy, the trend towards the governmental domination of the educational process.
>
> Higher education is, undoubtedly, an obligation of the State but State aid is not to be confused with State control over academic policies and practices. Intellectual progress demands the maintenance of the spirit of free inquiry. The pursuit and practice of truth regardless of consequences has been the ambition of universities. Their prayer is that of the dying Goethe: 'More light', or that of Ajax in the mist 'Light, though I perish in the light.'
>
> * * *
>
> The respect in which the universities of Great Britain are held is due to the freedom from governmental interference which they enjoy constitutionally and actually. Our universities should be released from the control of politics.
>
> *Liberal education*.—All education is expected to be liberal. It should free us from the shackles of ignorance, prejudice and unfounded belief. If we are incapable of achieving the good life, it is due to faults in our inward being, to the darkness in us. The process of education is the slow conquering of this darkness. To lead us from darkness to light, to free us from every kind of domination except that of reason, is the aim of education."

Para 71 of the said decision, which deals with the rights of the private aided non-minority professional institutions, is extracted hereunder:

> ***"Private aided professional institutions (non-minority)***
>
> **71.** While giving aid to profession[illegible]d

be permissible for the authority giving aid to prescribe by rules or regulations, the conditions on the basis of which admission will be granted to different aided colleges by virtue of merit, coupled with the reservation policy of the State. The merit may be determined either through a common entrance test conducted by the university or the Government followed by counselling, or on the basis of an entrance test conducted by individual institutions — the method to be followed is for the university or the Government to decide. The authority may also devise other means to ensure that admission is granted to an aided professional institution on the basis of merit. In the case of such institutions, it will be permissible for the Government or the university to provide that consideration should be shown to the weaker sections of the society."

At paragraph 72 in the said judgment, it has been held that once aid is granted to a private professional educational institution, the Government or the State agency, as a condition of the grant of aid, can put fetters on the freedom in the matter of administration and management of the institution. It is stated as under:

"72. .....The State, which gives aid to an educational institution, can impose such conditions as are necessary for the proper maintenance of the high standards of education as the financial burden is shared by the State. The State would also be under an obligation to protect the interest of the teaching and non-teaching staff. In many States, there are various statutory provisions to regulate the functioning of such educational institutions where the States give, as a grant or aid, a substantial proportion of the revenue expenditure including salary, pay and allowances of teaching and non-teaching staff. It would be its responsibility to ensure that the teachers working in those institutions are governed by proper service conditions. The State, in the case of such aided

institutions, has ample power to regulate the method of selection and appointment of teachers after prescribing requisite qualifications for the same. Ever since *In Re, Kerala Education Bill, 1957* this Court has upheld, in the case of aided institutions, those regulations that served the interests of students and teachers. Checks on the administration may be necessary in order to ensure that the administration is efficient and sound and will serve the academic needs of the institutions. In other words, rules and regulations that promote good administration and prevent maladministration can be formulated so as to promote the efficiency of teachers, discipline and fairness in administration and to preserve harmony among affiliated institutions. At the same time it has to be ensured that even an aided institution does not become a government-owned and controlled institution. Normally, the aid that is granted is relatable to the pay and allowances of the teaching staff. In addition, the management of the private aided institutions has to incur revenue and capital expenses. Such aided institutions cannot obtain that extent of autonomy in relation to management and administration as would be available to a private unaided institution, but at the same time, it cannot also be treated as an educational institution departmentally run by Government or as a wholly owned and controlled government institution and interfere with constitution of the governing bodies or thrusting the staff without reference to management."

40. A reading of the aforesaid paragraphs extracted from *TMA Pai's* case makes it very clear that in view of decision of the eleven Judges Constitution Bench of this Court, the scheme framed under the *Unni Krishnan's* case has been overruled. Therefore, the autonomy of the university is recognized in the said case and the object and intendment of the Parliament in excluding the universities from the definition of technical institution as defined under Section 2(h) of the AICTE Act makes is explicitly clear, after scan of

education institution with reference to the exclusion of universities and Sections 10, 11, 12 and 13 of the AICTE Act. The object of the statutory enactment made by the Parliament has been succinctly examined by this Court in *Bharathidasan University* and *Parshvanath Charitable Trust* cases referred to supra therefore they have rightly made observations that the role of the AICTE Act in view of the UGC Act and the powers and functions conferred by the UGC for controlling and regulating the universities and its affiliated colleges has been explicitly conferred upon the UGC. Hence, they have been given the power to regulate such universities and regulations in relation to granting sanctions/approvals and also maintaining educational standards and over-seeing the prescription of the fee structure including the admission of students in various courses and programmes that will be conducted by the university and its institutions, constituent colleges, units and the affiliated colleges. Therefore, we have to hold that the *Bharathidasan University* case (supra) on all fours be applicable to the fact situation of these appeals and we have to apply the said principle in the cases in hand whereas in the decisions of *Adhiyaman Education and Research Institute* case and *Jaya Gokul Education Trust's* case (supra) this Court has not examined the cases from the aforesaid perspective. Therefore, the same cannot be applied to the fact situation. The reliance placed upon those judgments by the learned senior counsel on behalf of the AICTE is misplaced.

Accordingly, point nos.1 and 2 are answered in favour of the appellants.

Answer to Point No.3

41. Learned senior counsel for AICTE, Mr. Rakesh Dwivedi, with reference to the definition of technical education under the provisions of the AICTE Act, urged that the definition of engineering and technology has to be construed and interpreted to bring MCA course under its fold in view of the

meaning assigned to those words occurred in the definition clause by placing reliance on the different dictionaries, which are extracted as hereunder:

As per the Webster's Comprehensive Dictionary, 'Technology' means:

> "(1) Theoretical knowledge of industry and the industrial arts.
>
> (2) The application of science to the arts.
>
> (3) That branch of ethnology which treats of the development of the arts".

Wharton's Law Lexicon defines 'Technology' as:

> "any information (including information embodied in software) other than information in the public domain, that is capable of being used in- (i) the development, production or use of any goods or software; (ii) the development of, or the carrying out of, an industrial or commercial activity or the provision of a service of any kind. *Explanation*, when technology is described wholly or partly by reference to the uses to which it (or the goods to which it relates) may be put, it shall include services which are provided or used, or which are capable of being used, in the development, production or use of such technology or goods. [Weapons of Mass Destruction and their delivery system…]. Means a branch of knowledge; the knowledge and means used to produce the material necessities of a society…."

Further, Encyclopedia Law Lexicon presents 'Technology' as:

> "any information (including information embodied in software) other than information in the public domain, that is capable of being used in- (i) the development production or use of any goods or software; (f,

or the carrying out of, an industrial or commercial activity or the provision of a service of any kind. [Section 4(1), The Weapons of Mass Destruction and their delivery system (Prohibition of Unlawful Activities Act, 2005].”

The New Shorter Oxford English dictionary defines ‘Technology’ as:

“1(a) The branch of knowledge that deals with the mechanical arts of applied sciences; a discourse or treaties on (one of) these subjects, orig. on an art or arts. (b). The terminology of a particular subject; technical nomenclature. 2(a). The mechanical arts or applied sciences collectively; the application of (any of) these. (b). A particular mechanical art or applied science.”

Further, ‘Technology’, in Advanced Law Lexicon is defined as

“any special or technical knowledge or any special service required for any purpose whosoever by an industrial concern under any foreign collaboration, and includes designs, drawings, publication and technical personnel.”

and ‘knowledge’ is defined in the same dictionary as

“the means and methods of producing goods and services, or the application of science to production or distribution, resulting in the creation of new products, new manufacturing processes, or more efficient methods of distribution. (*WTO*).”

The meaning of Engineering as given in Dictionaries are read as under:

Webster’s Comprehensive Dictionary - Engineering **–** Enginering in the broader sense, is that branch of human endeavour by which the forces of nature are brought under human control and the properties of matter made useful in structures and machines”

Advanced Law Lexicon – The activity or the functions of an Engineer; the science by which the properties of matter and the sources of energy in nature are made useful to man in structures, machines and products; relating to engineering.

The New Shorter Oxford English Dictionary – The work done by or the occupation of, an engineer, the application of the science for directly useful purposes as, construction, propulsion, communication or manufacture. The action of working artfully to bring something about. A field of study or activity concerned with deliberate alteration or modification in some particular area.

Law Lexicon – The activity or the functions of an engineer; the science by which the properties of matter and the sources of energy in nature are made useful to man in structures, machines and products.”

42. The above meanings of the words ‘technology’ and ‘engineering’ as per the dictionaries referred to supra would clearly go to show that MCA also comes within the definition of technology. Therefore, the contention that technical education includes MCA as raised by the learned senior counsel on behalf of the AICTE stand to its reasoning and logic in view of the nature of MCA course which is being imparted to the students at post graduation level which is being conducted by the institutions, constituent colleges and affiliated colleges to the universities. The same is a technical education and therefore, it comes within the definition of technical education but for its proper conduct of courses and regulation the role of AICTE must be advisory and for the same, a note shall be given to the UGC for its implementation by it but not the AICTE. Accordingly, point no.3 is answered in favour of respondent AICTE.

43. As per definition of ‘technical education’ under Section 2(g) of the AICTE Act and non produc

the AICTE to show that MBA course is a technical education, we hold that MBA course is not a technical course within the definition of the AICTE Act and in so far as reasons assigned for MCA course being 'technical education', the same does not hold for MBA course. Therefore, for the reasons assigned while answering the points which are framed in so far as the MCA course is concerned, the approval from the AICTE is not required for obtaining permission and running MBA course by the appellant colleges.

44. So far as point nos.4 and 5 are concerned, the amended Regulation Nos. 8(c) and 8(iv) of 2000 were introduced by the AICTE in exercise of its power under section 10(k) of AICTE Act by adding the MBA and MCA courses within the purview of the provisions of AICTE as it is included in the Regulation as a technical education. It is the case made out by learned counsel for the appellant Mr. Prashant Bhushan that the amended Regulation has not been placed before the Parliament which is mandatory as per the provisions of Section 24 of the AICTE Act, the said contention has not been disputed by the AICTE in these cases. The provision of Section 24 reads thus:

> "**24. Rules and regulations to be laid before Parliament**:- Every rule and every regulation made under this Act shall be laid, as soon as may be after it is made, before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and it before the expiry of the session immediately following the session or the successive sessions, aforesaid, both Houses agree that the rule or regulation should not be made, the rule or regulation shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule or regulation."

The position of law is well settled by this Court that if the Statute prescribes a particular procedure to do an act in a particular way, that act must be done in that manner, otherwise it is not at all done. In the case of *Babu Verghese v. Bar Council of Kerala*[7], after referring to this Court's earlier decisions and *Privy Council* and *Chancellor's Court,* it was held as under:

> **"31.** It is the basic principle of law long settled that if the manner of doing a particular act is prescribed under any statute, the act must be done in that manner or not at all. The origin of this rule is traceable to the decision in *Taylor v. Taylor* which was followed by Lord Roche in *Nazir Ahmad v. King Emperor*-who stated as under:
>
> **32.** This rule has since been approved by this Court in *Rao Shiv Bahadur Singh v. State of V.P.* and again in *Deep Chand v. State of Rajasthan*. These cases were considered by a three-Judge Bench of this Court in *State of U.P. v. Singhara Singh* and the rule laid down in *Nazir Ahmad case* was again upheld. This rule has since been applied to the exercise of jurisdiction by courts and has also been recognised as a salutary principle of administrative law."

In view of the above said decision, not placing the amended Regulations on the floor of the Houses of Parliament as required under Section 24 of the AICTE Act vitiates the amended Regulations in law and hence the submissions made on behalf of the appellants in this regard deserve to be accepted. Accordingly, point Nos. 4 and 5 are answered in favour of the appellants.

45. In so far as point no.6 is concerned, the law laid down in *Bharathidasan University* case, for the reasons recorded by us while answering point nos.1 and 2 in favour of the appellants, the said decision on all fours be applicable. We have

7. 1999 (3) SCC 422.

distinguished *Adhiyaman Education and Research Institute and Jaya Gokul Educational Trust* cases from *Bharathidasan University* case in the reasoning portion while answering point nos.1 and 2. Therefore, the said two cases need not be applied to the present case.

46. For the foregoing reasons, the common impugned judgment and order passed in W.A. 2652 of 2001, W.A. No. 3090 of 2001, WA 2835 of 2001, WA 3087 of 2001, WA 2836 of 2001, WA 3091 of 2001, WA 3092 of 2001, WA 2837 of 2001, WA 3088 of 2001, WA 2838 of 2001 and WA 3089 of 2001 is hereby set aside. The civil appeals are allowed. The relief sought for in the Writ Petitions is granted in so far as not to seek approval from the AICTE for MBA and MCA courses are concerned.

There will be no order as to costs.

B.B.B. Appeals allowed.

SHRI ANANT R. KULKARNI

v.

Y.P. EDUCATION SOCIETY AND ORS.

(Civil Appeal No. 3935 of 2013)

APRIL 26, 2013

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

Service Law – Departmental enquiry – Punishment imposed upon delinquent employee set aside by the Court/ Tribunal as the enquiry stood vitiated for technical reasons – Entitlement of employer to hold enquiry afresh from the point it stood vitiated – Held: Once the Court set asides an order of punishment on the ground, that the enquiry was not properly conducted, the Court should not severely preclude the employer from holding the enquiry in accordance with law – It must remit the concerned case to the disciplinary authority, to conduct the enquiry from the point that it stood vitiated, and to conclude the same in accordance with law – However, resorting to such a course depends upon the gravity of delinquency involved.

Service Law – Departmental enquiry – Enquiry at belated stage – If can be quashed on the ground of delay – Held: The court/tribunal should not generally set aside the departmental enquiry, and quash the charges on the ground of delay in initiation of disciplinary proceedings, as such a power is de hors the limitation of judicial review – The essence of the matter is that the court must take into consideration all relevant facts, and balance and weigh the same, so as to determine, if it is in fact in the interest of clean and honest administration, that the said proceedings are allowed to be terminated, only on the ground of a delay in their conclusion.

Service Law – Departmental enquiry – Enquiry on vague

and unspecified charges – Permissibility – Held: Nowhere should a delinquent be served a chargesheet, without providing to him, a clear, specific and definite description of the charge against him – When statement of allegations are not served with the chargesheet, the enquiry stands vitiated, as having been conducted in violation of the principles of natural justice – There must be fair-play in action, particularly in respect of an order involving adverse or penal consequences.

Service Law – Departmental enquiry – Enquiry against retired employee – Circumstances when such enquiry can be conducted – Held: The relevant rules governing the service conditions of an employee are the determining factors as to whether and in what manner the domestic enquiry can be held against an employee who stood retired after reaching the age of superannuation – Generally, if the enquiry has been initiated while the delinquent employee was in service, it would continue even after his retirement, but nature of punishment would change – The punishment of dismissal/removal from service would not be imposed.

Service Law – Departmental enquiry – For misconduct – Termination of appellant-employee – Challenge to – Meanwhile, appellant stood retired upon reaching the age of superannuation – Tribunal held that none of the charges levelled against the appellant stood proved, and that the enquiry had not been conducted according to the 1981 Rules – Termination order accordingly quashed – Writ Petition – Single Judge of High Court upheld the judgment of Tribunal, and found the enquiry to be entirely defective and thus, illegal – Division Bench too, upheld the judgment of the Single Judge, as well as that of the Tribunal, but simultaneously also held, that the respondents were at liberty to proceed with the enquiry afresh, as regards the said charges – On appeal, held: Division Bench committed error by giving liberty to the respondents to hold a fresh enquiry – Charges levelled

against the appellant were entirely vague, irrelevant and unspecific – Question of holding any fresh enquiry on such vague charges, therefore, unwarranted and uncalled for – Procedure prescribed under rr.36, 37 and 57 of the 1981 Rules were violated – Moreover, appellant had already retired – No rule brought to notice that may confer any statutory power on the respondent-management to hold fresh enquiry after retirement of an employee – In absence of any such authority, the Division Bench erred in creating a post-retirement forum that may not be permissible under law – Further, departmental enquiry can be quashed on the ground of delay provided the charges are not very grave – It was not necessary for the Division Bench to permit the respondents to hold a fresh enquiry on the said charges and that too, after more than a decade of the retirement of the appellant – Maharashtra Employees of Private School Rules, 1981 – rr.36, 37 & 57.

The appellant was the Head Master in a school. The respondents-management issued show-cause notice to the appellant, under Rule 28 of the Maharashtra Employees of Private School Rules, 1981, seeking an explanation as to why disciplinary proceedings should not be initiated against him, for his alleged misconduct.

The appellant submitted his reply. Subsequently, the Management Committee took a decision to hold disciplinary proceedings against the appellant as per the provisions of Rule 36 of the Rules 1981, and in pursuance thereof, a chargesheet containing 12 charges of misconduct, was served upon the appellant. The charges related to accounts and to the discharge of his functions as the Headmaster of the school. An Enquiry Committee submitted its report, making a recommendation that the appellant be dismissed from service. The enquiry report was accepted by the Management Committee, and th

appellant terminated. Aggrieved, the appellant challenged the termination order by filing appeal before the School Tribunal. Meanwhile, upon reaching the age of superannuation, the appellant stood retired. The Tribunal held, that none of the charges levelled against the appellant stood proved, and that the enquiry had not been conducted according to the Rules 1981. Thus, the termination order against the appellant was quashed. Aggrieved, the respondents-management filed Writ Petition. A Single Judge of the High Court upheld the judgment of the Tribunal. The Division Bench too, upheld the judgment of the Single Judge, as well as that of the Tribunal, but simultaneously also held, that the respondents were at liberty to proceed with the enquiry afresh, as regards the said charges, and therefore the present appeal.

In the instant appeal, the following questions of law arose for consideration: (i) In case the punishment imposed upon the delinquent employee is set aside by the Court/Tribunal as the enquiry stood vitiated for technical reasons, whether the employer is entitled to hold the enquiry afresh from the point it stood vitiated; (ii) Whether the enquiry can be quashed on the ground of delay; (iii) Whether the enquiry can be permitted to be held on vague and unspecified charges; and (iv) Under what circumstances enquiry can be conducted against the delinquent employee who has retired on reaching the age of superannuation.

Allowing the appeal, the Court

HELD: 1. Once the Court set asides an order of punishment on the ground, that the enquiry was not properly conducted, the Court should not severely preclude the employer from holding the inquiry in accordance with law. It must remit the concerned case

to the disciplinary authority, to conduct the enquiry from the point that it stood vitiated, and to conclude the same in accordance with law. However, resorting to such a course depends upon the gravity of delinquency involved. Thus, the court must examine the magnitude of misconduct alleged against the delinquent employee. It is in view of this, that courts/tribunals, are not competent to quash the charge-sheet and related disciplinary proceedings, before the same are concluded, on the aforementioned grounds. [Para 7] [1139-C-E]

Managing Director, ECIL, Hyderabad etc.etc. v. B. Karunakar etc.etc. **AIR 1994 SC 1074: 1993 (2) Suppl. SCR 576;** *Hiran Mayee Bhattacharyya v. Secretary, S.M. School for Girls & Ors.* **(2002) 10 SCC 293;** *U.P. State Spinning C. Ltd. v. R.S. Pandey & Anr.* **(2005) 8 SCC 264: 2005 (3) Suppl. SCR 603;** *Union of India v. Y.S. Sandhu, Ex-Inspector* **AIR 2009 SC 161: 2008 (13) SCR 784 — relied on.**

2. The court/tribunal should not generally set aside the departmental enquiry, and quash the charges on the ground of delay in initiation of disciplinary proceedings, as such a power is *de hors* the limitation of judicial review. In the event that the court/tribunal exercises such power, it exceeds its power of judicial review at the very threshold. Therefore, a charge-sheet or show cause notice, issued in the course of disciplinary proceedings, cannot ordinarily be quashed by court. The same principle is applicable in relation to there being a delay in conclusion of disciplinary proceedings. The facts and circumstances of the case in question, must be carefully examined, taking into consideration the gravity/ magnitude of charges involved therein. The Court has to consider the seriousness and magnitude of the charges and while doing so the Court must weigh all the facts, both for and against the delinquent officers and come to the conclusion, which is just and pr[illegible]e

circumstances involved. The essence of the matter is that the court must take into consideration all relevant facts, and balance and weigh the same, so as to determine, if it is infact in the interest of clean and honest administration, that the said proceedings are allowed to be terminated, only on the ground of a delay in their conclusion. [Para 8] [1140-A-D]

State of U.P. v. Brahm Datt Sharma & Anr. **AIR 1987 SC 943: 1987 (2) SCR 444;** *State of Madhya Pradesh v. Bani Singh & Anr.* **AIR 1990 SC 1308: 1990 Suppl. SCC 738;** *State of Punjab & Ors. v. Chaman Lal Goyal* **(1995) 2 SCC 570: 1995 (1) SCR 695;** *State of Andhra Pradesh v. N. Radhakishan* **AIR 1998 SC 1833: 1998 (2) SCR 693;** *M.V. Bijlani v. Union of India & Ors.* **AIR 2006 SC 3475: 2006 (3) SCR 896;** *Union of India & Anr. v. Kunisetty Satyanarayana* **AIR 2007 SC 906: 2006 (9) Suppl. SCR 257;** *The Secretary, Ministry of Defence & Ors. v. Prabash Chandra Mirdha* **AIR 2012 SC 2250: 2012 SCR 182;** *Chairman, LIC of India & Ors. v. A. Masilamani* **JT (2012) 11 SC 533 – relied on.**

3.1. Nowhere should a delinquent be served a chargesheet, without providing to him, a clear, specific and definite description of the charge against him. When statement of allegations are not served with the chargesheet, the enquiry stands vitiated, as having been conducted in violation of the principles of natural justice. Evidence adduced should not be perfunctory, even if the delinquent does not take the defence of, or make a protest with against that the charges are vague, that does not save the enquiry from being vitiated, for the reason that there must be fair-play in action, particularly in respect of an order involving adverse or penal consequences. What is required to be examined is whether the delinquent knew the nature of accusation. The charges should be specific, definite and giving details of the incident which formed the basis of charges

and no enquiry can be sustained on vague charges. [Para 10] [1141-F-H; 1142-A]

3.2. The purpose of holding an enquiry against any person is not only with a view to establish the charges levelled against him or to impose a penalty, but is also conducted with the object of such an enquiry recording the truth of the matter, and in that sense, the outcome of an enquiry may either result in establishing or vindicating his stand, and hence result in his exoneration. Therefore, fair action on the part of the authority concerned is a paramount necessity. [Para 11] [1142-C-D]

Surath Chandra Chakravarty v. The State of West Bengal **AIR 1971 SC 752: 1971 (3) SCR 1;** *State of Andhra Pradesh & Ors. v. S. Sree Rama Rao* **AIR 1963 SC 1723: 1964 SCR 25;** *Sawai Singh v. State of Rajasthan* **AIR 1986 SC 995: 1986 (2) SCR 957;** *U.P.S.R.T.C. & Ors. v. Ram Chandra Yadav* **AIR 2000 SC 3596: 2000 (9) SCC 327;** *Union of India & Ors. v. Gyan Chand Chattar* **(2009) 12 SCC 78: 2009 (10) SCR 124;** *Anil Gilurker v. Bilaspur Raipur Kshetria Gramin Bank & Anr.* **(2011) 14 SCC 379 – relied on.**

4. The relevant rules governing the service conditions of an employee are the determining factors as to whether and in what manner the domestic enquiry can be held against an employee who stood retired after reaching the age of superannuation. Generally, if the enquiry has been initiated while the delinquent employee was in service, it would continue even after his retirement, but nature of punishment would change. The punishment of dismissal/removal from service would not be imposed. [Para 18] [1144-G-H; 1145-A]

NOIDA Entrepreneurs Association v. NOIDA & Ors. **AIR 2011 SC 2112: 2011 (8) SCR 25;** *Kirti Bhusan Singh v. State of Bihar & Ors.* **AIR 1986 SC 2116: 1986 (3) SCR 230;** *Bhagirathi Jena v. Board of Directors,* **R**

1999 SC 1841: 1999 (2) SCR 354; *U.P. State Sugar Corporation Ltd. & Ors. v. Kamal Swaroop Tondon* **(2008) 2 SCC 41: 2008 (1) SCR 887 – relied on.**

B.J. Shelat v. State of Gujarat & Ors. **AIR 1978 SC 1109: 1978 (3) SCR 553;** *Ramesh Chandra Sharma v. Punjab National Bank & Anr.* **(2007) 9 SCC 15: 2007 (7) SCR 585;** *UCO Bank & Anr. v. Rajinder Lal Capoor* **AIR 2008 SC 1831: 2008 (5) SCR 775;** *State of Assam & Ors. v. Padma Ram Borah* **AIR 1965 SC 473;** *R.T. Rangachari v. Secretary of State* AIR 1937 PC 27; *State of Punjab v. Khemi Ram* **AIR 1970 SC 214: 1970 (2) SCR 657 – referred to.**

5.1. In the instant case, the Tribunal, as well as the Single Judge of the High Court have recorded a categorical finding of fact to the effect that initiation of departmental enquiry against the appellant had been done with malafide intention to harass him. The charges were not specific and precise; in fact, they were vague and unspecific. Furthermore, the Management committee had failed to observe the procedure prescribed in Rules 36 & 37 of the Maharashtra Employees of Private School Rules, 1981. The said Rules 36 & 37, prescribe a complete procedure for the purpose of holding an inquiry, wherein it is clearly stated that an inquiry committee should have minimum three members, one representative from the Management committee, one to be nominated by the employees from amongst themselves, and one to be chosen by the Chief Executive Officer, from amongst a panel of teachers who have been awarded National/State awards. In the instant case, there was only a two member committee. The procedure prescribed under the Rules is based on the Principles of Natural Justice and fair play, to ensure that an employee of a private school, may not be condemned unheard. [Para 21] [1149-C-F]

5.2. The Tribunal, as well as the Single Judge have both made it clear that the inquiry had not been

conducted in accordance with the provisions of Rules 36 and 37 of the Rules 1981. However, they themselves have dealt with each and every charge, and have recorded their findings on merit. The Management committee failed to prove even a single charge against the appellant. The present case is certainly not one where a punishment has been set aside only on a technical ground, that the inquiry stood vitiated for want of a particular requirement. Thus, in light of such a fact situation, the Division Bench has committed an error by giving liberty to the respondents to hold a fresh enquiry. [Paras 21, 22] [1149-F-H; 1150-A]

5.3. The conclusion reached by the Division Bench that the Tribunal and the Single Judge had found that there was a defect in the manner in which the enquiry was held, and therefore there was no question of it recording a finding on merit to the effect that charges levelled against the appellant were not proved, is also not sustainable in law. It is always open for the Court in such a case, to examine the case on merits as well, and in case the Court comes to the conclusion that there was infact, no substance in the allegations, it may not permit the employer to hold a fresh enquiry. Such a course may be necessary to save the employee from harassment and humiliation. [Para 24] [1150-F-H]

5.4. In the instant case, there is no allegation of misappropriation/ embezzlement or any charge which may cast a doubt upon the integrity of the appellant, or further, anything which may indicate even the slightest moral turpitude on the part of the appellant. The charges relate to accounts and to the discharge of his functions as the Headmaster of the school. The appellant has provided satisfactory explanation for each of the allegations levelled against him. Moreover, he has retired in the year 2002. The question o[illegible]h

enquiry on such vague charges is therefore, unwarranted and uncalled for. [Para 25] [1151-A-B]

5.5. Rules 36 and 37 of the Rules 1981, which prescribe the procedure of holding an enquiry were violated. The charges levelled against the appellant were entirely vague, irrelevant and unspecific. As per statutory rules, the appellant was not allowed to be represented by another employee. Thus, the procedure prescribed under Rule 57(1) of the Rules 1981 stood violated. No chargesheet containing the statement of allegations was ever served. A summary of the proceedings, alongwith the statements of witnesses, as is required under Rule 37(4) of the Rules 1981, was never forwarded to the appellant. He was not given an opportunity to explain himself, and no charge was proved with the aid of any documentary evidence. There existed no charge against the appellant regarding his integrity, embezzlement or mis-appropriation. The Single Judge has also agreed with the same. However, the Division Bench, though also in agreement, has given liberty to the respondents to hold a fresh enquiry. The court has not been apprised of any rule that may confer any statutory power on the management to hold a fresh enquiry after the retirement of an employee. In the absence of any such authority, the Division Bench has erred in creating a post-retirement forum that may not be permissible under law. [Paras 26, 27] [1151-E-H; 1152-A-B]

5.6. In light of the facts and circumstances of the case, none of the charges are specific and precise. The charges have not been accompanied by any statement of allegations,or any details thereof. It is not therefore permissible, for the respondents to hold an enquiry on such charges. Moreover, it is a settled legal proposition that a departmental enquiry can be quashed on the ground of delay provided the charges are not very grave.

[Para 28] [1152-C-D]

5.7. As the Tribunal as well as the Single Judge have examined all the charges on merit and also found that the enquiry has not been conducted as per the Rules 1981, it was not the cause of the Management Committee which had been prejudiced, rather it had been the other way around. In such a fact-situation, it was not necessary for the Division Bench to permit the respondents to hold a fresh enquiry on the said charges and that too, after more than a decade of the retirement of the appellant. The appellant shall be entitled to recover all his salary and retirement dues, if not paid already. [Paras 29, 30] [1152-E-G]

Case Law Reference

1993 (2) Suppl. SCR 576	relied on	Para 7
(2002) 10 SCC 293	relied on	Para 7
2005 (3) Suppl. SCR 603	relied on	Para 7
2008 (13) SCR 784	relied on	Para 7
1987 (2) SCR 444	relied on	Para 8
1990 Suppl. SCC 738	relied on	Para 8
1995 (1) SCR 695	relied on	Para 8
1998 (2) SCR 693	relied on	Para 8
2006 (3) SCR 896	relied on	Para 8
2006 (9) Suppl. SCR 257	relied on	Para 8
2012 SCR 182	relied on	Para 8
JT (2012) 11 SC 533	relied on	Para 8
1971 (3) SCR 1	relied on	Para 9

1964 SCR 25	**relied on**	**Para 11**
1986 (2) SCR 957	**relied on**	**Para 11**
2000 (9) SCC 327	**relied on**	**Para 11**
2009 (10) SCR 124	**relied on**	**Para 11**
(2011) 14 SCC 379	**relied on**	**Para 11**
2011 (8) SCR 25	**relied on**	**Para 12**
1978 (3) SCR 553	**referred to**	**Para 12**
2007 (7) SCR 585	**referred to**	**Para 12**
2008 (5) SCR 775	**referred to**	**Para 12**
AIR 1965 SC 473	**referred to**	**Para 13**
AIR 1937 PC 27	**referred to**	**Para 13**
1970 (2) SCR 657	**referred to**	**Para 14**
1986 (3) SCR 230	**relied on**	**Para 15**
1999 (2) SCR 354	**relied on**	**Para 16**
2008 (1) SCR 887	**relied on**	**Para 17**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3935 of 2013.

From the Judgment & Order dated 04.10.2011 of the High Court of Judicature of Bombay in Letters Patent Appeal No. 171 of 2011 in Writ Petition No. 1849 of 2003.

C.U. Singh, Prity Kunwar, Shivaji M. Jadhav for the Appellant.

Braj Kishore Mishra, Vijay Kumar, M.D. Adkar, Aparna Jha, Siddhartha Arya Vishwajit Singh for the Respondents.

The Judgment of the Court was delivered by

DR. B.S. CHAUHAN, J. 1. This appeal has been preferred against the impugned judgment and order dated 4.10.2011 of the High Court of Judicature of Bombay in Letters Patent Appeal No.171 of 2011 arising out of Writ Petition No. 1849 of 2003, by way of which the Division Bench of the High Court upheld the judgment of the learned Single Judge, as well as that of the School Tribunal (hereinafter referred to as the 'Tribunal'), quashing the enquiry against the appellant, while giving liberty to respondent Nos.1 and 2 to hold a fresh enquiry on the charges levelled against the appellant.

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

A. The appellant was appointed as Assistant Teacher in the school run by the respondents on 7.6.1965, and was promoted as the Head Master of the said school on 21.6.1979.

B. A new Management Committee came into power in the year 2000, and began to raise allegations of misconduct against the appellant, as the appellant had certain apprehensions with respect to the eligibility of certain office bearers of the Management Committee.

C. The respondents-management issued show-cause notice dated 21.2.2001 to the appellant, under Rule 28 of the Maharashtra Employees of Private School Rules, 1981 (hereinafter referred to as the 'Rules 1981'), seeking an explanation as to why disciplinary proceedings should not be initiated against him, for his alleged misconduct. The appellant submitted his reply on 3.3.2001, and also challenged the eligibility of some of the elected members of the Management Committee.

D. The Management Committee, vide resolution dated 4.3.2001 took a decision to hold disciplinary proceedings against the appellant as per the provisions of Rule 36 of the Rules 1981, and in pursuance thereof

17.5.2001 containing 12 charges of misconduct, was served upon the appellant. The appellant vide letter dated 1.7.2001, submitted his clarifications with respect to the said charges that had been levelled against him.

E. An Enquiry Committee consisting of two members instead of three, as per the Rules 1981, conducted the enquiry and submitted its enquiry report on 20.5.2002, making a recommendation that the appellant be dismissed from service. The said enquiry report was accepted by the Management Committee, and the services of the appellant were terminated vide order dated 24.5.2002 w.e.f. 31.5.2002.

F. Aggrieved, the appellant challenged the said termination order by filing Appeal No.65 of 2002, before the Tribunal. The respondents contested the appeal. However, upon reaching the age of superannuation, the appellant stood retired on 30.9.2002.

G. The Tribunal vide judgment and order dated 19.10.2002 held, that none of the charges levelled against the appellant stood proved, and that the enquiry had not been conducted according to the Rules 1981. Thus, the termination order against the appellant was quashed.

H. Aggrieved, the respondents-management filed Writ Petition No.1849 of 2003 before the High Court, and the learned Single Judge decided the said writ petition vide judgment and order dated 20.4.2011, upholding the judgment of the Tribunal, and found the enquiry to be entirely defective and thus, illegal.

I. The respondents-management filed Letters Patent Appeal No.171 of 2011, and the Division Bench too, upheld the judgment of the learned Single Judge, as well as that of the Tribunal, but simultaneously also held, that the respondents were at liberty to proceed with the enquiry afresh, as regards the said charges.

Hence, this appeal.

3. Shri C.U. Singh, learned senior counsel appearing for the appellant, has submitted that the charges have been found to be vague, and that the enquiry was conducted in violation of the statutory Rules 1981, and further that none of the charges reflected embezzlement or mis-appropriation, and cast no doubt upon the integrity of the appellant whatsoever. As the appellant stood retired on 30.9.2002, the question of holding a fresh enquiry in 2011 could not arise. The court does not lack competence to decide the case on merits even if it comes to the conclusion that there has been violation of statutory rules, principles of natural justice or the order also stood vitiated on some other technical ground. There is no statutory rule permitting the Management Committee to hold an enquiry against a person who has retired a decade ago, particularly when the school is a government-aided school, and the appellant-employee receives pension from the State. Thus, the appeal deserves to be allowed.

4. Per contra, Shri Braj Kishore Mishra, learned counsel appearing for the respondents, has submitted that a person cannot be allowed to go scot-free simply because he has retired. An enquiry can be conducted against him, and he can be punished by withholding either full or part of his pension. No fault can be found with the impugned judgment and thus, the appeal is liable to be dismissed.

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

6. The appeal raises the following substantial questions of law:-

(i) In case the punishment is set aside by the Court/Tribunal as the enquiry stood vitiated for technical reasons, whether the employer is entitled to hold the enquiry afresh from the point it stood vitiated;

(ii) Whether the enquiry can be quashed on the ground of delay;

(iii) Whether the enquiry can be permitted to be held on vague and unspecified charges; and

(iv) Under what circumstances enquiry can be conducted against the delinquent employee who has retired on reaching the age of superannuation.

In case the punishment is set aside:

7. It is a settled legal proposition that, once the Court set asides an order of punishment on the ground, that the enquiry was not properly conducted, the Court should not severely preclude the employer from holding the inquiry in accordance with law. It must remit the concerned case to the disciplinary authority, to conduct the enquiry from the point that it stood vitiated, and to conclude the same in accordance with law. However, resorting to such a course depends upon the gravity of delinquency involved. Thus, the court must examine the magnitude of misconduct alleged against the delinquent employee. It is in view of this, that courts/tribunals, are not competent to quash the charge-sheet and related disciplinary proceedings, before the same are concluded, on the aforementioned grounds.

(Vide: *Managing Director, ECIL, Hyderabad etc.etc. v. B. Karunakar etc.etc.* AIR 1994 SC 1074; *Hiran Mayee Bhattacharyya v. Secretary, S.M. School for Girls & Ors.,* (2002) 10 SCC 293; *U.P. State Spinning C. Ltd. v. R.S. Pandey & Anr.,* (2005) 8 SCC 264; and *Union of India v. Y.S. Sandhu, Ex-Inspector* AIR 2009 SC 161).

Enquiry at belated stage:

8. The court/tribunal should not generally set aside the departmental enquiry, and quash the charges on the ground of delay in initiation of disciplinary proceedings, as such a power

is *de hors* the limitation of judicial review. In the event that the court/tribunal exercises such power, it exceeds its power of judicial review at the very threshold. Therefore, a charge-sheet or show cause notice, issued in the course of disciplinary proceedings, cannot ordinarily be quashed by court. The same principle is applicable in relation to there being a delay in conclusion of disciplinary proceedings. The facts and circumstances of the case in question, must be carefully examined, taking into consideration the gravity/magnitude of charges involved therein. The Court has to consider the seriousness and magnitude of the charges and while doing so the Court must weigh all the facts, both for and against the delinquent officers and come to the conclusion, which is just and proper considering the circumstances involved. The essence of the matter is that the court must take into consideration all relevant facts, and balance and weigh the same, so as to determine, if it is infact in the interest of clean and honest administration, that the said proceedings are allowed to be terminated, only on the ground of a delay in their conclusion. (Vide: *State of U.P. v. Brahm Datt Sharma & Anr.,* AIR 1987 SC 943; *State of Madhya Pradesh v. Bani Singh & Anr.,* AIR 1990 SC 1308; *State of Punjab & Ors. v. Chaman Lal Goyal,* (1995) 2 SCC 570; *State of Andhra Pradesh v. N. Radhakishan,* AIR 1998 SC 1833; *M.V. Bijlani v. Union of India & Ors.,* AIR 2006 SC 3475; *Union of India & Anr. v. Kunisetty Satyanarayana,* AIR 2007 SC 906; *The Secretary, Ministry of Defence & Ors. v. Prabash Chandra Mirdha,* AIR 2012 SC 2250; and *Chairman, LIC of India & Ors. v. A. Masilamani,* JT (2012) 11 SC 533).

Enquiry – on vague charges :

9. In *Surath Chandra Chakravarty v. The State of West Bengal,* AIR 1971 SC 752 this Court held, that it is not permissible to hold an enquiry on vague charges, as the same do not give a clear picture to the delinquent to make out an effective defence as he will be unaware [illegible] of

the allegations against him, and what kind of defence he should put up for rebuttal thereof. The Court observed as under:–

> *"The grounds on which it is proposed to take action have to be reduced to the form of a* ***definite charge*** *or charges which have to be communicated to the person charged together with a statement of the allegations on which each charge is based and any other circumstance which it is proposed to be taken into consideration in passing orders has to be stated. This rule embodies a principle which is one of the specific contents of a reasonable or adequate opportunity for defending oneself. If a person is not* ***told clearly and definitely*** *what the allegations are on which the charges preferred against him are founded, he cannot possibly, by projecting his own imagination, discover all the facts and circumstances that may be in the contemplation of the authorities to be established against him."* (Emphasis added)

10. Where the chargesheet is accompanied by the statement of facts and the allegations are not specific in the chargesheet, but are crystal clear from the statement of facts, in such a situation, as both constitute the same document, it cannot be held that as the charges were not specific, definite and clear, the enquiry stood vitiated. Thus, nowhere should a delinquent be served a chargesheet, without providing to him, a clear, specific and definite description of the charge against him. When statement of allegations are not served with the chargesheet, the enquiry stands vitiated, as having been conducted in violation of the principles of natural justice. Evidence adduced should not be perfunctory, even if the delinquent does not take the defence of, or make a protest with against that the charges are vague, that does not save the enquiry from being vitiated, for the reason that there must be fair-play in action, particularly in respect of an order involving adverse or penal consequences. What is required to be examined is whether the delinquent knew the nature of

accusation. The charges should be specific, definite and giving details of the incident which formed the basis of **charges** and no **enquiry** can be sustained on vague charges.

(Vide: *State of Andhra Pradesh & Ors. v. S. Sree Rama Rao,* AIR 1963 SC 1723; *Sawai Singh v. State of Rajasthan,* AIR 1986 SC 995; *U.P.S.R.T.C. & Ors. v. Ram Chandra Yadav,* AIR 2000 SC 3596; *Union of India & Ors. v. Gyan Chand Chattar,* (2009) 12 SCC 78; and *Anil Gilurker v. Bilaspur Raipur Kshetria Gramin Bank & Anr.,* (2011) 14 SCC 379).

11. The purpose of holding an enquiry against any person is not only with a view to establish the charges levelled against him or to impose a penalty, but is also conducted with the object of such an enquiry recording the truth of the matter, and in that sense, the outcome of an enquiry may either result in establishing or vindicating his stand, and hence result in his exoneration. Therefore, fair action on the part of the authority concerned is a paramount necessity.

Enquiry against a retired employee:

12. This Court in *NOIDA Entrepreneurs Association v. NOIDA & Ors.,* AIR 2011 SC 2112, examined the issue, and held that the competence of an authority to hold an enquiry against an employee who has retired, depends upon the statutory rules which govern the terms and conditions of his service, and while deciding the said case, reliance was placed on various earlier judgments of this Court including *B.J. Shelat v. State of Gujarat & Ors.,* AIR 1978 SC 1109; *Ramesh Chandra Sharma v. Punjab National Bank & Anr.,* (2007) 9 SCC 15; and *UCO Bank & Anr. v. Rajinder Lal Capoor,* AIR 2008 SC 1831.

13. In *State of Assam & Ors. v. Padma Ram Borah,* AIR 1965 SC 473, a Constitution Bench of this Court held that it is

not possible for the employer to continue with the enquiry after the delinquent employee stands retired. The Court observed:-

> *"According to the earlier order of the State Government itself, the service of the respondent had come to an end on March 31, 1961. The State Government could not by unilateral action create a fresh contract of service to take effect from April 1, 1961. If the State Government wished to continue the service of the respondent for a further period, the State Government should have issued a notification before March 31, 1961."*
>
> (Emphasis added)

While deciding the said issue, the Court placed reliance on the judgment in *R.T. Rangachari v. Secretary of State,* AIR 1937 PC 27.

14. In *State of Punjab v. Khemi Ram,* AIR 1970 SC 214, this court observed:

> *"There can be no doubt that if disciplinary action is sought to be taken against a government servant it must be done before he retires as provided by the said rule. If a disciplinary enquiry cannot be concluded before the date of such retirement, the course open to the Government is to pass an order of suspension and refuse to permit the concerned public servant to retire and retain him in service till such enquiry is completed and a final order is passed therein."*

15. In *Kirti Bhusan Singh v. State of Bihar & Ors.,* AIR 1986 SC 2116, this Court held as under:

> *"…. We are of the view that in the absence of such a provision which entitled the State Government to revoke an order of retirement……. which had become effective and final, the order passed by the State Government revoking the order of retirement should be held as having been passed without the authority of law and is liable to be set aside. It, therefore, follows that the order of dismissal passed thereafter was also a nullity."*

16. In *Bhagirathi Jena v. Board of Directors, O.S.F.C. & Ors.,* AIR 1999 SC 1841, this Court observed:

> *"… There is also no provision for conducting a disciplinary enquiry after retirement of the appellant and nor any provision stating that in case misconduct is established, a deduction could be made from retiral benefits. Once the appellant had retired from service on 30-6-1995, there was no authority vested in the Corporation for continuing the departmental enquiry even for the purpose of imposing any reduction in the retiral benefits payable to the appellant. In the absence of such an authority, it must be held that the enquiry had lapsed and the appellant was entitled to full retiral benefits on retirement."*

17. In *U.P. State Sugar Corporation Ltd. & Ors. v. Kamal Swaroop Tondon,* (2008) 2 SCC 41**,** this Court dealt with a case wherein statutory corporation had initiated proceedings for recovery of the financial loss from an employee after his retirement from service. This Court approved such a course observing that in the case of retirement, master and servant relationship continue for grant of retrial benefits. The proceedings for recovery of financial loss from an employee is permissible even after his retirement and the same can also be recovered from the retrial benefits of the said employee.

18. Thus, it is evident from the above, that the relevant rules governing the service conditions of an employee are the determining factors as to whether and in what manner the domestic enquiry can be held against an employee who stood retired after reaching the age of superannuation. Generally, if the enquiry has been initiated while the delinquent employee was in service, it would continue even a…t

nature of punishment would change. The punishment of dismissal/removal from service would not be imposed.

19. The case requires to be examined in the light of the aforesaid legal propositions.

The following charges were framed against the appellant:

(a) Charge No.1:-The first respondent did not submit dead stock verification report in spite of several letters.

(b) Charge No.2:-The first respondent did not submit the documents such as cash books, ledgers and voucher files in spite of demands made by the management.

(c) Charge No.3:- relates to not calling School Committee meeting and causing loss of Rs.48851/ - as no timely approval was obtained for that expenditure from the school committee.

(d) Charge No.4:- The first respondent did not send appointment proposal dated 4.9.2000 of Mr. Ghadge for approval to the Education Officer (Secondary) Z.P. Solapur and salary of the said teacher could not be paid .

(e) Charge No.5:- The Respondent prepared budget 2001-2002 and forwarded to the management directly without obtaining sanction of the School Committee.

(f) Charge No.6:- The first respondent obstructed working of the management and the School Committee on the ground that he had challenged the election of the office bearers before the Joint Charity Commissioner, Latur even though there was no stay/injunction.

(g) Charge No.7:- The first respondent did not attend any of the 11 meetings of the Managing Committee in the capacity as a Head Master.

(h) Charge No.8:- The first respondent did not submit explanation regarding his teaching workload though asked for by the management as per letter No. S/ 167 dated 11.12.2000.

(i) Charge No.9:- The first respondent did not give his explanation about donation of Rs.4900/ - given by the Lioness Club of Barsi demanded by the management as per letter No. S/174 dated 27.12.2000.

(j) Charge No.10:- The respondent did not reply letter no. S/131 dated 10.10.2000 in respect of Internet connection.

(k) Charge No.ll:- The first respondent did not explain excessive telephone bills as stated by him in his letter no.L/83 dated 26.10.2000.

(1) Charge No.12:- The first respondent did not submit report as to his activities during two days on duty leave in the office of Education Officer (Secondary) Solapur and the Deputy Director of Education, Pune Region, Pune.

The charges were found proved and punishment was imposed.

20. The Tribunal examined all the issues involved, and recorded its specific findings as under:

"The charge No.11 is in respect of excessive telephone bills. The telephone bill for the academic year 1999-2000 is Rs.3931/-. According to Management this is excessive bill. The charge is vague. The

appellant that specifically no call was made for private purpose. The objection regarding call at Chennai is properly explained that this call was made to the Institute of Brilliant Tutorials as it was required for the students of Xth standard for guiding them for career for Engineering. The Institute by names Brilliant Tutorials is famous well known academy and some phone calls made to it are well within the powers of Head Master. **The total bill of Rs.3931/- for a High School during a year cannot be said to be excessive** particularly when many of the calls are made to Pune and Thane. These calls have properly been explained that Writ petition was filed against the school and these calls were made to the Advocate concerned in connection with the Writ Petition. Calling such an explanation on every call by the Management to the Head Master is nothing but over victimizing or interference of Management in day-to-day business of the school.

xx xx xx xx

There is no evidence brought before the Inquiry Committee to hold guilty for these charges. But the members seem to have anxious to hold the guilty of the charges to the appellant. They have based their conclusion on some thread of evidence ignoring all other circumstances and evidence in favour of appellant"

The Tribunal further stated as under:

(i) Charge No.1, is in respect of not submitting the documents papers asked by the Management particularly pertaining to dead stock.

(ii) Charge No.2 is regarding the Registers and journals regarding school fees, voucher files etc. The accounts of school are audited by the authorized auditor. Under these circumstances, calling these record seems to be only for finding loop holes. This is a sort of interference of the Management in day-to-day work of the school, which is

unwarranted. In spite of this, the explanation shows that there is sufficient compliance of direction and there is no insubordination.

(iii) Charge No.3, is not calling meetings of school committee as per code….and the explanation submitted by appellant not calling the meetings is acceptable.

(iv) Charge No.4, is in respect of not forwarding proposal of Shikshan Sevek to the Education Officer. The reasons explained by the appellant are acceptable.

(v) Charge No.5, is in respect of submitting the budget for the year 2001-2002 to the Management without approval of school committee. When the Management has accepted this budget this charge does not survive. As such when the Management has directly accepted the budget and budget proposals, this charge ought not to have been framed at all.

xx xx xx xx

(vii) Charge No.7, is in respect of not attending the Management council meeting. This charge is also purely technical. The explanation of the appellant is that intimation of meeting was given by the Management at the 11th hour before few hours of the meeting without providing agenda of the meeting…. The explanation needs sympathetic consideration and the allegations if at all considered, cannot be a ground for termination of appellant's service.

(viii) Charge No.8, is in respect of workload of about six hours in a week to be discharged by the Head Master….Explanation given by the appellant is that the hard subjects of science and mathematics were given to new comers as appellant was to retire in near future. He wanted that new man should be well prepared before appellant leaves the school. This explanation is reasonable and acceptable.

In the conclusion, I hold that the evidence on record is not sufficient to hold the appellant guilty of the charges. The net result of the scrutiny of the proceedings is that the inquiry seems to have been initiated on very technical flaws which lead to only conclusion that it was pre-determined and pre-judicial inquiry. As explained above, there is no sufficient proof on record to hold that the charges are proved."

21. The Tribunal, as well as the learned Single Judge of the High Court have recorded a categorical finding of fact to the effect that initiation of departmental enquiry against the appellant had been done with malafide intention to harass him. The charges were not specific and precise; infact, they were vague and unspecific. Furthermore, the Management committee had failed to observe the procedure prescribed in Rules 36 & 37 of Rules, 1981. The said Rules 36 & 37, prescribe a complete procedure for the purpose of holding an inquiry, wherein it is clearly stated that an inquiry committee should have minimum three members, one representative from the Management committee, one to be nominated by the employees from amongst themselves, and one to be chosen by the Chief Executive Officer, from amongst a panel of teachers who have been awarded National/State awards. In the instant case, there was only a two member committee. The procedure prescribed under the Rules is based on the Principles of Natural Justice and fair play, to ensure that an employee of a private school, may not be condemned unheard. It is pertinent to note that the Management committee failed to prove even a single charge against the appellant.

22. Therefore the Tribunal, as well as the learned Single Judge have both made it clear that the inquiry had not been conducted in accordance with the provisions of Rules 36 and 37 of the Rules 1981. However, they themselves have dealt with each and every charge, and have recorded their findings on merit. The present case is certainly not one where a punishment has been set aside only on a technical ground, that

the inquiry stood vitiated for want of a particular requirement. Thus, in light of such a fact situation, the Division Bench has committed an error by giving liberty to the respondents to hold a fresh enquiry.

23. The Division Bench after examining the case, held as under:

(i) If there was defect found in the manner in which the departmental enquiry was held, liberty should have been given to the management to hold a fresh enquiry if so advised, and if the appellant was found guilty thereafter, punishment could have been imposed on him as permissible under law.

(ii) Once the Tribunal and the learned Single judge have found that there was infact, a defect in the manner in which the enquiry was held, there was no question of them recording findings on merit to the effect that the charges were not proved against the appellant.

(iii) However, before taking any steps towards holding an enquiry, the management would have to make payment of the full salary owed to the appellant, for the period between the date of termination of the appellant from service, till the date of his retirement.

24. The conclusion reached by the Division Bench that the Tribunal and the learned Single Judge had found that there was a defect in the manner in which the enquiry was held, and therefore there was no question of it recording a finding on merit to the effect that charges levelled against the appellant were not proved, is also not sustainable in law. It is always open for the Court in such a case, to examine the case on merits as well, and in case the Court comes to the conclusion that there was infact, no substance in the allegations, it may not permit the employer to hold a fresh enquiry. Such a course may be necessary to save the employee from harassment and humiliation.

25. In the instant case, there is no allegation of misappropriation/embezzlement or any charge which may cast a doubt upon the integrity of the appellant, or further, anything which may indicate even the slightest moral turpitude on the part of the appellant. The charges relate to accounts and to the discharge of his functions as the Headmaster of the school. The appellant has provided satisfactory explanation for each of the allegations levelled against him. Moreover, he has retired in the year 2002. The question of holding any fresh enquiry on such vague charges is therefore, unwarranted and uncalled for.

26. The Education Officer (Secondary), Zilla Parishad, Solapur, had filed an affidavit before the High Court, wherein it was stated that a dispute had arisen between the trustees, and in view thereof, an enquiry was initiated against the appellant. The respondents terminated the services of the appellant and many other employees, as a large number of cases had been filed against the Management Committee without impleading the State of Maharashtra, though the same was a necessary party, as the school was a government-aided school. Rules 36 and 37 of the Rules 1981, which prescribe the procedure of holding an enquiry have been violated. The charges levelled against the appellant were entirely vague, irrelevant and unspecific. As per statutory rules, the appellant was not allowed to be represented by another employee. Thus, the procedure prescribed under Rule 57(1) of the Rules 1981 stood violated. No chargesheet containing the statement of allegations was ever served. A summary of the proceedings, alongwith the statements of witnesses, as is required under Rule 37(4) of the Rules 1981, was never forwarded to the appellant. He was not given an opportunity to explain himself, and no charge was proved with the aid of any documentary evidence. There existed no charge against the appellant regarding his integrity, embezzlement or mis-appropriation. Therefore, the question of mis-appropriation of Rs.4,900/- in respect of a telephone bill remained entirely irrelevant. Furthermore, the same was not a charge of mis-appropriation. The learned Single Judge has

also agreed with the same. The Division Bench though also in agreement, has given liberty to the respondents to hold a fresh enquiry.

27. We may add that the court has not been apprised of any rule that may confer any statutory power on the management to hold a fresh enquiry after the retirement of an employee. In the absence of any such authority, the Division Bench has erred in creating a post-retirement forum that may not be permissible under law.

28. In light of the facts and circumstances of the case, none of the charges are specific and precise. The charges have not been accompanied by any statement of allegations, or any details thereof. It is not therefore permissible, for the respondents to hold an enquiry on such charges. Moreover, it is a settled legal proposition that a departmental enquiry can be quashed on the ground of delay provided the charges are not very grave.

29. In the facts and circumstances of the case, as the Tribunal as well as the learned Single Judge have examined all the charges on merit and also found that the enquiry has not been conducted as per the Rules 1981, it was not the cause of the Management Committee which had been prejudiced, rather it had been the other way around. In such a fact-situation, it was not necessary for the Division Bench to permit the respondents to hold a fresh enquiry on the said charges and that too, after more than a decade of the retirement of the appellant.

30. In view of the above, appeal succeeds and is allowed. The impugned judgment and order of the High Court is modified to the extent referred to hereinabove. The appellant shall be entitled to recover all his salary and retirement dues, if not paid already. No costs.

B.B.B. Appeal allowed.

MUMBAI WASTE MANAGEMENT LTD.

v.

SECRETARY OF ENVIRONMENT GOVERNMENT OF INDIA & ORS.

(Special Leave Petition (Civil) No. 18394-95/2012)

MAY 2, 2013

[GYAN SUDHA MISRA AND J. CHELAMESWAR, JJ.]

HAZARDOUS WASTE (MANAGEMENT AND HANDLING) RULES, 1989:

r. 5 (2) -- Allotment of area to petitioner to collect, treat, recycle, reprocess, store and dispose of hazardous waste – Subsequently, allotment to another concern also – Writ petition by petitioner challenging the order of curtailment – Held: The order is not patently unjust or illegal on the existing facts of the case -- In view of the order of allocation specifically determining the territory which has been allotted to petitioner and fifth respondent, order of High Court as also of appellate authority do not need to be interfered with as High Court is correct and justified in holding that petitioner would not encroach upon the territory which falls beyond the territory which had been allotted to it -- As long as competence and authority of Maharashtra Pollution Control Board and Department of Environment, Government of Maharashtra is not struck down as illegal and invalid by any court of competent jurisdiction, it is not open for petitioner to assail their authority for the first time before Supreme Court at the stage of special leave to appeal, specially when the question had not been raised by petitioner before High Court -- Hazardous Waste (Management, Handling and Transboundary Movement) Rules, 2008 – Constitution of India, 1950 – Art.136.

CIVIL APPELLATE JURISDICTION : Petition For Sepcial Leave (Civil) No. 18394-18395 of 2012.

From the Judgment & Order dated 16.03.2012 of the High Court of Bombay in CA No. 1310 of 2011, CWP No. 3953 of 2011.

Shailesh K. Kapoor, Ajay Kumar, Rajan Singh, Rameshwar Prasad Goyal for the Petitioner.

P.S. Patwalia, Jayant Kumar, Dr. Sadhna Mahashabde, Dharitry Phookan, Vivek Vishnoi, Mukesh Verma, Pawan Kumar Shukla, Yash Pal Dhingra for the Respondents.

The following order of the Court was delivered

O R D E R

1. Extensive arguments were advanced by the counsel for the petitioner at the admission stage itself who has assailed the order passed by the High Court of Judicature at Bombay in Writ Petition No.3953/2011 whereby the High Court was pleased to dismiss the writ petition directing the petitioner not to encroach upon the area of operation allotted by respondent No.2, Secretary of Environment, Government of India to any other facility except its own.

2. The petitioner-Mumbai Waste Management Ltd. (shortly referred to as 'MWM') in writ petition No.3953/2011 out of which present SLP arises was issued the letter of award to collect, treat, recycle, reprocess, store and dispose of hazardous waste from the area allotted to the petitioner. Similarly, the respondent No.5 SMS Infrastructure Ltd. was also issued the letter of consent on 27.10.2005 for treatment, storage and disposal facility of hazardous waste from the area allotted to respondent No.5. The areas were determined upon certain geographical criteria. The petitioner - MWM has been allotted the Westernmost Belt of Maharashtra consisting of districts of Thane, Raigad, Ratnagiri and Sindu

Similarly, respondent No.5 - SMS had been given other districts to deal with waste management facilities. Since the petitioner - MWM was issued the letter of award for the years prior to respondent No.5, the petitioner MWM felt aggrieved as it curtailed some part of their area of operation as part of those areas were given to respondent No.5 - SMS since it offered more facilities for treatment of hazardous waste by the government.

3. The petitioner - MWM, therefore, challenged the fixing of the territorial jurisdiction and the assignment of the areas of operation by the government-respondent No.2 and claim that it is entitled to collect the hazardous waste of establishment outside the area allotted to it.

4. The principal ground of challenge of the Petitioner-MWM is that under the rules of 2005 in force, the consent to operate was not materially changed under the new rules of 2008 under which the government merely sought to re-fix the territorial area of operation through the orders of respondent No.2. The petitioner-MWM assailed the order of curtailment essentially on the ground that on 24.9.2008, the Central Government through respondent No.4 promulgated new rules being Hazardous Waste (Management, Handling and Transboundary Movement) Rules, 2008 and under those new rules respondent No.2 was denuded of the power to fix/re-fix the territorial area of operation of the waste management facilities. The petitioner contended that under 2008 rules respondent No.2 is only the monitoring authority to the facilities set up but not to allocate/re-allocate the territorial jurisdiction.

5. The High Court was pleased to hold that all that was required to be adjudicated was whether the action of respondent No.2 modifying the allocated area and re-fixing the jurisdiction of the two facilities between petitioner - MWM and respondent No.5 - SMS is validly made under the 2008 rules or whether it is in excess of the jurisdiction of their authority. It has been categorically observed therein that the 2008 rules

have not been challenged by the petitioner.

6. The High Court on a perusal and assessment of the relevant Rule 5 of the 1989 Rules as also the 2008 Rules in regard to the Hazardous Waste Management Rules finally concluded that under 2008 Rules the person engaged in collection of hazardous waste has to obtain authorization from respondent No.2 in the State of Maharashtra. As such respondent No.2 authorized such facilities to collect waste under the old rules by an application made in a specific format in that behalf. The High Court was pleased to hold that not only the collection and treatment but re-cycling and re-processing, storage and disposal of the waste by such facilities would be only as per the authorization of respondent No.2 in the State of Maharashtra. The High Court found substance in the contention on behalf of respondent No.5 that as the collection and treatment, recycling, re-processing, storage and disposal is under the authorization of respondent No.2, the area of such operation would fall impliedly within the jurisdiction and authority of respondent No.2 to grant and authorize the applicant for collection of waste management. The learned Judges of the High Court also took judicial notice of the fact that the industries augmenting hazardous chemical waste and its effluents requiring proper management for its collection, treatment, re-cycling and disposal had increased manifestly in recent years in keeping with economic advancement and trade in such chemicals. Consequently, more facilities had to be established wherein more players would enter upon such trade. Hence the monopoly of facility was bound to be denuded. The High Court finally was pleased to hold that the area of allocation granted to MWM which are in the Westernmost 4 districts of Maharashtra does not suffer from the ills of unreasonableness of the criteria for allocation. Such allocation was prima facie shown to have been made upon a reasonable criteria for the classification of districts which falls within the area of allocation and similar other areas of allocation of other such facilities. The High Court also noted that the area of a n

challenged by the petitioner nor it had sought to quash or set aside the orders of respondent No.2 dated December 11, 2008 and March 9, 2009 or the respondent No.4 in appeal therefrom dated January 29, 2011. Consequently, the direction to the MWM not to encroach upon the area of other facilities provider like respondent No.5 was required to be passed in favour of respondent No.5 SMS which also had filed a separate writ petition No.5846/2011.

7. Counsel for the petitioner vehemently and with utmost force *inter-alia* contended that the High Court was clearly in error in issuing a direction to the petitioner to confine its area of operation relating to waste management to the four districts, as Maharashtra Pollution Control Board was authorized only to monitor and supervise and could not tinker or interfere with the area of allocation. However, the counsel did not even expressly much less with any clarity said so but adopted a circuitous and vague argument that the respondent had no authority to reduce and expand or allot any area for the business of waste management as it was only competent to authorize the parties to treat the industrial waste and it had no authority or jurisdiction to do anything other than treat the waste product. What is sought to be emphasized by the petitioner's counsel is that the respondents had no authority to allocate the area for operating the business of waste management.

8. In spite of our persistent query, the counsel for the petitioner could not establish or explain it to this Court that if the respondent No.2 - Maharashtra Pollution Control Board was not authorized to allocate the area then who exactly would allocate the area and in the process also missed that if that were the position then the petitioner himself would not be left with any authority to operate this business as he has been allotted the area to operate by the same authority who allotted it to the Respondent No.5.

9. However, learned senior counsel for the respondent-

SMS, Mr. Patwalia relied upon rule 5 sub rule (2) of Hazardous Waste (Management & Handling) Rules, 1989 and has drawn the attention of this Court to the provision of sub-rule (2) of Rule 5 which lays down as follows:-

> **"5. Grant of authorization for handling hazardous wastes.**
>
> (2) Every occupier generating hazardous wastes and having a facility for collection, reception, treatment, transport storage and disposal of such wastes shall make an application in Form 1 to the State Pollution Control Board for the grant of authorisation for any of the above activities:
>
> Provided that the occupier not having a facility for the collection, reception, treatment, transport, storage and disposal of hazardous wastes shall make an application to the State Pollution Control Board in Form 1 for the grant of authorisation within a period of six months from the date of commencement of these rules."

10. Learned counsel submitted that the above quoted sub-rule (2) of Rule (5) clearly establishes that authorization to operate or treat waste management would have to be interpreted so as to infer that the authorization included allocation of the area and if this were not so then there would be no difference in the contents of sub rule (1) and sub-rule (2) of Rule 5 and sub-rule (2) will merely be an imitation of sub-rule (1). In that view of the matter, he submitted, that the Maharashtra Pollution Control Board was clearly competent to determine the area of operation also.

11. However, we have noticed that the High Court has not entered into the question as to whether sub-rule (2) of Rule 5 is the provision from which it could be inferred that the Maharashtra Pollution Control Board is competent to authorize a party to treat and operate waste mar

it is also competent to allocate the territory. In that view of the matter, it would not be appropriate to express any view on this aspect of the matter as in that event, it would be judging the issue which was neither raised nor dealt with by the High Court. In view of this, one of the options available for this Court could have been to remand the matter to the High Court to determine this issue as the same had not been considered earlier. But we refrain and desist ourselves from doing so as we notice that the order is not patently unjust or illegal on the existing facts of this case which could persuade this Court to enter into a determination of the question which had neither been raised nor dealt with by the High Court.

12. There is yet another reason not to enter into this aspect as the High Court has clearly observed that the petitioner has not challenged the orders of respondent No.2 dated December 11, 2008 and March 9, 2009 or order of respondent No.4. The petitioner had merely challenged the order of the appellate authority dated January 29, 2011 and the appellate authority had clearly observed and rightly so that it had no jurisdiction to determine the question as to whether respondent No.2 - Maharashtra Pollution Control Board and respondent No.4 - Department of Environment, Government of Maharashtra had jurisdiction to allocate territory for conducting the business of waste management. In that view of the matter, we do not think it appropriate to adjudicate and record a finding in regard to the competence and authority of respondent No.2 and respondent No.4. Nevertheless, we find no reason to entertain these special leave petitions by which the High Court had refused to entertain the writ petition assailing the order of the appellate authority which in view of the order of respondent No. 2 and respondent No.4 was pleased to hold that the petitioner will have to confine its area of operation to the area of those territories for which an order had been passed in its favour and the area which was allotted to respondent No.5 – SMS will not be encroached by the petitioner.

13. In view of the order of allocation specifically determining the territory which has been allotted to the petitioner and respondent No.5, the order of the High Court as also the appellate authority do not need to be interfered with as the High Court appears to be correct and justified while holding that the petitioner would not encroach upon the territory which falls beyond the territory which had been allotted to it. However, since the competence and authority of respondent No.2 and respondent No.4 had not been gone into by the High Court, it is left open to be raised later in an appropriate case specifically for the reason that the High Court has not recorded any finding in regard to the competence of the respondent No.2 and respondent No.4 in regard to allotment of territory or area . As long as the competence and authority of respondent No. 2 and respondent No. 4 is not struck down as illegal and invalid by any court of competent jurisdiction, it is not open for the petitioner to assail their authority for the first time before this Court at the stage of Special Leave to Appeal, specially when this question had neither been raised by the petitioner before the High Court nor dealt with by the High Court out of which the instant matter arises nor the High Court has dealt with the same by rightly observing that the petitioner has never challenged the orders dated December 11, 2008, March 9, 2009 nor has raised this question before the High Court as to whether respondent No.2 and respondent No.4 had jurisdiction to determine the territory of the area of operation by the operators dealing in waste management. Therefore, as already indicated hereinabove, the petitioner cannot be allowed to assail their authority in the instant special leave petitions in absence of any challenge to question before the High Court.

14. In view of the aforesaid analysis, we find no substance in these special leave petitions and consequently they are dismissed.

R.P. SLPs dismissed.